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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas, Ninth Judicial Circuit
Hon. Bentley D. Price, Circuit Court Judge

Appellate Case No. 2020-001030

Maybank 2754, LLC, ...Appellant,

v.

Eugene Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo
Living Trust Dated December 11, 1997; 1776, LLC; Beach Fenwick, LLC;
The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny
Creek Associates, LLC; John Doe and Mary Roe Respondents.

RECORD ON APPEAL
VOLUME IV

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appellate Case No.: 2020-001030

Appeal from Charleston County
Court of Common Pleas, Ninth Judicial Circuit
Hon. Bentley D. Price, Circuit Court Judge

2020-CP-10-00209

Maybank 2754, LLC, ... Appellant,

v.

Eugene Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11,1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe Respondents.

**ALL RESPONDENTS' MOTION TO DISMISS APPEAL AND FOR COSTS
AND
MEMORANDUM IN SUPPORT THEREOF**

Respondents Eugene Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11,1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC

("Respondents") respectfully move the Court to dismiss this appeal of the trial court's orders (1) dated June 30, 2020 denying Appellant's Motion for Temporary Injunction and granting Respondents' Motion to Refer and (2) dated July 13, 2020, denying Plaintiff's Motion for Reconsideration, denying Plaintiff's Motion for Temporary Injunction and again referring all pre-trial matters, including previously filed motions, to the Master-In-Equity, with finality (the "Orders") because this appeal is moot. On August 17, 2020 after Plaintiff filed its notice of appeal, the Master-In-Equity conducted a status conference, which Appellant participated in, and, on the following day, the Master issued an Order Returning the Case to the Circuit Court. That August 18, 2020 Order specifically concludes "that the matter should be returned to the circuit court for disposition under Rule 28 and 53(b) and that this ruling would moot Plaintiff's appeal." (**Exhibit A**).

This appeal, therefore, is mooted by the Master-In-Equity's August 18, 2020 Order Returning Case to Circuit Court that explicitly provides its "ruling would moot Plaintiff's appeal." Yet, even in light of the August 18, 2020 Order, Appellant still maintains its intent to appeal. Because the issue raised on appeal is mooted by the August 18, 2020 Order, Respondents respectfully request this Court dismiss Appellant's appeal and move for costs and fees against the Appellant pursuant to Rule 222, SCACR.

DISCUSSION

The specific litigation underlying this appeal is in its infancy; nonetheless, certain parties and the property itself have a storied history. This case involves various claims by Maybank 2754, LLC ("Maybank") that it an easement right over Beach Fenwick's

adjoining 22 acre property. (“Subject Property”). Michel F. Laplante (“Laplante”) is the majority owner of Plaintiff Maybank and serves as its manager.

Laplante, certain members of his family, and Laplante’s business entities have a “contentious” and litigious history with Respondent Eugene Zurlo (“Zurlo”). In 1999, Respondent Eugene J. Zurlo Living Trust Dated December 11, 1997 (“Zurlo Trust”) and Laplante formed Penny Creek Associates, (“PCA”) to purchase and improve approximately 60 acres of land located along Maybank Highway on Johns Island, South Carolina. Laplante and his family were 50% members of PCA; Laplante and the Zurlo Trust were each 50% voting members. Until October 2013, PCA was the sole member of Maybank. On October 7, 2013, although the PCA Operating Agreement required both Trustees of the Zurlo Trust to sign documents involving interests in PCA real estate, Zurlo¹ purportedly executed a Resolution of the Sole Shareholder of PCA (the “Resolution”) in which PCA approved the transfer of its membership interest in Maybank to the “Laplante Family” and agreed to provide a thirty-foot private right of way access easement over the “Subject Property” at some undefined point in the future – the location and condition of which would “be mutually agreed upon at the completion of that certain road known as Pitchfork Road.” It is undisputed that the Resolution was not recorded, Pitchfork Road has not been completed, and there is no identifiable, described, or recorded easement over the Subject Property.

¹ At the time of the referenced Resolution, PCA was the sole member of Maybank 2754. The Resolution, however, was not properly executed by PCA, but rather was executed by Laplante and purportedly by Eugene Zurlo; not the Zurlo Trust.

In December 2013, Zurlo commenced a derivative action against PCA and others, including Laplante, seeking a judicial dissolution of PCA. In 2014, Wells Fargo commenced a foreclosure action against PCA and others, including Laplante, seeking to foreclose its mortgage upon a large tract of property from which the Subject Property was later sold to Beach Fenwick. The derivative action was resolved, as a result of which the Zurlo Trust received a promissory note from PCA secured by a mortgage on the Subject Property. The Zurlo Trust assigned this note and mortgage to 1776, LLC (“1776”).

In June 2017, after years of litigation, the Master-In-Equity for Charleston County issued an Order and Judgment of Foreclosure and Sale (“Foreclosure Order”) in favor of Wells Fargo. In August 2017, 1776 purchased the real property at issue in the foreclosure action including the Subject Property. 1776 subsequently sold the Subject Property to Beach Fenwick in December 2019.

On January 13, 2020, Appellant filed its Complaint against Respondents, alleging, *inter alia*, Respondents denied Maybank 2754’s right to a thirty (30’) private right of way easement upon the completion of Pitchfork Road. The Complaint includes causes of action for declaratory judgment for an easement, civil conspiracy, declaratory judgment for restrictive covenant and temporary injunction.

Subsequently, Respondents filed the following motions:

- 1) February 17, 2020 – Defendants Beach Fenwick, LLC and The Beach Co.’s (“Beach Entities”) Motion to Dismiss;
- 2) February 17, 2020 – Beach Entities’ Motion to Refer to the Master-In-Equity;
- 3) February 20, 2020 – Defendant Seamon Whiteside Associates, Inc.’s (“Seamon Whiteside”) Motion to Dismiss;

- 4) February 21, 2020 – Defendant 1776 LLC’s (“1776”) Motion to Dismiss;
- 5) February 21, 2020 –1776’s Motion to Refer to the Master-In-Equity;
- 6) March 10, 2020 – Defendants Eugene J. Zurlo, individually and as co-trustee of Eugene J. Zurlo Living Trust’s (“Zurlo Parties”) Motion to Refer to the Master-In-Equity; and
- 7) March 11, 2020 – Plaintiff Maybank 2754’s (“Maybank”) Motion for Temporary Injunction.

On June 16 and June 25, 2020, the Circuit Court heard oral arguments on Appellant’s Motion for Temporary Injunction, and Respondents’ Motion to Refer to the Master in Equity but not hear or rule on the Motions to Dismiss.²

On June 30, 2020 the Court issued its Form 4 Order with the following Statement of Judgment:

Plaintiff Maybank 2754 LLC’s Motion/Temporary Injunction is denied. Defendant Beech Company’s Motion to Dismiss and Refer to the Master, along with all outstanding motions to refer to the master, are granted. See **Exhibit B**.

Appellant filed a Rule 59 Motion to Reconsider on July 1, 2020. The Motion was denied by Order of the Court on July 13, 2020. See **Exhibit C**. In its July 13, 2020 Order, the Circuit Court reiterated its holding in the June 30, 2020 Order finding:

The Plaintiff’s Motion for a Temporary Restraining Order is Denied, the Plaintiff’s Motion to Reconsider is denied, and the entire case and *all the pending Motions are referred to the Master-in-Equity, pursuant to and consistent with South Carolina Rules of Civil Procedure, Rule 53. All pre-trial matters, including the parties’ motions, shall be and are hereby referred to the Master-In-Equity, with finality, with appeal directly to the South Carolina Court of Appeals or the South Carolina Supreme Court. (emphasis added).* See **Exhibit C**.

² The Circuit Court Ruled on Motions (2), (5), (6), and (7) above.

Appellant filed a Notice of Appeal on July 15, 2020 on the grounds that the June 30 and July 13 Orders “refer the entire case to the master [-In-Equity]” and are, therefore “immediately appealable because they affect the mode of trial, a substantial right.” However, as explained below, the Orders do not affect the mode of trial but, instead, rightly refer “...all *pending motions* and all *pre-trial* matters ... to the Master-In-Equity” “*pursuant to and consistent with the South Carolina Rules of Civil Procedure, Rule 53.*” (emphasis added). As a result, the Master-In-Equity conducted a status conference on August 17, 2020, pursuant to which the Court issued a Form 4 “Order Returning the Case to the Circuit Court” and concluded “the matter should be returned to circuit court for disposition under Rule 38 and 53(b) and that this ruling would moot Plaintiff’s appeal.” **(Exhibit A).**

Even after the August 18, 2020 Order, Appellant continues with its appeal as evidenced by its letter to the South Carolina Court of Appeals Clerk, Ms. Kitchings, and its Motion to Order the Transcript Outside the Filing Deadlines of Rule 207. **(Exhibit D, E).** Yet, Appellant does not assert any grounds for appeal different than what it filed in its July 15, 2020 Notice.

The Master-In-Equity’s Order Returning the Case to Circuit Court is unambiguous and clear in its holding. It found that “[Maybank] objects to the court’s jurisdiction as it has filed a Notice of Appeal of the Order of Reference on the basis of its Mode of trial for which Plaintiff demands trial by jury. . . This court concludes that the matter should be returned to the circuit court for disposition under Rule 38 and 53(b) and that this ruling would moot Plaintiff’s appeal.”

“[M]oot appeals result when intervening events render a case nonjusticiable.” *McClam v. State*, 386 S.C. 49, 55, 686 S.E.2d 203, 206 (Ct. App. 2009) (citing *Sloan v. Greenville County*, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct.App.2003)). A matter becomes moot “when judgment, if rendered, will have no practical legal effect upon [the] existing controversy.” *Collins Music Co. v. IGT*, 365 S.C. 544, 549, 619 S.E.2d 1, 3 (Ct. App. 2005) (citing *Curtis v. State*, 345 S.C. 557, 567–68, 549 S.E.2d 591, 596 (2001)).

The issue Maybank raises in its Notice of Appeal is whether the Circuit Court’s Order Referring the matter to the Master-In-Equity affects its “mode of trial” or its substantial rights. The Master-In-Equity subsequently sent this matter back to circuit court and, therefore, Appellants “mode of trial” is no longer affected. This intervening event rendered this appeal nonjusticiable. Indeed, the Master-In-Equity explicitly held this appeal moot. Appellant’s relief sought by this court is “impossible” because it already enjoys the relief requested.

Respectfully, Respondents request this Court dismiss the appeal as moot because an intervening act, the Master-In-Equity’s Order, granted the same relief to Appellant as Appellant seeks pursuant to this appeal, thus rendering the matters at issue nonjusticiable and non-appealable. Respondents requests costs and fees as applicable under SCAR Rule 222.

If this Court allows Appellant’s appeal to move forward, which it should not, Respondents respectfully this Court provide that all matters not affected by the appeal move forward before the Circuit Court. Alternatively, because Beach Fenwick is currently in the process of developing the Subject Property. Beach Fenwick respectfully requests

this Court establish a bond, in an amount not less than \$26,000,000³, to serve as compensation to Beach Fenwick for the substantial delay in its development of the Subject Property and costs associated therewith, should Appellant fail to prevail on the merits.

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³ This number is based upon projections prepared on behalf of Beach Fenwick as to costs and losses it will incur by a delay of two years in the development of the Subject Property.

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE #: 2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as Co-Trustee
of the Eugene J. Zurlo Living Trust Dated December
11, 1997; ET. AL.;

Defendants,

/

**PLAINTIFF'S RESPONSE IN OPPOSITION TO THE DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT**

Plaintiff, MAYBANK 2754, LLC, by and through its undersigned attorney, hereby responds in opposition to Defendants', EUGENE J. ZURLO, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997, Motion and Memorandum in Support of Summary Judgment; Defendants', BEACH FENWICK, LLC AND THE BEACH COMPANY, Motion for Summary Judgment on Behalf of Beach Fenwick, LLC and the Beach Company [sic]; Defendant, SEAMON, WHITESIDE & ASSOCIATES, INC., Supplement to Motion to Dismiss and/or Motion for Summary Judgment; and Defendant's, 1776, LLC, Notice and Motion for Summary Judgment, and in support thereof states as follows:

Summary Judgment Standard

Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRPC. "When determining if any triable issues of fact exist, the evidence and **all reasonable inferences must be viewed in the light most favorable to the non-moving party.**" *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857 (2002) (citation omitted). (emphasis added). In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C.

326, 330, 673 S.E.2d 801, 803 (2009). “**All ambiguities, conclusions, and inferences arising in and from the evidence must be construed most strongly against the movant.**” *Baugus v. Wessinger*, 303 S.C. 412, 415 401 S.E.2d 169 (1991) (citations omitted) (emphasis added).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Id.*; *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts. *Gilliland v. Elmwood Properties*, 301 S.C. 295, 299, 391 S.E.2d 577 (1990).

Easements Generally

“An easement is the right of one person to use the land of another for a specific purpose. An easement is characterized as either appurtenant, in gross, or in gross for commercial purposes. A restrictive covenant... is contractual in nature and restricts in some particular the free use of land by its owner.” *Smith v. Commissioners of Public Works of the City of Charleston*, 441 S.E.2d 331, 335 (S.C. Ct. App. 1994) (citations omitted). “The character of an express easement is determined by the nature of the right and the intention of the parties creating it. An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. In contrast, an appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. It also passes with the dominant estate upon conveyance.” *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

“Easements in gross are not favored by the courts, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate.” *Smith*, 441 S.E.2d at 336 (S.C. Ct. App. 1994) (citations omitted). “The distinction between an appurtenant easement and an easement in gross involves the extent of a grant of an easement, as opposed to the creation of an easement.” *Williams v. Tamsberg*, 425 S.C. 248-249, 259, 831 S.E.2d 494 (Ct. App. 2018) (citations omitted). “An easement in gross is of a commercial character when the use authorized by it results primarily in economic benefit rather than personal satisfaction. Easements in gross, if of a commercial character, are alienable.” *Sandy Island Corp v. Rasdale*, 246 S.C. 414, 422 143 S.E.2d 803 (1965).

Creation of an Easement and/or a Restrictive Covenant in a Written Instrument

“A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments.” *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) (quoting 28A C.J.S. Easements § 57 (1996)). As the Court of Appeals stated in *Smith*, 441 S.E.2d 331, 335 (S.C. Ct. App. 1994):

Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so as to carry out that intention. *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965); 23 Am.Jur.2d Easements and Licenses § 23 (1966) (**if the language is uncertain or ambiguous in any respect, all surrounding circumstances, including the construction which the parties have placed on the language, may be inquired into and taken into consideration by the court**).

(emphasis added).

In *Smith v. Commissioners of Public Works of the City of Charleston*, 441 S.E.2d 331, 333 (Ct. App. 1994), Smith sought a declaratory judgment to declare the existence of an easement based upon a 1955 written agreement on property owned by the Commissioners of Public Works of the City of Charleston (herein “CPW”). Article II of the agreement contained the following provision:

Kittredge and all future owners of Dean Hall Plantation and Cypress Gardens [Smith’s predecessor in title] shall have the right, and the same is hereby granted to them, of ingress, egress and regress to the banks of and across **the canal about to be constructed**, leading from the Cooper River to Back River, at any point contiguous to the lands being conveyed by Kittredge to the Authority [CPW’s successor in title].

Id. (emphasis added).

In ruling that the written agreement created an easement and restrictive covenant, the South Carolina Court of Appeals in *Smith* stated:

Although we find the agreement was ambiguous, we nonetheless hold the evidence supports the master’s conclusion that Article II of the 1955 agreement **creates an easement. We also conclude that Article III was intended to be a restrictive covenant...** We hold the language of the agreement is evidence supporting the master’s conclusion that the agreement establishes an easement

appurtenant between dominant ("future owners of Dean Hall Plantation") and servient (CPW) estates. The intent of the parties seems clear given the "future owners" language of Article II and the binding successors language of Article XI. The "impending condemnation" circumstances of the agreement and a 1955 letter from Kittredge's lawyer to Bushy Park's corporate secretary support the conclusion that Kittredge wanted to retain the right to cross CPW's land to enjoy the water and his other land. It is also clear that he intended by the language employed to attach the attribute of assignability (alienability) to the easement. *Sandy Island Corp. v. Ragsdale, supra*; 25 Am.Jur.2d Easements and License § 13 (1966) (easements in gross are not favored by the courts, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate).

There is clearly no merit to CPW's contention that much significance should be placed on the failure of the Smiths to mention the agreement in the deed from Kittredge's Trustees to the Smiths. **The absence of any mention of the easement agreement in the deed is not relevant.**

Id. at 335-6 (emphasis added).

After the Court of Appeals in *Smith* found that the agreement established an easement, the court ruled that the easement was to be located in a location as is reasonably necessary for the full enjoyment of the plaintiffs' property. The Court of Appeals stated, "The subject **unlocated** easement must be interpreted, however, in light of good faith, reasonableness **and what was necessarily the intent of the parties to the 1955 agreement.**" *Id.* at 336 (emphasis added). Accordingly, the Court of Appeals in *Smith* remanded the case for a determination of the number of access points and routes to include their width. *Id.* at 337.

In *Douglas v. Medical Investors, Inc.*, 256 S.C. 440, 182 S.E.2d 720 (1971), the South Carolina Supreme Court ruled that an instrument creating an easement was an easement in gross for commercial purposes even though it was not apparent on its face. The Court found that the wording of the instrument "leaves the exact character of the easement in doubt", and stated, "[w]e are therefore presented with a situation where it is impossible to determine the nature or character of the easement from the language used in the reservation. Under such circumstances, parole evidence was properly considered in determining the character of the easement reserved." *Id.* (emphasis added). In reaching its ruling the Court stated, "The fallacy in respondent's argument [that the character of the easement should be determined solely from the working of the instrument and parole evidence also was inadmissible] lies in the fact

that...the wording of the present reservation leaves the exact character of the easement in doubt.” *Id.* at 447. Thus, the Court ruled that parole evidence was properly admitted to determine the character of the easement.

An easement by grant is not required to be recorded to be valid, and recording is not necessary if the buyer has actual notice. *See, Frierson v. Watson*, 636 S.C. 60, 68 (Ct. App. 2006). “A purchaser of land with actual, constructive, or implied notice that the property is burdened with an easement ordinarily takes the estate subject to the easement. *Loftis v. South Carolina Elec. and Gas Co.*, 361 S.C. 434, 441 (Ct. App. 2004).

Argument

1. Plaintiff incorporates by reference its Compliant, the Plaintiff’s Request for Judicial Notice of Recorded Documents and City of Charleston Ordinances and Plaintiff’s Request for Judicial Notice of Recorded Document and Document filed with the South Carolina Secretary of State (herein “Request for Judicial Notice”), including all documents attached thereto, and Affidavit of Michel F. Laplante, in opposition to Defendants’ motions for summary judgment (including the motion to dismiss filed by Seamon, Whiteside and Associates, Inc.)

2. The instant case is analogous to the situation in *Smith v. Commissioners of Public Works of the City of Charleston*, 441 S.E.2d 331 (S.C. Ct. App. 1994), a declaratory judgment action involving the interpretation of written agreement in which the South Carolina Court of Appeals ruled that it created both an easement and restrictive covenant.

3. The documents from which Plaintiff bases its claim for an easement, or in the alternative, a restrictive covenant, which are the Resolution of the Sole Shareholder of Penny Creek Associates, L.L.C. (herein “Resolution”), the Contract for Assignment of Interest (herein “Contract for Assignment”), and the Assignment of Membership Interest and Written Consent in Lieu of a Special Meeting of the Sole Member of Maybank 2754, LLC (Assignment”), are ambiguous. Therefore, parole evidence is necessary and admissible to determine the intention of the parties relative to the nature or character, extent and location of the easement, and the intention of the parties relative to the reference to “that certain roadway known as Pitch Fork Road”.

4. Furthermore, just as the key identifier in *Smith* was an unconstructed (“about to be

constructed”) canal that was referenced in a written agreement, the key identifier in this case is an unconstructed planned roadway, “Pitch Fork Road” referenced in the Resolution, Contract for Assignment and Assignment. *Id.* at 333. Therefore, it is of no consequence that “Pitch Fork Road” is presently unconstructed. However, what is of consequence is what the parties intended by specifically referencing “Pitch Fork Road” in the Resolution, Contract for Assignment and Assignment and making the Maybank membership interest transfer specifically conditioned on the grant of the easement.

5. Without limitation, material issues of fact exist that should cause the Defendants’ motion for summary judgment should be denied. For example, material issues of fact exist as to as to the parties’ intent as to the Maybank membership interest transfer being specifically conditioned on the grant of the easement, the nature or character, extent and the location of the easement, the reference in the Resolution, Contract for Assignment and Assignment to “that certain roadway known as Pitch Fork Road”, the Defendants’ actual knowledge of the subject easement, and Zurlo and/or all the Defendants being part of a deceitful scheme to develop the subject property without affording any provisions or reservations for the easement with the specific intent to harm the Plaintiff, which caused Plaintiff damages, including special damages. Furthermore, material issues facts exist as to whether the Resolution, Contract for Assignment and Assignment giving rise to the easement was a mere “agreement to agree” as Defendants’ claim (which they were not).

6. The Resolution, Contract for Assignment, and Assignment, clearly reference "Pitch Fork Road". Thus, inferences (among other inferences) exist that the parties to the Resolution, Contract for Assignment and Assignment knew of the existence of "Pitch Fork Road" and also knew that "Pitch Fork Road" would be located on the Property even though it was not constructed at the time of the Maybank membership interest transfer and even though its precise routing was then not yet confirmed. Therefore, consideration of and inquiry into all surrounding circumstances, including the construction which the parties have placed on the language, should be made. *See, Smith v. Commissioners of Public Works of the City of Charleston*, 441 S.E.2d 331, 225 (Ct. App. 1994).

7. The Plaintiff has filed the Affidavit of Michel F. Laplante that states in paragraph 22 in relevant part: "Although at the time of the Maybank membership interest transfer, the actual construction of Pitchfork Road was not complete, and remains incomplete, Zurlo and I both

knew that a portion of the roadway known as "Pitch Fork Road" was planned to be located on the Property, although its precise routing was not yet confirmed, which is why it is specifically referenced in the Resolution, Contract for Assignment of Interest and Assignment." Also, in paragraph 26 of the Affidavit of Michel F. Laplante, it states in relevant part, "At the time of the Maybank membership interest transfer, I knew that a portion of Pitchfork Road would be located on the Property, although the precise routing was not yet confirmed."

8. Moreover, as to the terminus element, the Court of Appeals in *Williams v. Tamsberg*, 425 S.C. 249, 262-63, 821 S.E.2d 494 (Ct. App. 2018), stated:

[D]etermining the existence of a terminus is a fact-specific inquiry dependent upon the facts of each individual case...the existence of a terminus on the land of the party claiming an easement appurtenant may be established if the easement meets certain criteria. Intuitively, the dominant estate must have access to the purported easement. In addition, a court could find an easement appurtenant if the purported easement (1) at least touches the dominant estate and (2) in cases where the easement is an adjacent boundary between—or runs parallel to—the dominant and servient estates such as in the instant case, the easement does not extend beyond the purported dominant estate's boundary—i.e., at most, the easement ends at the lot line of the dominant estate.

(citations omitted) (emphasis added).

Therefore, consideration and inquiry as to the specific facts of the circumstances giving rise to the Maybank membership interest transfer and easement should be made.

9. Additionally, Count II of the Compliant, plead in the alternative to Count I, seeks a declaratory judgment pursuant to South Carolina Code §15-53-10, et. seq., that a restrictive covenant exists over the subject property by virtue of the Resolution. Count II of the instant action is also similar to the situation in *West v. Newberry Electric Cooperative*, 357 S.C. 537 (S.C. Ct. App. 2004). In *West*, the Court of Appeals found that a 1955 written easement agreement was a restrictive covenant despite the fact that the agreement was unrecorded. In so finding, the Court of Appeals stated:

The very language of the 1955 easement reveals it to be a restrictive covenant that runs with the land. In the agreement, NEC promises to relocate the power line should the property ever "be developed." That agreement applies to the land. While the agreement does not specify whether this promise was to be honored only with respect to the Matthews, **it does envision the future of the land** and thus applies to the Wests. *See Marathon*, 325 S.C. at 604, 483 S.E.2d at 765

(explaining that a "restrictive covenant runs with the land, and is thus enforceable by a successor-in-interest, if the covenanting parties intended that the covenant run with the land, and the covenant touches and concerns the land") (citation omitted).

Moreover, the restrictive covenants in the 1955 easement touch and concern the subject property. The Matthews insisted upon several conditions in order to maintain the safety and value of the property. The subject of the covenants is a power line connected to and crossing over the land. Adherence to the covenants by NEC directly affects the nature and value of the easement to both NEC and the Wests. The covenants in the easement also restrict the manner in which NEC can use the easement. **The exact location of the easement on the property is not described in the easement, but its possible relocation is contemplated.** The covenants were obviously intended to touch and concern the subject property.

Id. at 542-3.

10. Just as the exaction location of the easement was not described in *West* and was found to be enforceable as a restrictive covenant, the exact location of the easement is not described Resolution, Contract for Assignment and Assignment and should be found to be a restrictive covenant alternative or in addition to an easement. *Id.*

11. Material issues of fact also exist as to whether the Defendants committed civil conspiracy. Plaintiff has alleged conduct that goes well beyond legitimate business competition. Plaintiff's alleges specific planning for the intended harm to occur, to wit: the development of the property without any reservation of provision for the Plaintiff's easement despite all Defendants having actual knowledge of the easement. The alleged injury was alleged to have been specifically planned by Zurlo and/or all the Defendants. *See*, Order p. 26 – 9, *Labelle v. Brown & Williamson Tobacco Corporation*, C.A. No. 2:98-3235-23 (Dist. S.C. 1999).

12. The Defendants' reliance on the Master-in-Equity's Order and Judgment of Foreclosure and Sale entered in Charleston County Court of Common Pleas Case # 2014-CP-10-04946 is misplaced because the Plaintiff was neither named as a party nor served with process in that case.

13. Thus, the Master-in-Equity never had personal jurisdiction over the Plaintiff in the foreclosure case, and as a result, its rights and interests in the subject property were never extinguished or impacted by the foreclosure judgment. Therefore, the reservation of jurisdiction of the foreclosure case by the Master-in-Equity only affects those whom were named as parties

and also properly served with process. To conclude otherwise would obviously violate the Plaintiff's due process rights. A judgment is void if a court acts without personal jurisdiction. *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). A court generally obtains personal jurisdiction by the service of a summons. *Ex parte S.C. Dep't of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002) (citing *State v. Sanders*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920). ("The purpose of the summons is to acquire jurisdiction of the person of the defendant.. .")). Accordingly, the foreclosure judgment is void against the Plaintiff

14. The membership transfer of Maybank 2754, LLC, was specifically conditioned on the grant of the easement. Therefore, the doctrines of unclean hands and equitable estoppel should apply to prevent Defendants from disavowing or denying the existence and validity of the easement. Accordingly, material issues of fact also exist as to these issues.

15. Plaintiff has filed a motion to compel for pending discovery responses from Defendant, 1776, LLC, and is still pending discovery documents from Seamon, Whiteside & Associates, Inc. Therefore, summary judgment is premature. *See, Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 ("[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.")

16. Lastly, Plaintiff has filed its Motion to Amend Complaint and proposed Amended Verified Complaint, which is incorporated herein by reference. Accordingly, for this reason also, summary judgment should be denied.

Conclusion

Defendants' motions for summary judgment should be denied (including the motion to dismiss filed by Seamon, Whiteside and Associates, Inc.), so that the existing material issues of fact can be determined by a jury.

WHEREFORE, Plaintiff requests that the Court deny the Defendants' motions for summary judgment (including the motion to dismiss filed by Seamon, Whiteside and Associates, Inc.); deem as filed the Plaintiff's proposed Amended Complaint; and grant such further relief as this Court deems just and proper.

Respectfully submitted,

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JASON M. TAROKH
S. CAROLINA BAR # 72837

September 18, 2020

THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

MAYBANK 2754, LLC,

Plaintiff,

vs.

EUGENE J. ZURLO, Individually and as
Co-Trustee of the Eugene J. Zurlo Living
Trust Dated December 11, 1997;
1776, LLC; BEACH FENWICK, LLC;
THE BEACH COMPANY; SEAMON,
WHITESIDE & ASSOCIATES, INC.;
PENNY CREEK ASSOCIATES, LLC;
JOHN DOE AND MARY ROE,

Defendants.

Case No. 2020-CP-10-00209

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
ON BEHALF OF
BEACH FENWICK, LLC AND THE BEACH
COMPANY [SIC]

Beach Fenwick, LLC ("Beach Fenwick") and The Beach Company [sic] ("Beach Co.") (collectively referred to as the "Beach Entities"), by and through their undersigned counsel, respectfully submit this memorandum in support of their motion for summary judgment, pursuant to Rule 56, South Carolina Rules of Civil Procedure ("SCRCP"). The Beach Entities also adopt the arguments of Eugene J. Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997. For the reasons stated herein, in addition to the reasons to be set forth in argument of counsel, the Beach Entities respectfully request this Court grant their Motion for Summary Judgment.

BACKGROUND

On or about January 18, 1999, Penny Creek Associates, LLC ("PCA") was formed as a South Carolina limited liability company. Upon formation, Michel Laplante ("Laplante") and certain members of the Laplante family¹ ("Laplante Family") were 50% members of PCA. The Eugene J. Zurlo Living Trust Dated December 11, 1997 ("Zurlo Trust") was the other 50% member. Although the overall ownership was split 50/50 between the Zurlo Trust and the Laplante Family, the Third Amended and Restated Operating Agreement of PCA established Laplante and the Zurlo Trust as the sole voting members of PCA. (See the Zurlo Trust's Reply to Plaintiff's Amended Objection and Response in Opposition to Motion for Order of Reference to the Master-In-Equity, Exhibit 1).

In March, 1999, PCA purchased certain property located along Maybank Highway in Johns Island, South Carolina ("Original Tract"). In August, 2000, PCA executed and delivered a note, in favor of First Union National Bank, secured by a mortgage upon the Original Tract. In April, 2006, PCA executed and delivered a promissory note in favor of Wachovia Bank, National Association, also secured by a mortgage on the Original Tract.² These notes were ultimately consolidated and the respective mortgages modified. Certain properties encumbered by the mortgages were released from the liens, leaving others, including the one at issue in this action.

¹ The Laplante Family, as referenced herein, consists of John H. Laplante (now deceased), Peter F. Laplante and Marianne Laplante-Scarlata in addition to Michel Laplante.

² Wells Fargo Bank, N.A. is the successor by merger to Wachovia Bank, National Association that is the successor by merger to First Union and was, at all times relevant to this action, the owner and holder of both notes executed and delivered by PCA.

On April 19, 2006, Maybank 2754, LLC ("Maybank") was formed as a South Carolina limited liability company to acquire a small parcel of property (the "Maybank Tract") adjacent to the Original Tract. Until October, 2013, PCA was the sole member of Maybank. On or about October 7, 2013, a Resolution of the Sole Shareholder of Penny Creek Associates, L.L.C. ("Resolution") (Compl., Exhibit 1) was executed by Laplante and purportedly executed by Gene Zurlo on behalf of the Zurlo Trust.³ The Resolution references a Contract for Assignment of Interest dated October 7, 2013, pursuant to which PCA agreed to sell its entire membership interest in Maybank to the Laplante Family, for cited consideration. The Resolution also states, *inter alia*:

WHEREAS, as a condition of closing, [PCA] has agreed to grant, transfer, sell and convey to [Laplante Family], their successors and assigns, an access easement for pedestrian and vehicular ingress egress and access to, from and over that portion of the lands of [PCA] known as "Residual Tract B-2-2" ... ("30' Private R/W), the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road ("Pitch Fork Road"). Upon the completion of Pitch Fork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30' Private R/W.

This Resolution is the sole document upon which Maybank relies for its claim of an easement upon property now owned by Beach Fenwick.⁴ Maybank admits, in its Complaint, that only upon completion of Pitch Fork Road would an easement agreement be executed and recorded by the parties privy to the Resolution, and only then would the

³ Gene Zurlo was not a trustee of the Zurlo Trust. Rather, Eugene J. Zurlo and Charlotte Zurlo were and remain Co-Trustees.

⁴ If it is determined Maybank has no valid property interest in the property at issue, Maybank's remaining causes of action, all of which are dependent thereon, must also fail. Thus, the matters addressed herein, and the other support for this Motion for Summary Judgment on behalf of The Beach Entities, including argument of counsel, shall apply to all of Maybank's causes of action.

parties agree as to the location and condition of the access easement. Maybank also admits that Pitch Fork Road has not been completed, the Resolution was never recorded, there is no agreement as to the location of any easement nor has any other interest allegedly held by Maybank upon Beach Fenwick's property ever been recorded.

In December, 2013, Defendant Zurlo commenced a derivative action against PCA and others, including Laplante, seeking a judicial dissolution of PCA. That case was resolved in February 2016 by way of a settlement made a part of the record. ("Dissolution Action"). (See Case No. 2013-CP-10-07280). The settlement resulted in, among other things, PCA executing and delivering to the Zurlo Trust a promissory note in the amount of \$3,250,000, which note was secured by a mortgage on the Original Tract. The mortgages⁵ held by Wells Fargo were unaffected. Ultimately, the note and the mortgage delivered by PCA in favor of Zurlo were assigned to 1776, LLC ("1776").

On August 14, 2014, Wells Fargo, as mortgagee, initiated a foreclosure action upon the Original Tract, naming PCA, Laplante and others, with actual, recorded interests in the Original Tract, as defendants ("Foreclosure Action") (See Case No. 2014-CP-10-04946). Through the pendency of the Foreclosure Action, Laplante answered, through counsel, and took affirmative action by way of cross claims and third-party claims as well as motions for an injunction and a temporary restraining order.

The Foreclosure Action resulted in the entry of Master-In-Equity's Order and Judgment of Foreclosure and Sale, filed in the office of the Clerk of Court for Charleston County on June 23, 2017 ("Foreclosure Order"). (See Beach Entities' Motion to Refer

⁵ The mortgages securing the indebtedness to Wells Fargo's predecessors, then ultimately Wells Fargo, were modified, see Modification of Mortgages dated October 1, 2102 and recorded in the office of the Register of Deeds for Charleston County on October 15, 2012, in Book 0284, Page 614.

Matter to Master-In-Equity, Exhibit 1). The Original Tract was subject to a Master's sale on September 7, 2017, pursuant to which 1776 credit bid its lien upon the Original Tract and became the title holder by way of Master's Deed dated August 29, 2017 and recorded in the office of the Register of Deeds for Charleston County at Book 0662, Page 915. There is no purported easement mentioned in the Foreclosure Action, and consequently, none mentioned in the deed to 1776, as Maybank had no legitimate property interest and thus, the chain of title did not and could not include the easement.

1776 conveyed a portion of the Original Tract to Beach Fenwick by way of deed dated December 12, 2019 and recorded in the office of the Register of Deeds for Charleston County at Book 0846, Page 268 (the "Subject Property"). Again, there is no language evidencing any easement, as no easement has ever been prepared or recorded, as admitted by Maybank. On January 13, 2020, Maybank initiated this action, in which the Beach Entities are entitled to summary judgment, as a matter of law; there are no material facts in dispute.

STANDARD OF REVIEW

Rule 56(c) of the South Carolina Rules of Civil Procedure requires that summary judgment be granted if "there is no genuine issue of material fact and... the moving party is entitled to judgment as a matter of law." S.C. R. Civ. P. 56(c).⁶ Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, "this initial responsibility may be discharged by 'showing' – that is, pointing out to the

⁶ "The non-moving party in a motion for summary judgment must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition." *Schmidt v. Courtney*, 357 S.C. 310, 322, 592 S.E.2d 326, 333 (Ct. App. 2003).

trial court – that there is an absence of evidence to support the nonmoving party’s case.” *Baughman v. American Telephone and Telegraph Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Under South Carolina law, where “plain, palpable and indisputable facts exist on which reasonable minds cannot differ,” summary judgment in favor of the moving party is proper. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976).

DISCUSSION

The Beach Entities are entitled to summary judgment on all of Plaintiff’s claims against them as there is no genuine issue of material fact. Specifically, the Beach Entities are entitled to summary judgment as a matter of law because (1) for myriad reasons, no “easement” exists, (2) Plaintiff is collaterally estopped and estopped by silence from asserting any property right against the Beach Entities because, even if it existed, such easement was foreclosed pursuant to that certain action initiated and completed in favor of Wells Fargo, and (3) the Resolution upon which Plaintiff relies is not properly executed and, therefore, unenforceable.

I. No easement or property right ever existed and cannot exist in the future

The Beach Entities are entitled to summary judgment on all claims -- Plaintiff does not have any property right over the Subject Property because (a) the alleged easement lacks sufficient description to support any claim to a property right, (b) the Resolution created nothing more than an “agreement to agree,” (c) Plaintiff admits it does not have an existing easement, and (d) alternatively, if the Resolution created an easement, which it did not, the easement is one in gross and, therefore, not transferrable to Plaintiff.

a. The Resolution does not create a property right

i. First, the Resolution fails to meet the essential elements required in order to create a valid property right. “South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.” *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (citing *Hughes v. Edwards*, 265 S.C. 529 (1975)).

“A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments.” *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) (citing 28A C.J.S. Easements § 57, at 235 (1996)). “The language of an easement determines its extent.” *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 67, 558 S.E.2d 902, 906–07 (Ct. App. 2001). “Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in [the] plain, ordinary, and popular sense.” *Id.* (citation omitted). While it “is not essential to the validity of a grant of an easement that it be described by metes and bounds or by figures giving definite dimensions of the easement,” “[a] description of an easement in a recorded document is sufficient when it contains language that acts as a guide to the location of the easement on the land such that the easement is ‘capable of being rendered to a certainty [by reference] to something extrinsic ... to which it refer[s].’” *Id.*, at 72, 558 S.E.2d at 909 (citations omitted). “While a property description need not be perfect, it must allow one examining it to identify the property conveyed; otherwise, the

conveyance is void.” *Hoyler v. State*, 428 S.C. 279, 295, 833 S.E.2d 845, 853 (Ct. App. 2019).

Assuming, *arguendo*, the Resolution could serve as the basis of a valid easement, the description lacks any identifiable location or condition of the easement. The Resolution provides, “the location and condition of [the easement] shall be mutually agreed upon at a future date.” As such, the document upon which Plaintiff relies for its purported easement is clearly lacking any sort of description of the land impacted by such easement and is not “capable of being rendered to a certainty [by reference] to something extrinsic.” *Id.* The Resolution lacks a clear and unambiguous description of the location, extent and type of easement sufficient to allow any party examining it to be able to identify the location and nature thereof. Indeed, no such description exists because no grant of an easement ever occurred. Additionally, when appearing before this Court in the action *sub judice*, on June 25, 2020, Laplante, as manager of Plaintiff, admitted, under oath, the Resolution was regarding a “contract for assignment of interest” and “we didn’t care...” June 25, 2020 Tr., 25:25 – 26:2; 46:1 – 46:11; (Exhibit 1). Accordingly, the Resolution, even if it could stand as a basis of a valid legal interest, fails to establish essential terms of the very interest Plaintiff claims it creates and, as such, cannot as a matter of law, constitute a valid and enforceable property right.

ii. The Resolution undisputedly requires the location and condition of the “easement” contemplated therein be agreed upon by the parties to the Resolution. PCA no longer owns the Subject Property, thus rendering such an agreement impossible. However, almost four years passed before PCA lost ownership of the Subject Property and, at no point during those years did the Laplante Family, the alleged recipient of an

easement interest, accomplish an agreement with PCA sufficient to establish a valid easement.

iii. Further, as more fully analyzed below, Plaintiff claims to have an easement that may occur at some unidentifiable point in the future “upon the completion of Pitch Fork Road.” Importantly, Plaintiff’s Complaint provides “17. Pitchfork Road had not been completed.”

As established by the foregoing, the Resolution lacks a clear and unambiguous description of the location, extent, and type of easement. In fact, the Resolution completely lacks *any* description of the location, extent or type of easement, and by its mere terms fails. Therefore, the Resolution never created an easement or property right.

b. Alternatively, if the Resolution created anything, it created an unenforceable “agreement to agree”

As noted above, “South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.” *Player v. Chandler*. There can be no contract so long as, in the contemplation of the parties thereto, something remains to be done to establish contract relations.” *Hughes v. Edwards*, 265 S.C. 529, 536 (1975), citing *Insurance Company of North America v. United States*, 159 F. 2d. 699 (4th Cir. 1947).

In short, an “agreement to agree” does not amount to a contract under South Carolina law. *BCD LLC v. BMW Mfg. Co., LLC*, 360 F. App’x 428, 435 (4th Cir. 2010) (citing *Trident Constr. Co., Inc. v. Austin Co.*, 272 F.Supp.2d 566, 575 (D.S.C.2003)). “The parties merely agreed to enter into negotiations to reach an agreement, but

subsequently failed to reach an actual agreement on essential terms pertaining to land allocations, divisions of parcels, and restrictive covenants for the property.” *Id.*

This is precisely what happened here, and Plaintiff admits as much. See June 25, 2020 Tr., 47:20 – 48:1 (Exhibit 1). The unrecorded Resolution, or more precisely, the unrecorded contract referenced therein but not provided until after the filing of this action, purportedly is a contractual right for the Seller (PCA) and Buyer (Laplane Family) to agree in the future to create an easement. In South Carolina, this agreement to agree does not amount to a contract and cannot detrimentally impact future purchases of the property because the parties “subsequently failed to reach an actual agreement on essential terms pertaining to land allocations ... and restrictive covenants for the property.” *BCD LLC*, at 435; see also *Burbach Broadcasting Co. of Delaware v. Elkins Radio Corp.*, 278 F.3d 401, 407 (4th Cir.2002) (stating that, in preliminary negotiations, when terms are indefinite and basic terms have not been agreed upon, there is no basis to fashion a remedy, and thus no enforceable contract).

Moreover, if an “easement” was created, which it was not, it is merely a contractual right as opposed to a property right and, therefore, was not in the deed and does not run with the land.

c. Alternatively, if an easement was created, which it was not, it was an easement in gross and not an easement appurtenant

An easement is either appurtenant or in gross. *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965). An appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997); *Windham v. Riddle*, 381 S.C. 192, 672 S.E.2d 578, (2009)

(citations omitted) (emphasis added). It also passes with the dominant estate upon conveyance. *Id.* (citing *Carolina Land Co., Inc. v. Bland*, 265 S.C. 98, 217 S.E.2d 16 (1975)). Unless an easement has all the aforementioned elements necessary to establish an appurtenant easement, it will be characterized as an easement in gross. *Id.* (citing 12 S.C. Juris. *Easements* § 3(c)). “An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer.” *Id.* 381 S.C. at 201-02, 672 S.E.2d at 583. Where language in a plat reflecting an easement is capable of more than one construction, that construction which least restricts the property will be adopted. *Hamilton v. CCM, Inc.*, 274 S.C. 152, 263 S.E.2d 378 (1980).

If the Resolution created some easement interest, which it did not, the agreement to agree upon an easement was between PCA and the Laplante Family; the Resolution created no property interest for the benefit of Maybank. Therefore, because the Laplante Family did not own the property that would be benefitted by this reputed easement, the essential element that an appurtenant easement has “one terminus on the land of the party claiming it” is not met.

Maybank is unable to establish another essential element of an appurtenant easement, *to wit*: it must be essentially necessary to the enjoyment of the dominant parcel. It is undisputed that Maybank’s property fronts on Maybank Highway. Maybank, therefore, has ready access to its property. While Maybank may wish it had other, additional access, such is not an entitlement and cannot unilaterally create such an encumbrance upon Beach Fenwick’s property. Because the reputed “easement” is not necessary for the use of Maybank’s property, and because Maybank fails to meet other, requisite elements of an appurtenant easement, any such easement would be an

easement in gross. See *Ballington v. Paxton* 327 S.C. 372, 488 S.E.2d 882 (1997). Thus, if an easement was created by virtue of the Resolution, which it was not, such would have been an easement in gross which is a mere personal privilege and incapable of transfer or assignment.

d. Plaintiff admitted, in its pleadings and by sworn testimony, that it does not have a valid, enforceable easement

i. Plaintiff acknowledges it does not have a valid easement through its pursuit of a claim against its former legal counsel alleging professional negligence on the part of counsel for failing to perfect the “easement” (Case No. 2020-CP-10-02180). In that matter, Plaintiff states, *inter alia*:

BBT and Byars breached their professional obligation and fiduciary duty to Maybank to provide legal services...by failing to prepare and record a document, in the office of the Register of Deeds...so as to provide constructive knowledge to the public of the existence of the thirty (30) foot right of way easement. BBT and Byars were careless and negligent failing to record the Resolution, or failing to prepare and record a document...
Comp. ¶¶ 21,22

ii. By Plaintiff’s admission, the Resolution, upon which it relies as the basis for the claim of an easement, fails to meet the statute of frauds. In order to satisfy the statute of frauds, there must be a writing that, by its terms, establishes the essential terms of the agreement without resort to parol evidence, *signed by the party against whom enforcement is sought. Springbob v. University of South Carolina*, 407 S.C. 490, 757 S.E.2d 384 (2014) (emphasis added). Plaintiff admits the failure to memorialize any easement in a manner sufficient to satisfy the requisite elements therefor. Additionally, the Resolution is not and could not have been signed by the Beach Entities. Thus, the claim to an easement is further defeated pursuant to the statute of frauds.

Based upon the forgoing admissions alone, Maybank's claims fail as a matter of law.

II. Plaintiff is collaterally estopped from asserting any property right against the Beach Entities because, had there been an easement, it was foreclosed pursuant to the foreclosure action

Wells Fargo commenced a foreclosure action in 2014 against PCA and its members, pursuant to which it foreclosed its lien upon the Original Tract. (See, Case No.: 2014-CP-10-04946, filed with the Charleston County Clerk of Court). The Master-in-Equity's Foreclosure Order, dated June 23, 2017 foreclosed and barred any and all future claims related to the property or any interest in the property in question. Laplante was a named Defendant in the foreclosure action; was Manager of PCA; was the controlling member of Maybank; was represented by counsel; filed cross claims in the foreclosure action; and was present at the June 19, 2017 hearing when testimony and exhibits concerning the foreclosure were presented to the Court. The June 23, 2017 Foreclosure Order made no exception or mention for an easement and there was no easement noted on any plat. Indeed, the Master-In-Equity further entered a Consent Order amending the property description of the Original Tract because the parties identified a mistake in the legal description. (Exhibit 2). Laplante, as the manager of PCA and controlling member of Maybank and a self-touted real estate developer, failed to mention the existence of the "easement" and now, years later, attempts to relitigate the issue.

"Collateral estoppel will bar the relitigation of an issue which was actually litigated and necessary to the outcome of a prior lawsuit." *McNaughton-McKay Elec. Co. of N.C.*

v. Andrich, 324 S.C. 275, 279, 482 S.E.2d 564, 566 (Ct. App. 1997).⁷ Under South Carolina law, the party asserting collateral estoppel must show that the issue of fact or law in the present lawsuit was: “(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” *Meyer v. McGowan*, No. 2:16-CV-00777-RMG, 2018 WL 4300121, at *2 (D.S.C. Sept. 10, 2018) (citing *Carolina Renewal, Inc. v. S.C. Dep’t of Transp.*, 385 S.C. 550, 554 (S.C. Ct. App. 2009)). Maybank’s “absence from the previous ... lawsuit does not insulate it from issue preclusion.” *Carolina Renewal, Inc. v. S.C. Dep’t of Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009).

Here, Laplante’s knowledge is imputed to Plaintiff. S.C. Code Ann. § 33-44-102. Maybank, through its manager, Laplante, had a “full and fair opportunity to previously litigate the issue” in the foreclosure action. See *Carolina Renewal, Inc.*, at 555, 684 S.E.2d at 782. Maybank has previously argued it cannot be bound by the terms of the Master’s Foreclosure Order. (See Plaintiff’s Motion for Reconsideration of the Court’s Order Entered on June 30, 2020, at ¶¶ 18-19). Maybank was not a party to the foreclosure action because it did not possess a real property interest in the Original Tract, including the Subject Property. The record of the foreclosure action reveals that Laplante actively participated in that proceeding, making no mention in any of his pleadings or at the foreclosure hearing of any alleged property interest of Maybank.

⁷ “Laches is an equitable doctrine defined as ‘neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.’” *Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007) (citation omitted). Plaintiff’s unreasonable delay in asserting its rights has resulted and continues to result in prejudice to the Beach Entities and other defendants.

This issue of a description of property rights and existing easements on the Original Tract, including the Subject Property, was actually litigated in the foreclosure; the Master-In-Equity fully determined the property rights to be sold, leaving no question what the buyer was acquiring. The breadth of the property rights was further solidified upon the revision of the original Order to amend the property description. Lastly, estopping Plaintiff is necessary to support the prior judgment/foreclosure order because the sale of the subject property could be revisited if the rights acquired/sold through the foreclosure subsequently changed.

Moreover, “it is a well-established principle in South Carolina that estoppel by silence arises when one party observes another dealing with his property in a manner inconsistent with his rights and makes no objection while the other party changes his position based on the party's silence.” *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 358, 628 S.E.2d 902, 911 (Ct. App. 2006) (citing *Seabrook Island Property Owners Association v. Pelzer*, 292 S.C. 343, 356 S.E.2d 411 (Ct.App.1987)). Maybank’s silence, through its controlling member and current manager, Laplante, constitutes estoppel by silence. Laplante maintained silent through the Dissolution Action as to any purported right of Maybank to an easement, and likewise maintained silence through the Foreclosure Action, thus constituting estoppel by silence, preventing Maybank from making claims at this point, in this action, as to an easement.

The June 23, 2017 Foreclosure Order is now the law of the case because it involves the same parties and the same property. By bringing this action, Maybank seeks to have a circuit court judge collaterally attack the Master’s Foreclosure Order. It is a cardinal rule in South Carolina that one Circuit Court should not overrule another,

especially when the other circuit court judge has retained jurisdiction. See *Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003) (holding that a family court judge could not overrule the prior unappealed order of another family court judge because it had become law of the case); *In re Morrison*, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *Cooper Tire & Rubber Co. v. Perry et al.*, 261 S.C. 538, 201 S.E.2d 245 (1973) (holding that where a ruling on a demurrer to complaint is not appealed from, it becomes the law of the case); *Watkins v. Hodge*, 232 S.C. 245, 247–48, 101 S.E.2d 657, 658 (1958) (refusing to consider jurisdictional matter of underlying case where issue had been ruled upon and not challenged on appeal). *Judy v. Martin*, 381 S.C. 455, 458–59, 674 S.E.2d 151, 153 (2009).

For the reasons provided above, the Beach Entities respectfully request this Court find Maybank is collaterally estopped from raising issues already litigated – the issue of what property rights were foreclosed and sold in the 2017 Foreclosure Order. Maybank, through its manager and controlling member, actively participated in and had a full and fair opportunity to raise the issue of any purported property interest in the foreclosure action. Additionally, the Beach Entities respectfully request this Court find Maybank is estopped by its silence as a result of its failure to raise any claim to a reputed easement either during the dissolution action or the foreclosure action.

III. The Resolution Plaintiff relies on is not properly executed and, therefore, unenforceable.

The Resolution is null and void because it was not properly executed by the Zurlo Trust in accordance with the Third Amended and restated Operating Agreement of PCA. In order for the Resolution to be properly executed in according with Section 3.19 of the

PCA Third Amended Operating Agreement, the Resolution must have been signed by Eugene and Charlotte Zurlo as Co-Trustees of the 1997 Zurlo Living Trust after a Special Meeting was held. Absent a Special Meeting, the Class A members and Manager were required to adopt by unanimous Written Consent the future easement and signed a signed written consent in lieu of a special meeting. This never happened. (See Defendant Zurlo's Motion for Summary Judgment Exhibit E and Exhibit, Class and Voting Sections of the Third Amended and Restated Operating Agreement and Resolution).

Because the Resolution was not properly executed, the agreement is null and void and no property right purportedly created therein can exist.

CONCLUSION

Based upon the foregoing, the grounds set forth in their Motion for Summary Judgment, the affirmative defenses set forth in their Answer and the forthcoming argument of counsel, the Beach Entities respectfully submit to this Court there is no genuine issue of material fact in dispute, and they are entitled to an Order of the Court granting their Motion for Summary Judgment, based upon the foregoing.

/s/ Cheryl D. Shoun

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Attorneys for Defendants
The Beach Company and
Beach Fenwick, LLC

September 18, 2020

Charleston, South Carolina

Exhibit 1 - Transcript of June 25, 2020

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	DOCKET NO. 2020-CP-10-0209
	)	
	)	
MAYBANK 2754, LLC	)	
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
EUGENE J. ZURLO, et al	)	
	)	
Defendants	)	
	)	
	)	
	)	
	)	TRANSCRIPT OF RECORD
	)	May 25, 2020
	)	Zoom videoconferencing

B E F O R E:

THE HONORABLE BENTLEY PRICE, JUDGE

A P P E A R A N C E S:

JASON M. TAROKH, ESQ.
Attorney for the Plaintiff

CHERYL SHOUN, ESQ.
Attorney for the Defendants Beach Company & Beach Fenwick

J. RUTLEDGE YOUNG, SR., ESQ.
Attorney for Defendant 1987 Zurlo Trust

BRIAN HELLMAN, ESQ.
Attorney for Defendant 1776, LLC

JORDAN TEICH, ESQ.
Attorney Defendant Seamon Whiteside & Associates

JOYCE C. RUEGER,
Certified Verbatim Reporter-Master
Circuit Court Reporter

[Certified Transcript Provided for: Cheryl Shoun, Esq.]

1 THE COURT: All right. I'll allow it in over any
2 objections.
3 MR. TAROKH: Thank you, Your Honor.
4 [Whereupon, Plaintiff's exhibit number 1 is entered
5 into evidence by the Court]
6 Q. [Mr. Tarokh] And Mr. Laplante, could you just tell
7 us what was the intent of this doc -- of the Resolution.
8 MS. SHOUN: Again, Your Honor, same objection.
9 THE COURT: Same ruling. Move to the next
10 question.
11 Q. [Mr. Tarokh] Does the document -- does the
12 Resolution reference another document?
13 A. Yes.
14 Q. And what is that document?
15 A. It is the contract for assignment of interest.
16 Q. Okay. Mr. Laplante, if you could please look to
17 what I identified as plaintiff's exhibit number 2. Do
18 you have that in front of you?
19 A. Yes, sir.
20 Q. Is plaintiff's exhibit number 2 the document
21 referenced in the Resolution?
22 A. Yes.
23 Q. And can you tell me what plaintiff's exhibit number
24 2 is?
25 A. It is a detailed contract for transfer of this

Maybank 2754, LLC v Eugene J. Zurlo, et al
Motion for Temporary Injunction-Michel Laplante-Direct Examination by Mr. Tarokh
June 25, 2020

1 A. To be honest we didn't care where it was located
2 along that line that abutted our property and accessed
3 our property. So the location that is on the drawing was
4 again was set by Seamon Whiteside.

5 But as long as we have a connection from our
6 property line to the pitch fork -- and that routing we
7 did not want to encumber the sale as a manager of Penny
8 Creek if we located the exact alignment we would have
9 encumbered the sale of that property and I would not have
10 met my fiduciary duties to Penny Creek by subdividing the
11 property in that fashion.

12 Q. Just to clarify at the time of this easement you
13 were the manager of Penny Creek Associates, LLC, correct?

14 A. Yes, sir.

15 Q. And then you also ---

16 A. --- I --

17 Q. --- go ahead; I'm sorry.

18 A. Go ahead.

19 Q. So, go ahead.

20 A. I had been for 18 or 19 years; a long time, yes sir.

21 Q. Okay. And at the same time as the purchase you
22 became a member of Maybank 2754, LLC is that correct?

23 A. Yes, with my children.

24 Q. And the reason the easement was conditioned upon the
25 completion of pitchfork road was why?

1 MS. SHOUN: Again, Your Honor, I would object to
2 the extent -- I understand Your Honor has indicated that
3 he may be able to testify what his intent was to the
4 previous two questions but I think we've gone way beyond
5 that. And that's not what this question seeks.

6 THE COURT: All right. Rephrase ---

7 MS. SHOUN: --- he's asking for the intent.

8 MR. TAROKH: I can rephrase, Your Honor. I can
9 rephrase.

10 Q. [Mr. Tarokh] What was the intent of the location of
11 the easement at the time of the easement agreement, at
12 the time of the resolution of the contract for assignment
13 what was your intent on behalf of Maybank? What was the
14 intent of Maybank?

15 A. The intent was to have an access point to the
16 pitchfork which would make the development of the
17 potential site match what we'd, what was always -- what
18 was sold to us, we were just doing what was told to us
19 and we could connect.

20 And we were flexible on that and that's why it said
21 that we mutually agreed. I understand that if in fact it
22 was set in one location it would make marketing that site
23 very, very different if it was set so that's why we
24 agreed. And that's why when the previous buyer looked at
25 it we were looking at alignments for them. They wanted

1 to know the exact alignment. Everyone was familiar with
2 that including all the real estate agents ---

3 MS. SHOUN: --- Your Honor, I'm sorry. Again,
4 we're going way outside the scope of this witness's
5 knowledge. There is no foundation of ---

6 MR. TAROKH: --- Your Honor, he's testifying as to
7 his intent and he is consistently being cut off. We're
8 having to restart these questions because of these
9 objections that are frankly baseless. He can testify as
10 to his knowledge, his intent. The Court already said he
11 could.

12 And he's describing to the Court what was the
13 purpose of making this contingent on the completion of
14 pitch fork road. It's in the face of the document. That
15 can be an ambiguous phrase, it is an ambiguous phrase.
16 What was the intention upon completion of pitch fork
17 road? Why was that?

18 He was a party to the transaction by virtue of being
19 manager -- by virtue of being manager of Penny Creek at
20 the time. He was also a member -- he also became a
21 member of Maybank 2754, LLC. That's sufficient knowledge
22 to testify as to those facts.

23 THE COURT: All right. But is that your argument
24 for your Motion for Temporary Injunction?

25 MR. TAROKH: Yes, Your Honor. In sum, it's the

Exhibit 2 - 2017-08-28 Consent Order
Amending Master In Equity's Order

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Wells Fargo Bank, N.A., as Successor by
Merger to Wachovia Bank, National
Association, as Successor by Merger to First
Union National Bank,

Plaintiff,

vs.

Penny Creek Associates, L.L.C. a/k/a Penny
Creek Associates, LLC; Michel F. LaPlante
a/k/a Michel Laplante a/k/a Mitch Laplante;
Charlotte R. Zurlo; Eugene J. Zurlo; Charlotte
R. Zurlo and Eugene J. Zurlo, as Co-Trustees
of The Nicklaus Lane Realty Trust No. 1 under
Declaration of Trust dated May 22, 1998, and
The Zurlo Investment Trust No. 1 pursuant to
trust agreement dated August 10, 1998;
Fenwick Hall Plantation Property Owners
Assn., Inc. a/k/a Fenwick Hall Plantation
Property Owners' Association, Inc.; Preserve
at Fenwick Hall Property Owners Association,
Inc. a/k/a The Preserve at Fenwick Hall
Property Owners' Association, Inc.; and The
Grove At Fenwick Plantation Condominium
Association, Inc.,

Defendants.

Michel Laplante,

Third-Party Plaintiff,

vs.

The Eugene J. Zurlo Living Trust, Dated
December 11, 1997,

Third-Party Defendant.

IN THE CIRCUIT COURT

Case No. 2014-CP-10-04946

CONSENT ORDER
AMENDING MASTER-IN-EQUITY'S
ORDER AND JUDGMENT OF
FORECLOSURE AND SALE
NUNC PRO TUNC

FILED
2011 AUG 28 PM 4:43
JULIE L. MISTONE
CLERK OF COURT



This matter comes before the Court upon the request of the plaintiff and defendant 1776, LLC¹, who was the successful bidder at the foreclosure sale held on August 1, 2017, to amend the property description attached to the Master-in-Equity's Order and Judgment of Foreclosure and Sale entered on June 23, 2017 (the "Foreclosure Order") in order to reflect the prior sale and release of Lots 14, 16 and 55, The Preserve at Fenwick Plantation. It appears to the Court that the said lots were listed in the Foreclosure Order but had been previously sold to third-parties and released from the lien of Plaintiff's Mortgage prior to the foreclosure sale.

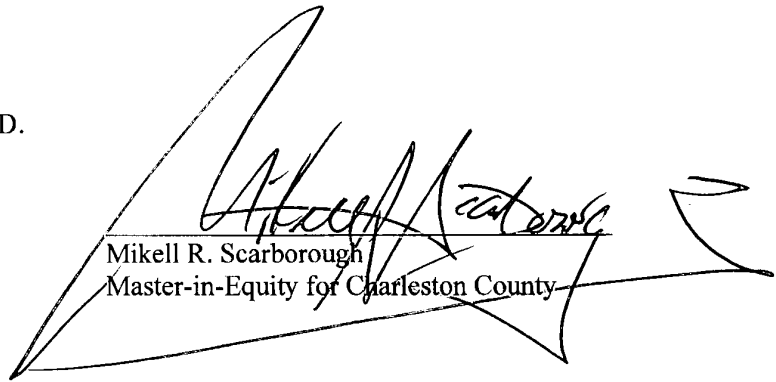
NOW, THEREFORE, by and with the consent of the plaintiff and defendant 1776, LLC, through counsel, the Court hereby finds and concludes that it is appropriate and necessary to amend the property descriptions attached as Exhibits "A-1" and "A-2" to the Order, in order to reflect the prior release of Lots 14, 16 and 55, The Preserve at Fenwick Plantation from the within foreclosure.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Exhibits "A-1" and "A-2" attached to the Foreclosure Order should be, and the same hereby are, amended *nunc pro tunc* in order to reflect the release of Lots 14, 16 and 55, The Preserve at Fenwick Plantation. Accordingly, Exhibits "A-1" and "A-2" attached to the Foreclosure Order are hereby replaced in their entirety with Revised Exhibits "A-1" and "A-2" attached hereto, which are substituted in lieu thereof.

¹ The motion of defendant 1776, LLC to intervene as a party defendant was granted by Order entered June 21, 2017.



AND IT IS SO ORDERED.

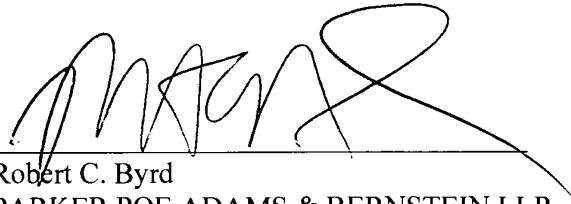


Mikell R. Scarborough
Master-in-Equity for Charleston County

August 28, 2017

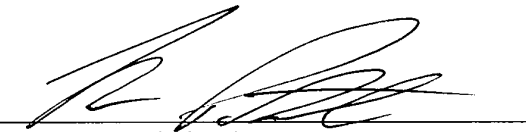
Charleston, South Carolina

WE SO MOVE AND CONSENT:



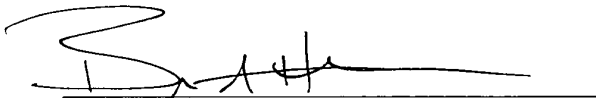
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Attorney for Defendant 1776, LLC

REVISED EXHIBIT A-1**Tract B-2:**

ALL that piece, parcel or tract of land, together with the improvements thereon, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as "Tract 'B-2' 42.7 Acres," on a plat entitled, "SUBDIVISION OF PROPERTY IN THE NAME OF F-H-P REALTY LOCATED ON JOHNS ISLAND, CHARLESTON COUNTY, S.C.," by Forrest G. Calvert, RLS, dated September 17, 1979, and recorded in the RMC Office for Charleston County, South Carolina (hereinafter the "RMC Office") in Plat Book AO at Page 74, said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully be shown.

And Tract A:

ALL that piece, parcel or tract of land, together with the improvements thereon, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as "FHP Realty Tract 'A' 5.503 Acres" on a plat entitled, "PLAT SHOWING THE ABANDONMENT OF PROPERTY LINES FOR TMS NO. 346-00-00-12 AND TMS NO. 346-00-00-011, AND THE SUBSEQUENT SUBDIVISION OF TMS NO. 346-00-00-007 INTO TRACT 'A' CONTAINING 5.503 ACRES AND TRACT 'B' CONTAINING 7.497 ACRES OWNED BY FHP REALTY LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Hoffman Lester Associates, Inc., dated September 24, 1997, and recorded January 20, 1998, in the aforesaid RMC Office in Plat Book EC at Page 263.

The aforesaid Tract B-2 and Tract A are also more particularly shown on that certain plat entitled, "PLAT SHOWING PROPERTY LINE BETWEEN TMS NO. 346-00-00-004, TRACT B-2 (CONTAINING 42.49 ACRES) AND TMS NO. 346-00-00-007, RESIDUAL TRACT B (CONTAINING 5.50 ACRES) TO FORM TRACT B-2 (CONTAINING 47.99 ACRES), OWNED BY FHP REALTY LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Hoffman Lester and Associates, Inc., dated April 7, 2000, and recorded as Exhibit "___" [sic: "C"] to that certain deed of conveyance from FHP Realty Company, a Partnership, to Penny Creek Associates, L.L.C., and also about to be recorded in the RMC Office for Charleston County, S.C.

Note: The above-referenced deed from FHP Realty Company, a Partnership, to Penny Creek Associates, L.L.C. is dated August 7, 2000, and recorded in the RMC Office for Charleston County on August 8, 2000, in Book O-352 at Page 691.

TOGETHER WITH a twenty-foot (20') non-exclusive easement in common with Helena Igoe Blanchard, her heirs and assigns, and others entitled thereto, in favor of "Tract B" above-described, for ingress and egress over, upon and across that certain twenty-foot (20') easement extending from Maybank Highway on the south to "Tract A" on the north, as said Tract A is shown on that certain plat recorded in Plat Book AK at Page 76 in the RMC Office, which easement is granted in that certain deed of conveyance from Helena Igoe Blanchard to FHP Realty Company, a Partnership, dated April 27, 1978, and recorded in Book P-115 at Page 273, in the RMC Office.

LESS AND EXCEPTING: ALL that certain streets, roads, drives and cul-de-sacs situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina and being shown and designated as "FENWICK HALL ALLEÉ R/W VARIES" on a plat entitled, "PLAT DEDICATING FENWICK HALL ALLEÉ, VARIABLE RIGHT-OF-WAY (TMS NO 346-00-00-078 TRACT C) TO THE USE OF THE PUBLIC CONTAINING 0.71 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Hoffman Lester Associates, Inc., dated August 27, 2001, and recorded November 1, 2001, in the RMC Office for Charleston County, South Carolina in Plat Book EF at Page 157. Said streets, roads, drives and cul-de-sacs butting and bounding, measuring and containing, and having such courses and distances as shown are shown on said plat, it being the intent of this legal description to convey the entire right-of-way. Reference being had to the aforesaid plat for a more full and complete description, being all of the said dimensions, a little more or a little less. Together with an exclusive easement for drainage and maintenance purposes over all drainage easement shown on the said plat.

LESS AND EXCEPTING: ALL that certain streets, roads, drives and cul-de-sacs situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina and being shown and designated as "EXTENSION OF FENWICK HALL ALLEÉ" on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 (TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE AN EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES PREPARED FOR PENNY CREEK ASSOCIATES, LLC AND FENWICK TARRAGON APARTMENTS, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by HLA, Inc., dated December 6, 2004, and recorded March 25, 2005, in the RMC Office for Charleston County, South Carolina in Plat Book EH at Page 817. Said streets, roads, drives and cul-de-sacs butting and bounding, measuring and containing, and having such courses and distances as shown are shown on said plat, it being the intent of this legal

description to convey the entire right-of-way. Reference being had to the aforesaid plat for a more full and complete description, being all of the said dimensions, a little more or a little less. Together with an exclusive easement for drainage and maintenance purposes over all drainage easement shown on the said plat.

LESS AND EXCEPTING: ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, measuring and containing 12.250 acres as more fully shown and designated as "PROPOSED TRACT B-2-3" on that plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the RMC Office for Charleston County, South Carolina, said parcel having such location, buttings, boundings, courses and distances as by references to said plat more fully appear.

THE ABOVE REFERENCED PROPERTY IS ALSO KNOWN AS

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as **Tract B-2-1**, said to contain 11.645 total acres, as shown on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the R.M.C. Office for Charleston County (herein after "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Penny Creek Associates, LLC by deed of FHP Realty Company, a Partnership, dated August 7, 2000, and recorded August 8, 2000, in the RMC Office for Charleston County, South Carolina in Book O-352 at Page 691.

TMS#: 346-00-00-004

AND

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as **Tract B-2-2**, said to contain 22.91 acres total, more or less, as shown on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the R.M.C. Office for Charleston County (herein after "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Penny Creek Associates, LLC by deed of FHP Realty Company, a Partnership, dated August 7, 2000, and recorded August 8, 2000, in the RMC Office for Charleston County, South Carolina in Book O-352 at Page 691.

TMS#: 346-00-00-076

ALSOTract C:

ALL that certain piece, parcel or lot of land, situate, lying and being in the City of Charleston, County of Charleston, South Carolina, and being shown and delineated as TRACT "C," 59.280 acres of highland and 95.063 acres of marshland, on a plat by Forrest G. Calvert, dated November, 1977, entitled in part "PLAT SHOWING SUBDIVISION OF FENWICK HALL PLANTATION, 237.176 AC. HIGHLAND 148.058 AC. MARSH LOCATED ON JOHNS ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA. PROPERTY OF MRS. HELENA IGOE BLANCHARD," and recorded in Plat Book AK at Page 76, in the RMC Office for Charleston County, South Carolina (the "RMC Office"), and having such location, size, shape, buttings, boundings, and dimensions as will appear by reference to said plat which is incorporated herein by reference, be all the dimensions and measurements shown thereon a little more or less.

SAVING AND EXCEPTING that certain piece, parcel or lot of land, situate, lying and being in Charleston County, South Carolina, described as 0.97 acres of land as conveyed to the South Carolina Department of Transportation in that certain deed of conveyance from Fenwick Acres dated April 16, 1998, and recorded July 28, 1998, in Book R-307 at Page 246, in the RMC Office.

The aforesaid property and said 0.97 acre parcel are more particularly shown on that certain plat prepared by Southeastern Surveying, Inc. entitled, "A BOUNDARY SURVEY OF TRACT 'C' CONTAINING 153.53 ACRES, OWNED BY FENWICK ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," dated March 23, 1999, and recorded in the RMC Office in Plat Book ED at Page 70.

LESS AND EXCEPTING: ALL that certain piece, parcel or tract of land, situate, lying and being in the City of Charleston, Charleston County, South Carolina, containing 15.63 acres, more or less, shown and designated as "TRACT C-1" on that certain plat entitled, "PLAT SHOWING THE ADJUSTMENT OF THE PROPERTY LINE BETWEEN TMS 346-00-00-078 (TRACT C, R/W), TMS 346-00-00-076 (TRACT B-2-2) & TMS 346-00-00-002 (TRACT C), TO FORM RESIDUAL TRACT C 137.1 ± ACRES, RESIDUAL TRACT B-2-2 22.91 ACRES AND TRACT C, R/W 0.71 ACRES TO DEDICATED AS A PUBLIC RIGHT OF WAY AND SHOWING TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.63 ACRES PREPARED FOR PENNY CREEK ASSOCIATES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Hoffman Lester & Associates, Inc., dated June 11, 2001, and recorded August 29, 2001, in the Charleston County RMC Office in Plat Book EF at Page 23 (the "Plat"), said property having such location, size, shape, dimensions, courses, distances, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that certain streets, roads, drives and cul-de-sacs situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina and being shown and designated as "FENWICK HALL ALLEÉ R/W VARIES" on a plat entitled, "PLAT DEDICATING FENWICK HALL ALLEÉ, VARIABLE RIGHT-OF-WAY (TMS NO 346-00-00-078 TRACT C) TO THE USE OF THE PUBLIC CONTAINING 0.71 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Hoffman Lester Associates, Inc., dated August 27, 2001, and recorded November 1, 2001, in the RMC Office for Charleston County, South Carolina in Plat Book EF at Page 157. Said streets, roads, drives and cul-de-sacs butting and bounding, measuring and containing, and having such courses and distances as shown are shown on said plat, it being the intent of this legal description to convey the entire right-of-way. Reference being had to the aforesaid plat for a more full and complete description, being all of the said dimensions, a little more or a little less. Together with an exclusive easement for drainage and maintenance purposes over all drainage easement shown on the said plat.

LESS AND EXCEPTING: ALL that certain streets, roads, drives and cul-de-sacs situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina and being shown and designated as "EXTENSION OF FENWICK HALL ALLEÉ" on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 (TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE AN EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES PREPARED FOR PENNY CREEK ASSOCIATES, LLC AND FENWICK TARRAGON APARTMENTS, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by HLA, Inc., dated December 6, 2004, and recorded March 25, 2005, in the RMC Office for Charleston County, South Carolina in Plat Book EH at Page 817. Said streets, roads, drives and cul-de-sacs butting and bounding, measuring and containing, and having such courses and distances as shown are shown on said plat, it being the intent of this legal description to convey the entire right-of-way. Reference being had to the aforesaid plat for a more full and complete description, being all of the said dimensions, a little more or a little less. Together with an exclusive easement for drainage and maintenance purposes over all drainage easement shown on the said plat.

LESS AND EXCEPTING: ALL that certain piece, parcel or lot of land, situate, lying and being in the City of Charleston, Charleston County, South Carolina, and described as "LOT 1" on a plat prepared by GPA Professional Land Surveyors entitled, "SUBDIVISION PLAT SHOWING THE SUBDIVISION OF TMS# 346-00-00-002 TO CREATE NEW LOTS 1, 2, 3, and RESIDUAL, THE PRESERVE AT FENWICK PLANTATION OWNED BY PENNY CREEK ASSOCIATES, LLC," dated April 12, 2005, and recorded April 26, 2005, in Plat Book EH at Page 884 in the RMC Office for Charleston County, South Carolina.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being located on Johns Island, Charleston County, South Carolina, shown as "LOT 15 7,871 SF 0.181 AC" on a plat entitled, "A FINAL SUBDIVISION PLAT OF A PORTION OF THE PRESERVE AT FENWICK PLANTATION LOTS 19 THRU 25, LOTS 31 THRU 35 AND PUBLIC RIGHT-OF-WAY BEING A PORTION OF LOT 1, OWNED BY EPIC DEVELOPMENT GROUP, LLC AND LOT 15, HELD IN TRUST AND TO BE CONVEYED TO EPIC DEVELOPMENT GROUP, LLC, BEING A PORTION OF LOT 3 AND EASEMENTS LOCATED ON LOT 2, OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated January 25, 2006, last revised April 13, 2006, and recorded May 5, 2006, in Plat Book EJ at Pages 722-727, in the RMC Office for

Charleston County. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those pieces, parcels or lots of land located in the City of Charleston, Charleston County, South Carolina and shown and designated as "P.O.A. OPEN SPACE 9,701 SF 0.223 AC," "P.O.A. OPEN SPACE 23,630 SF 0.543 AC" and "P.O.A. OPEN SPACE 26,343 SF 0.605 AC" on a plat entitled, "A FINAL SUBDIVISION PLAT OF A PORTION OF THE PRESERVE AT FENWICK PLANTATION LOTS 19 THRU 25, LOTS 31 THRU 35 AND PUBLIC RIGHT-OF-WAY BEING A PORTION OF LOT 1, OWNED BY EPIC DEVELOPMENT GROUP, LLC AND LOT 15, HELD IN TRUST AND TO BE CONVEYED TO EPIC DEVELOPMENT GROUP, LLC, BEING A PORTION OF LOT 3 AND EASEMENTS LOCATED ON LOT 2, OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated January 25, 2006, last revised April 13, 2006, and recorded May 5, 2006, in Plat Book EJ at Pages 722-727, in the RMC Office for Charleston County. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown as "LOT A-1" on a plat entitled, "A SUBDIVISION PLAT OF LOT 3 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT A-1 LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Southeastern Surveying of Charleston, Inc., dated May 10, 2006, and recorded June 15, 2006, in Plat Book DF at Page 133, in the RMC Office for Charleston County. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as "LOT 40 12,690 SF 0.291 AC #1648" on a plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC THE PRESERVE AT FENWICK PLANTATION TO CREATE LOT 40, CONTAINING 0.291 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated June 25, 2008, and recorded March 4, 2009, in Plat Book L09 at Page 0097, in the RMC Office for Charleston County, South Carolina. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as "LOT 52" and "LOT 53" on that certain plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 52, LOT 53 AND ZURLO WAY RIGHT-OF-WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying LLC, dated June 9, 2013, and recorded July 2, 2013, in Plat Book L13 at Page 0238, in the RMC Office for Charleston County. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that certain piece, parcel or lot of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as LOT 13 on that certain plat entitled, "A SUBDIVISION PLAT OF RESIDUAL LOT 3 OWNED BY PENNY CREEK ASSOCIATES, LLC THE PRESERVE AT FENWICK PLANTATION TO CREATE A NEW LOT 13, CONTAINING 0.187 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated June 25, 2008, revised June 3, 2010, and recorded June 9, 2010, in the RMC Office for Charleston County, South Carolina in Plat Book L10 at Page 0154. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as LOT 58 and LOT 59 on that certain plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 58, #1612 ZURLO WAY AND LOT 59, #1608 ZURLO WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying LLC, dated March 7, 2014, and recorded March 20, 2014, in the RMC Office for Charleston County, South Carolina in Plat Book L14 at Page 0094. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina, and being shown and designated as LOT 14 and LOT 16 on that certain plat entitled, "A FINAL SUBDIVISION PLAT OF LOTS 14 AND 16, BEING A PORTION OF LOT 3 THE PRESERVE AT FENWICK PLANTATION OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying, LLC, dated October 19, 2016, and recorded

December 7, 2016, in the RMC Office for Charleston County, South Carolina in Plat Book L16 at Page 0553. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that certain piece, parcel or lot of land situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina, and being shown and designated as LOT 55 on a plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 54, #1611 ZURLO WAY AND LOT 55, #1615 ZURLO WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying, LLC, dated July 14, 2014, and recorded July 23, 2014, in the RMC Office for Charleston County, South Carolina in Plat Book L14 at Page 0316. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

DERIVATION: BEING a portion of the same property conveyed to Penny Creek Associates, L.L.C. by (i) deed of Fenwick Acres, a Partnership, dated March 25, 1999, and recorded March 25, 1999, in the RMC Office for Charleston County, South Carolina in Book D-323 at Page 311; and (ii) deed of Julius H. Weil, Jr. dated March 25, 1999, and recorded March 25, 1999, in the said RMC Office in Book D-323 at Page 439.

<u>Property</u>	<u>TMS#</u>
Residual Tract C (55.19 acres)	346-00-00-002
Lot 2 Residual (13.31 acres)	346-00-00-258
Lot 3 Residual (9.35 acres)	346-00-00-259
Zurlo Way (Private R/W)	346-00-00-781
Lot 54	346-00-00-784

REVISED EXHIBIT "A-2"

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as Tract B-2-1, said to contain 11.645 total acres, as shown on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the R.M.C. Office for Charleston County (herein after "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Penny Creek Associates, LLC by deed of FHP Realty Company, a Partnership, dated August 7, 2000, and recorded August 8, 2000, in the RMC Office for Charleston County, South Carolina in Book O-352 at Page 691.

TMS#: 346-00-00-004

ALSO

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as Tract B-2-2, said to contain 22.91 acres total, more or less, as shown on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the R.M.C. Office for Charleston County (herein after "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Penny Creek Associates, LLC by deed of FHP Realty Company, a Partnership, dated August 7, 2000, and recorded August 8, 2000, in the RMC Office for Charleston County, South Carolina in Book O-352 at Page 691.

TMS#: 346-00-00-076

ALSO

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, State of South Carolina, shown and designated as Lot 2, said to contain 16.41 total acres, more or less, as shown on a plat entitled, "SHOWING THE SUBDIVISION OF TMS# 346-00-00-002 TO CREATE NEW LOTS 1, 2, 3, AND RESIDUAL THE PRESERVE AT FENWICK PLANTATION TO BE OWNED BY EPIC DEVELOPMENT, LLC THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by GPA Professional Land Surveyors, dated May 15, 2005, and recorded in Plat Book EJ at Page 107, in the R.M.C. Office for Charleston County, South Carolina (hereinafter "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as "LOT 40 12,690 SF 0.291 AC #1648" on a plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC THE PRESERVE AT FENWICK PLANTATION TO CREATE LOT 40, CONTAINING 0.291 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated June 25, 2008, and recorded March 4, 2009, in Plat Book L09 at Page 0097, in the RMC Office for Charleston County, South Carolina. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as "LOT 52" and "LOT 53" on that certain plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 52, LOT 53 AND ZURLO WAY RIGHT-OF-WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying LLC, dated June 9, 2013, and recorded July 2, 2013, in Plat Book L13 at Page 0238, in the RMC Office for Charleston County. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as LOT 58 and LOT 59 on that certain plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 58, #1612 ZURLO WAY AND LOT 59, #1608 ZURLO WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY,

SOUTH CAROLINA,” by SWA Surveying LLC, dated March 7, 2014, and recorded March 20, 2014, in the RMC Office for Charleston County, South Carolina in Plat Book L14 at Page 0094. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that certain piece, parcel or lot of land situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina, and being shown and designated as LOT 55 on a plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 54, #1611 ZURLO WAY AND LOT 55, #1615 ZURLO WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying, LLC, dated July 14, 2014, and recorded July 23, 2014, in the RMC Office for Charleston County, South Carolina in Plat Book L14 at Page 0316. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

BEING a portion of the same property conveyed to Penny Creek Associates, L.L.C. by (i) deed of Fenwick Acres, a Partnership, dated March 25, 1999, and recorded March 25, 1999, in the RMC Office for Charleston County, South Carolina in Book D-323 at Page 311; and (ii) deed of Julius H. Weil, Jr. dated March 25, 1999, and recorded March 25, 1999, in the said RMC Office in Book D-323 at Page 439.

<u>Property</u>	<u>TMS#</u>
Lot 2 Residual (13.31 acres)	346-00-00-258
Zurlo Way (Private R/W)	346-00-00-781
Lot 54	346-00-00-784

ALSO

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, State of South Carolina, shown and designated as Lot 3, said to contain 11.96 total acres, more or less, as shown on a plat entitled, "SHOWING THE SUBDIVISION OF TMS# 346-00-00-002 TO CREATE NEW LOTS 1, 2, 3, AND RESIDUAL THE PRESERVE AT FENWICK PLANTATION TO BE OWNED BY EPIC DEVELOPMENT, LLC THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by GPA Professional Land Surveyors, dated May 15, 2005, and recorded in Plat Book EJ at Page 107, in the R.M.C. Office for Charleston County, South Carolina (hereinafter "R.M.C. Office"); said parcel having such location, size, shape,

dimensions, buttings and boundings as will by reference to said plat more fully appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being located on Johns Island, Charleston County, South Carolina, shown as "LOT 15 7,871 SF 0.181 AC" on a plat entitled, "A FINAL SUBDIVISION PLAT OF A PORTION OF THE PRESERVE AT FENWICK PLANTATION LOTS 19 THRU 25, LOTS 31 THRU 35 AND PUBLIC RIGHT-OF-WAY BEING A PORTION OF LOT 1, OWNED BY EPIC DEVELOPMENT GROUP, LLC AND LOT 15, HELD IN TRUST AND TO BE CONVEYED TO EPIC DEVELOPMENT GROUP, LLC, BEING A PORTION OF LOT 3 AND EASEMENTS LOCATED ON LOT 2, OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated January 25, 2006, last revised April 13, 2006, and recorded May 5, 2006, in Plat Book EJ at Pages 722-727, in the RMC Office for Charleston County. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those pieces, parcels or lots of land located in the City of Charleston, Charleston County, South Carolina and shown and designated as "P.O.A. OPEN SPACE 9,701 SF 0.223 AC," "P.O.A. OPEN SPACE 23,630 SF 0.543 AC" and "P.O.A. OPEN SPACE 26,343 SF 0.605 AC" on a plat entitled, "A FINAL SUBDIVISION PLAT OF A PORTION OF THE PRESERVE AT FENWICK PLANTATION LOTS 19 THRU 25, LOTS 31 THRU 35 AND PUBLIC RIGHT-OF-WAY BEING A PORTION OF LOT 1, OWNED BY EPIC DEVELOPMENT GROUP, LLC AND LOT 15, HELD IN TRUST AND TO BE CONVEYED TO EPIC DEVELOPMENT GROUP, LLC, BEING A PORTION OF LOT 3 AND EASEMENTS LOCATED ON LOT 2, OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated January 25, 2006, last revised April 13, 2006, and recorded May 5, 2006, in Plat Book EJ at Pages 722-727, in the RMC Office for Charleston County. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown as "LOT A-1" on a plat entitled, "A SUBDIVISION PLAT OF LOT 3 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT A-1 LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Southeastern Surveying of Charleston, Inc., dated May 10, 2006, and recorded June 15, 2006, in Plat Book DF at Page 133, in the RMC Office for Charleston County. Said lot having such size, shape,

dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that certain piece, parcel or lot of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as LOT 13 on that certain plat entitled, "A SUBDIVISION PLAT OF RESIDUAL LOT 3 OWNED BY PENNY CREEK ASSOCIATES, LLC THE PRESERVE AT FENWICK PLANTATION TO CREATE A NEW LOT 13, CONTAINING 0.187 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated June 25, 2008, revised June 3, 2010, and recorded June 9, 2010, in the RMC Office for Charleston County, South Carolina in Plat Book L10 at Page 0154. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina, and being shown and designated as LOT 14 and LOT 16 on that certain plat entitled, "A FINAL SUBDIVISION PLAT OF LOTS 14 AND 16, BEING A PORTION OF LOT 3 THE PRESERVE AT FENWICK PLANTATION OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying, LLC, dated October 19, 2016, and recorded December 7, 2016, in the RMC Office for Charleston County, South Carolina in Plat Book L16 at Page 0553. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

BEING a portion of the same property conveyed to Penny Creek Associates, L.L.C. by (i) deed of Fenwick Acres, a Partnership, dated March 25, 1999, and recorded March 25, 1999, in the RMC Office for Charleston County, South Carolina in Book D-323 at Page 311; and (ii) deed of Julius H. Weil, Jr. dated March 25, 1999, and recorded March 25, 1999, in the said RMC Office in Book D-323 at Page 439.

<u>Property</u>	<u>TMS#</u>
Lot 3 Residual (9.35 acres)	346-00-00-259

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Sep 21 2020

Appeal from Charleston County
Court of Common Pleas, Ninth Judicial Circuit
Hon. Judge Bentley D. Price, Circuit Court Judge, Presiding

SC Court of Appeals

2020-CP-10-00209

Eugene J. Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe.....Respondents,

Versus

Maybank 2754, LLC..... Appellant.

**RETURN TO RESPONDENTS'
MOTION TO DISMISS**

s/Scarlet B. Moore

Scarlet B. Moore, #72534
Attorney for Appellant, Maybank 2754, LLC
P.O. Box 17615
Greenville, S.C. 29606
(864) 214-5805
(864) 752-0930 (FAX)

September 21, 2020

NOW INTO COURT, comes the Appellant Maybank 2754, LLC, who submits the following Return to the Respondents' Motion to Dismiss. The Appellant asserts that the appeal should not be dismissed, due to the fact that the order entered by the Master-In-Equity transferring this matter back to the Circuit Court was entered without jurisdiction. Rule 205 of the SCRAP is clear that upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal. Rule 205 permits the lower court to proceed with matters not affected by the appeal, however this exception is not applicable in this case. The Master's order purports to usurp the jurisdiction of the appellate court on the issue directly before this court – namely whether this matter shall be tried by a jury. However, it appears from the Respondents' motion to dismiss that they would be willing to execute a consent order for this Court's consideration, with all parties consenting to the jurisdiction of the Circuit Court for a trial by jury in this matter.

Further, the Respondents' request for a bond is meritless as a final judgment has not been entered in their favor in this case. Lastly, the Respondents have not followed the proper procedure for requesting an appeal bond by placing a request in a motion to this Court.

The Respondents' motion to dismiss this matter lacks merit, and it should be dismissed, with prejudice.

Respectfully Submitted,

s/Scarlet B. Moore

Scarlet B. Moore, #72534

Attorney for Appellant,

Maybank 2754, LLC

P.O. Box 17615

Greenville, S.C. 29606

(864) 214-5805

(864) 752-0930 (FAX)

Greenville, South Carolina
September 21, 2020.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Sep 21 2020

SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas, Ninth Judicial Circuit
Hon. Judge Bentley D. Price, Circuit Court Judge, Presiding

2020-CP-10-00209

Eugene J. Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe.....Respondents,

Versus

Maybank 2754, LLC..... Appellant.

CERTIFICATE OF SERVICE

I certify that on this date, I have served the **Appellant's Return to the Respondents' Motion to Dismiss**, on opposing counsel to their respective e-mail addresses, pursuant to the Order of the Supreme Court Appellate Case No, 2020-000447(g)(3).

Cheryl D. Shoun - cshoun@nexsenpruet.com

Alexandra Harrington Austin -aaustin@nexsenpruet.com

John Patrick Turner Norris - pnorris@cskl.law

Kent Taylor Stair - kstair@cskl.law

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J. Rutledge Young, Jr. - ryoung@duffyandyoung.com

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Jennifer Canaday -- jcanaday@cskl.law

Katie Shaw – kshaw@cskl.law

Respectfully Submitted,

s/Scarlet B. Moore

Scarlet B. Moore, #72534

Attorney for Appellant,

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September 21 2020.

SCARLET B. MOORE, ESQ.

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September 21, 2020

Jenny Abbott Kitchings
Clerk, The South Carolina Court of Appeals
P.O. Box 11629
Columbia, S.C. 29211

RECEIVED

Sep 21 2020

SC Court of Appeals

**RE: Maybank 2754, LLC, Appellant vs. Eugene J. Zurlo, Individually and as
Co-Trustee of the Eugene J. Zurlo Living Trust dated December 11, 1997;
Beach Fenwick, LLC; The Beach Company;
Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC;
John Doe and Mary Roe, Respondents
Case Number: 2020-001030**

Dear Madam Clerk,

Enclosed please find the Appellant's Return to Respondents' Motion to Dismiss,
and a Certificate of Service. If the Court requires further information, please do not
hesitate to contact me. With kind regards, I remain

Very Truly Yours,

s/Scarlet B. Moore

Scarlet B. Moore, Esq.
Counsel for Appellant

SBM/sfk

Cc: Alexandra Harrington Austin, Esq.
Blake Abernethy McKie, Esq.
Thomas Bacot Pritchard, Esq.
Jason S. Smith, Esq.
Jason M. Tarokh, Esq.
J. Rutledge Young, Jr., Esq.
Jenifer Canaday

Brian A. Hellman, Esq.
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Cheryl D. Shoun, Esq.
Kent Taylor Stair, Esq.
Jordan N. Teich, Esq.
Katie Shaw

scarlet28@msn.com

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
MAYBANK 2754, LLC,	)	CASE NO.: 2020-CP-10-00209
	)	
Plaintiff,	)	
	)	
v.	)	1776, LLC'S MEMORANDUM
	)	OF LAW IN SUPPORT OF
	)	SUMMARY JUDGMENT
EUGENE J. ZURLO, Individually and as	)	
Co-Trustee of the Eugene J. Zurlo Living	)	
Trust Dated December 11, 1997; ET AL.,	)	
	)	
Defendants.	)	
	)	

Defendant 1776, LLC ("1776") submits this memorandum of law in support of its motion for summary judgment, as follows:

I.

THE ALLEGED EASEMENT DID NOT SURVIVE FORECLOSURE

No genuine issue of material fact exists to prolong this litigation. The other defendants have already explained the legal reasons why there was never an easement to begin with. This defendant adds, that even if there was an easement (which there was not), it did not survive the recent foreclosure of first-in-time, prior-recorded, bank-owned mortgages arising in 2000 and 2006 that were *never subordinated by the bank* to the later-in-time, unrecorded purported easement, alleged by the plaintiff to have arisen in 2013 by way of a "Resolution" referencing the grant of a future easement. *See* S.C. Code Ann. § 30-7-20 ("The recordation of any contract in the nature of a *subordination*, waiver or extension of any lien on real property, created by law or by agreement of the parties, shall be upon the record of the recorded mortgage or other written instrument...") (emphasis added).

These facts are all matters of record over which there can be no factual or legal dispute. *See* Complaint at ¶ 14; *Wells Fargo v. Penny Creek Associates, et al.*, Civil Action No. 2014-CP-

10-4946 (Charleston County, Filed May 26, 2014); Mortgage recorded in the Register of Deeds in Charleston County on August 8, 2000, in Book P-532, at Page 613; Mortgage recorded in the Register of Deeds in Charleston County on April 7, 2006, in Book G-579, at Page 249.

Further, the plaintiff has already judicially admitted that its alleged easement was lost in the bank's foreclosure action. In a separate legal malpractice action that the plaintiff filed against its own former attorney, the plaintiff alleged:

21. BBT and Byars were careless and negligent failing to record the Resolution, or failing to prepare and record a document, in the office of the Register of Deeds (formerly, Register of Mesne Conveyance) of Charleston County, South Carolina so as to provide constructive knowledge to the public of the existence of the thirty (30) foot private right of way easement.

22. As a direct and proximate result of the Defendants' breach of the above-described duty owed to Maybank, Maybank has suffered, and continues to suffer, damage.

23. Additionally, Maybank has suffered special damages in that its adjacent lot has lost the value of a (30) foot private right of way easement across the Property.

Maybank 2754, LLC v. Buist, Byars & Taylor, LLC et al., Civil Action No. 2020-CP-1001811 (Charleston County, Filed April 13, 2020). Additionally, the affidavit that the plaintiff filed in support of its legal malpractice claim stated:

...the agreement should have been recorded at the time of closing to put all future buyers and lenders on notice that [the property] is subject to an easement.

Id. (Affidavit of Lisa Brown, Filed May 14, 2020).

The plaintiff cannot take a contrary position in this litigation, rendering its lengthy affidavit and numerous exhibits irrelevant. *See Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410, 416 (1964) (“[A]llegations, statements or admissions contained in a pleading are conclusive as against the pleader.”); *Quinn v. Sharon Corp.*, 540 S.E.2d 474, 480, 343 S.C. 411, 423 (Ct. App. 2000) (“[T]he fact a litigant is using the court as a forum for his inconsistent statements injures the judicial

system; therefore, such abuse must be avoided under all circumstances.”); *see also Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co., Inc.*, 976 F.2d 58, 61 (1st Cir. 1992) (“plaintiff should not be allowed to contradict its express factual assertion in an attempt to avoid summary judgment”).

II.

THIS COURT SHOULD NOT REVIVE THE ALLEGED EASEMENT AFTER FORECLOSURE

“[C]ourts should be particularly jealous of the integrity of judicial sales” and should not “rewrite the terms of sale after the sale.” *Ex Parte Johnson*, 640 S.E.2d 887, 889-90 (Ct. App. 2006) (quoting *In re Wilson*, 141 S.C. 60, 63, 139 S.E. 171, 172 (1927)). Further, “[t]here is a long-standing rule in this State that one judge of the same court cannot overrule another.” *Charleston Cnty. Dep’t of Soc. Servs. v. Father, Stepmother, & Mother*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995). Accordingly, the plaintiff’s complaint, which, in effect, asks Your Honor to rewrite the terms of the foreclosure sale conducted before Judge Scarborough so as to revive a non-existing and otherwise admittedly extinguished easement, should be summarily dismissed.

/s/ Jason S. Smith

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Attorneys for Defendant 1776, LLC

Charleston, South Carolina
September 21, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE #: 2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as Co-Trustee
of the Eugene J. Zurlo Living Trust Dated December
11, 1997; 1776, LLC; BEACH FENWICK, LLC;
THE BEACH COMPANY; SEAMON, WHITESIDE
& ASSOCIATES, INC.; PENNY CREEK ASSOCIATES,
LLC; JOHN DOE AND MARY ROE

Defendants,

**PLAINTIFF’S MOTION TO ALTER OR AMEND ORDER ENTERED ON OCTOBER 7,
2020, ORDER ENTERED ON OCTOBER 8, 2020, AND ORDER GRANTING ALL
DEFENDANTS SUMMARY JUDGMENT; MOTION TO AMEND AND/OR VACATE
FINDINGS OF FACT; REQUEST FOR RULING ON ISSUES RAISED; AND REQUEST
FOR EXPEDITED RULING**

Plaintiff, MAYBANK 2754, LLC, by and through its undersigned attorney, hereby respectfully moves the Court to reconsider and alter or amend its Form 4 Order entered on October 7, 2020 (herein “10.7.20 Order”), its Form 4 Order entered on October 8, 2020 (herein “10.8.20” Order), and its Order Granting All Defendants’ Summary Judgment entered on October 12, 2020 (herein “Order Granting Summary Judgment”)¹, pursuant to Rule 59(e), SCRCF to deny summary judgment in favor of the Defendants and grant Plaintiff’s Motion to Amend Complaint; respectfully moves the Court to amend and/or vacate its findings of fact set forth in the Order Granting Summary Judgment pursuant to Rule 52(b), SCRCF; respectfully

¹ The Order Granting Summary Judgment appears to be the same proposed order with some minor revisions that was submitted to the Court by one of the attorneys for the Defendants at the September 24, 2020 hearing, which was also subsequently e-mailed to the Court’s law clerk after the hearing. *See, Bankers Trust of South Carolina v. Bruce*, 283 S.C. 408, 418, 323 S.E.2d 523 (S.C. Ct. App. 1984) (“It is next claimed the trial judge signed an order prepared in its entirety by the Leatherwood firm and that the findings therein are wholly unsupported by the facts. This court does not condone that practice. However, the findings in the order, though not the product of the trial judge’s mind, are formally his.”)

requests that the Court specifically rule on issues raised by the Plaintiff; and also respectfully requests an expedited ruling on this motion; and in support thereof states as follows:

The Three Orders

Following the September 24, 2020 hearing on Plaintiff's motion to amend complaint, Defendants', EUGENE J. ZURLO, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997 (herein "Zurlo"); BEACH FENWICK, LLC and THE BEACH COMPANY (herein "Beach Entities"); and 1776, LLC (herein "1776"), motions for summary judgment, and Defendant's, SEAMON, WHITESIDE & ASSOCIATES, INC. (herein "SWA"), motion to dismiss and supplement to motion to dismiss and/or motion for summary judgment (herein referenced as a motion for summary judgment), the Court entered the 10.7.20 Order. The 10.7.20 Order stated:

Defendant Eugene Zurlo's Motion for Summary Judgment is GRANTED.
Defendant The Beach Company's Motion for Summary Judgment is GRANTED.
Plaintiff's Motion to Amend Complaint is DENIED. Defendant Seamon Whiteside and Associates Inc.'s Motion to Supplement/Motion to Dismiss is GRANTED.

A true and correct copy of the 10.7.20 Order is attached hereto and incorporated as "Exhibit A".

Then, on October 8, 2020, the Court entered its 10.8.20 Order. The 10.8.20 Order stated:

The Order is a supplement to the Form 4 filed On October 7, 2020. Defendant, 1776, LLC's Motion for Summary Judgment is GRANTED. Defendants The Beach Company and Beach Fenwick's Motion for Summary Judgment is Granted.

The 10.8.20 Order stated it ends the case. A true and correct copy of the 10.8.20 Order is attached hereto and incorporated herein as "Exhibit B". Then, on October 12, 2020, the Court entered its Order Granting Summary Judgment (herein "Order Granting Summary Judgment") with findings of fact and conclusion of law. A true and correct copy of the Order Granting Summary Judgment is attached hereto and incorporated herein as "Exhibit C".

It is unclear whether the Order Granting Summary Judgment was intended by the Court to amend or supplement the prior 10.7.20 Order and the 10.8.20 Order. Plaintiff presumes it does, but the Order Granting Summary Judgment does not specifically state so or even reference

the 10.7.20 Order or the 10.8.20 Order. Therefore, it is unclear whether Order Granting Summary Judgment intended to amend or supplement the prior 10.7.20 Order and the 10.8.20 Order, and for this reason, Plaintiff respectfully seeks clarification and moves this Court to specifically state that the Order Granting Summary Judgment amended or supplemented the 10.7.20 Order and 10.8.20 Order.

The 10.7.20 Order and the 10.8.20 Order did not contain any findings of fact or conclusions of law and gave no explanation or reasoning for the Court's decision, which is error. *See, Carey v. Snee Farm Community Foundation*, 388 S.C. 229, 694 S.E.2d 244 (Ct. App. 2010) (Vacating order granting summary judgment and remanding for a written order identifying facts and accompanying legal analysis.).

The Court erred in granting summary judgment and denying Plaintiff's Motion to Amend Complaint. Rule 15(a) "strongly favors amendments and the court is encouraged to freely grant leave to amend." *Patton v. Miller*, 420 S.C. 471, 489-90, 804 S.E.2d 252, 261 (2017) (quoting *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (S.C. Ct. App. 2005)). Plaintiff's counsel made an ore tenus motion to amend its complaint at a prior hearing on June 25, 2020, which the court said it would not take up at that time and for Plaintiff to file the motion to be heard at a later date. After the June 25, 2020 hearing, the Court referred this case to the Master-in-Equity, which caused Plaintiff to appeal the orders of reference on July 15, 2020 to protect its right to a jury trial. Subsequently, Zurlo filed his motion for summary judgment on August 14, 2020, which was after Plaintiff's counsel sent Defendants' counsel an e-mail (to comply with Rule 11, SCRCP) on July 8, 2020, inquiring whether they would consent to the filing of the Amended Verified Complaint. After the Master-in-Equity referred the case back to the Circuit Court on August 18, 2020, the other Defendants except Seamon, Whiteside & Associates, Inc., and 1776, LLC, filed their motions for summary judgment. The Beach Entities filed their motion for summary judgment on August 19, 2020, just a day after the Master-in-Equity referred the case back to the Circuit Court. Plaintiff filed its Motion to Amend Complaint on August 24, 2020. Seamon, Whitesides & Associates, Inc., and 1776, LLC, filed their motions for summary judgment after Plaintiff filed its Motion to Amend Complaint. Defendants were sent with Plaintiff's Verified Amended Complaint (without the exhibits attached) on July 8, 2020, before any of their motions for summary judgment were filed.

I. Requests for Rulings on Issues Raised by the Plaintiff

In deciding to deny Plaintiff's motion to amend complaint and grant the Defendants' motions for summary judgment, the Court did not rule on any issues raised by the Plaintiff. Therefore, Plaintiff respectfully requests a ruling as to each issue raised in opposition to Defendants' motions for summary judgment and in support of Plaintiff's motion to amend complaint. The issues for which Plaintiff seeks a ruling are enumerated below.

1. Whether the Resolution of the Sole Shareholder of Penny Creek Associates, L.L.C. (herein "Resolution"), the Contract for Assignment of Interest (herein "Contract for Assignment"), and the Assignment of Membership Interest and Written Consent in Lieu of a Special Meeting of the Sole Member of Maybank 2754, LLC (herein "Assignment") together created an easement, and/or a restrictive covenant.
2. Whether the Resolution, Contract for Assignment and Assignment were ambiguous.
3. Whether the equitable doctrines of equitable estoppel and/or unclean hands apply against the Defendants so as to preclude the alleged defense of the sufficiency in which Zurlo signed the Resolution to bind Penny Creek Associates, LLC thereto, and the Defendants' ability to disavow, dishonor and deny the existence of the easement when the grant of the easement was made a specific condition of the subject membership interest of Maybank, 2754, LLC, and the membership interest transfer occurred. The South Carolina Supreme Court in *Strickland v. Strickland*, 375 S.C. 76, 84-5, 650 SE.2d 465 (2007) stated,

The essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel. The elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped. (citations omitted).

The doctrine of unclean hands precludes a party from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the other party. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 531 S.E.2d 287 n. 2 (2000). The Affidavit of Michel L. Laplante states in relevant part that:

13. Zurlo, on behalf of PCA, has previously executed a certain Certificate of Resolution to Borrow Money dated November 30, 2009 as “Eugene J. Zurlo, Member”, without describing his capacity as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997, which caused me to rely upon the sufficiency of his signing documents in that manner to bind PCA. [...]

14. In addition, on February 21, 2017, I received an e-mail from Zurlo wherein he stated that PCA’s counsel “have been very careful to get Written Consents signed by all PCA Class A Members when any property (asset) sells so that sales are properly authorized and the purchasers get good title....” [...]

31. I relied upon the grant of the easement reflected in the Resolution, Contract for Assignment and Assignment in proceeding with the Maybank membership interest transfer.

4. Whether genuine issues of material fact exist to support Plaintiff’s claim for declaratory judgment for a restrictive covenant.

5. Whether genuine issues of material fact exist to support Plaintiff’s claim for civil conspiracy against the Defendants.

6. Whether the Court took judicial notice as requested in Plaintiff’s Requests for Judicial Notice of Recorded Documents and City of Charleston Ordinances filed on August 24, 2020, and Plaintiff’s Requests for Judicial Notice of Recorded Document and Document filed with the South Carolina Secretary of State filed on September 14, 2020.

7. Whether Plaintiff had a full and fair opportunity to complete discovery. See,

Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (“[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.”)

- a. Defendant, 1776, LLC, served more than 2,900 pages of documents in response to Plaintiff’s First Set of Requests for Production of Documents to the Defendant, 1776, LLC, on September 21, 2020 and September 22, 2020, mere days before the September 24, 2020 hearing on Defendants’ motions for summary judgment, which prejudiced the Plaintiff. Plaintiff served its requests for production on 1776, LLC, on March 4, 2020, and Plaintiff filed its Motion to Compel Defendant, 1776, LLC, Answers to Interrogatories and Responses and Documents to Requests for Production on September 3, 2020, after and on the same day as 1776, LLC, filed its motion for summary judgment.
- b. Defendant, Seamon, Whiteside & Associates, Inc., served what appears to be more than 1,800 documents (total number of pages undetermined) in response to Plaintiff’s First Set of Requests for Production of Documents to the Defendant, Seamon, Whiteside & Associates, Inc., on September 23, 2020 after 5:00pm, the very evening before the September 24, 2020 hearing on Defendants’ motions for summary judgment, which prejudiced the Plaintiff. Plaintiff served its requests for production on Seamon, Whiteside & Associates, Inc., on March 4, 2020.

8. Whether justice requires that Plaintiff be permitted to amend its complaint as set forth in Plaintiff’s Motion to Amend Complaint, and whether Defendants would be prejudiced if Plaintiff is permitted to amend its complaint.

II. The existence of genuine issues of material fact

Genuine issues of material facts exist as to the following issues, which should preclude the entry of summary judgment against the Plaintiff: (1.) whether the Resolution of the Sole Shareholder of Penny Creek Associates, L.L.C. (herein “Resolution”), that certain Contract for Assignment of Interest and Assignment (herein “Contract for Assignment”), and that certain

Assignment of Membership Interest and Written Consent in Lieu of a Special Meeting of the Sole Member of Maybank 2754, LLC (herein “Assignment”), created an easement and/or a restrictive or merely constituted an “agreement to agree”; (2) the nature or character, extent and the location of the easement; (3.) the manner in which Zurlo signed the Resolution and its sufficiency to bind Penny Creek Associates, LLC thereto; (4.) the parties’ intent as to the Maybank 2754, LLC membership interest transfer (which occurred) being specifically conditioned on the grant of the easement; (5.) the parties’ intent relative to the reference in the Resolution, Contract for Assignment and Assignment to “that certain roadway known as Pitch Fork Road”; (6.) the Defendants’ actual and imputed knowledge of the easement; (7.) the innocent purchaser and/or bona-fide purchaser for value status of 1776, LLC and Beach Fenwick, LLC; (8.) Zurlo and/or all the Defendants being part of a deceitful scheme and conspiracy to develop the subject property without affording any provisions or reservations for the easement with the specific intent to harm the Plaintiff, which caused Plaintiff damages, including special damages; (9.) the application of equitable estoppel and/or unclean hands as to both the sufficiency in which Zurlo signed the Resolution to bind Penny Creek Associates, LLC thereto, and Defendants’ ability to disavow, dishonor and deny the existence of the easement when the grant of the easement was made a specific condition of the membership interest of Maybank, 2754, LLC transfer, which occurred; (10.) whether the June 23, 2017 foreclosure judgment entered in *Wells Fargo Bank N.A., etc., v. Penny Creek Associates, LLC; et. al.*, Charleston County Court of Common Pleas Case # 2014-CP-10-04946 (herein “foreclosure case”) has any application, enforceability or effect against the rights, claims and interests of Plaintiff, Michel F. Laplante, John H. Laplante (herein “John”), Marianne Laplante-Scarlata (“herein “Marianne”), or Peter F. Laplante (herein “Peter”) relative to the subject property and easement; (11) whether the foreclosure judgment entered in the foreclosure case is the law of the case in the instant case; (12.) whether the doctrine of judicial estoppel applies against the Plaintiff by virtue of its claims against the attorney and law firm that prepared the Resolution, Contract for Assignment and Assignment pending in *Maybank 2754, LLC v. Buist, Byars & Taylor, LLC; et. al.*, Charleston County Court of Common Pleas Case # 2020-CP-10-02180; (13.) whether the doctrine of collateral estoppel applies against the Plaintiff; (14.) whether the doctrine of estoppel by silence applies against the Plaintiff; and (15.) whether the doctrine of laches applies against the Plaintiff.

III. Defendants are not entitled summary judgment

Under the heading, “**SUMMARY JUDGMENT STANDARD**”, the Order Granting Summary Judgment states, “Courts are reluctant to dismiss cases at the Summary Judgment state, even if there is not legal or factual basis to proceed. However, reviewing just the Plaintiff’s Complaint and Responses to the Zurlo Parties Request to Admit in this case, there is no genuine issue as to the very material fact that the Wells Fargo foreclosure action voided any recorded or unrecorded easement not subordinated to the Wells Fargo Mortgages, and Plaintiff admits there is no written, recorded easement so all parties are entitled to summary judgment as a matter of law. **With no facts to support a claim, and no law on Plaintiff’s side**, then the court should dismiss the case to avoid prolonged futile time and expenses to all the parties.” (Order Granting Summary Judgment p. 5-6) (emphasis added). The Order Granting Summary Judgment also states, “The threshold legal issue is whether there is a legally enforceable easement.” (Order Granting Summary Judgment p. 7). The Court’s conclusion and analysis are erroneous as more fully explained herein.

Defendants are not entitled to summary judgment. Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRPC. “When determining if any triable issues of fact exist, the evidence and **all reasonable inferences must be viewed in the light most favorable to the non-moving party.**” *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857 (2002) (citation omitted). (emphasis added). In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). “**All ambiguities, conclusions, and inferences arising in and from the evidence must be construed most strongly against the movant.**” *Baugus v. Wessinger*, 303 S.C. 412, 415 401 S.E.2d 169 (1991) (citations omitted) (emphasis added). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Id.*; *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts. *Gilliland v.*

Elmwood Properties, 301 S.C. 295, 299, 391 S.E.2d 577 (1990). Under this standard, the Defendants are not entitled to summary judgment.

a. The Affidavit of Michel F. Laplante (herein the “Affidavit”) provides at least a scintilla of evidence, and indeed more, to support Plaintiff’s claims and raise genuine issues of material fact, thereby making summary judgment improper. The Affidavit contains the following facts:

- i. The creation of Maybank 2754, LLC (herein “Plaintiff” or “Maybank”), the Plaintiff and how it was solely held by Penny Creek Associates, LLC (herein “PCA”) until sometime in October 2013 (Laplante Aff. ¶ 2.);
- ii. Michel F. Laplante (herein “Laplante”) and certain members of his family described below began owning Maybank together by virtue of being transferred one hundred percent (100%) of the membership rights in Maybank from PCA (Laplante Aff. ¶ 2.);
- iii. Laplante has been a member of Maybank since 2013 and later became manager of Maybank after the death of John H. Laplante (herein “John”), his son, on October 15, 2019 (Laplante Aff. ¶ 2-3.);
- iv. Marianne Laplante-Scarlata (herein “Marianne”) and Peter F. Laplante (herein “Peter”) have been members of Maybank since 2013 (Laplante Aff. ¶ 4.);
- v. Laplante and Zurlo, by and through the Eugene J. Zurlo Living Trust Dated December 11, 1997, are members of PCA since 1999 (Laplante Aff. ¶ 5.);
- vi. Laplante was a manger of PCA from 1999 to approximately May 2016 (Laplante Aff. ¶ 6.);
- vii. Laplante is and has been a licensed architect for over thirty (30) years (Laplante Aff. ¶ 7.);
- viii. Laplante is and has been a real estate developer for over twenty-five (25) years (Laplante Aff. ¶ 7.);

- ix. Laplante has known Zurlo for over approximately twenty-five (25) years and were business partners and involved in multiple real estate development projects with tens of millions of dollars (Laplante Aff. ¶ 8.);
- x. Laplante has been involved in commercial property development projects in multiple states as an architect, real estate developer and/or consultant for over approximately twenty-five (25) years (Laplante Aff. ¶ 9.);
- xi. Zurlo and Laplante created PCA for the purpose of acquiring and developing real estate (Laplante Aff. ¶ 10.);
- xii. Prior to 2013, PCA purchased the real property that is the subject of this case, which is described as “Residual Tract B-2-2” in the Resolution, Contract for Assignment, and Assignment, and which is also assigned TMS # 346-00-00-076 (herein “Property”), as a real estate development project (Laplante Aff. ¶ 11.);
- xiii. Laplante’s signatures appear on the Resolution, Contract for Assignment (on behalf of PCA and Maybank), and Assignment (Laplante Aff. ¶ 12.);
- xiv. The signatures of John, Peter F. Laplante and Marianne appear on the Contract for Assignment and Assignment (Laplante Aff. ¶ 12.);
- xv. The Resolution bears the signature of Zurlo (Laplante Aff. ¶ 2.);
- xvi. Zurlo, on behalf of PCA, has previously executed a certain Certificate of Resolution to Borrow Money dated November 30, 2009 as “Eugene J. Zurlo, Member”, without describing his capacity as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997, which caused Laplante to rely upon the sufficiency of his signing documents in that manner to bind PCA (Laplante Aff. ¶ 13.);
- xvii. In addition, on February 21, 2017, Laplante received an e-mail from Zurlo wherein he stated that PCA’s counsel “have been very careful to get Written Consents signed by all PCA Class A Members when any property (asset) sells so that sales are properly authorized and the purchasers get good title....” (Laplante Aff. ¶ 14.);
- xviii. Until sometime in October 2013, PCA was the sole member of Maybank (Laplante Aff. ¶ 15.);

- xix. Maybank was created by PCA to purchase and hold the real property described as Lot “B-3” in that certain deed recorded in Book F583, Page 757 in the Office of the Charleston County Register of Deeds, and which is assigned TMS # 346-00-00-008 (herein “adjacent lot”) (Laplante Aff. ¶ 16.);
- xx. The adjacent lot is next to the Property. Maybank purchased the adjacent lot in 2006 (Laplante Aff. ¶ 17.);
- xxi. At the time of its acquisition by Maybank, the adjacent lot had, and still has, a building located on it with leased office space. Maybank still owns the adjacent lot (Laplante Aff. ¶ 17.);
- xxii. Maybank’s purchase of the adjacent lot was the result of development planning sessions with Zurlo, where he and Laplante agreed that the only reason for Maybank to purchase the adjacent lot was to increase its commercial utility and development potential, and thereby its value, by creating a second means of ingress and egress across the Property, which PCA owned at the time (Laplante Aff. ¶ 18.);
- xxiii. In 2013, the Resolution was prepared by Custis Byars, Esq., and his law firm, Buist, Byars & Taylor, LLC, as part of a real estate-related transaction (herein “Maybank membership interest transfer”) wherein PCA’s interest in Maybank, would be transferred to Laplante and John, Marianne and Peter, on the very specific condition that PCA grant a thirty (30) foot private right of way access easement for pedestrian and vehicular ingress, egress and access to, from and over the Property, the location and condition of which was to be mutually agreed upon at the completion of that certain roadway known as “Pitch Fork Road” (herein sometimes “Pitchfork Road” or “Pitch Fork Road”) as stated in the Resolution and also the Contract for Assignment and Assignment (Laplante Aff. ¶ 19.);
- xxiv. As part of the Maybank membership interest transfer, the Contract for Assignment, which is referenced in the Resolution, was prepared by Custis Byars, Esq., and his law firm, Buist, Byars & Taylor, LLC. The Contract

for Assignment references the easement. Attached to the Contract for Assignment is the Assignment, which was also prepared by Custis Byars, Esq., and his law firm, Buist, Byars & Taylor, LLC. The Assignment references the easement (Laplante Aff. ¶ 20.);

- xxv. Although at the time of the Maybank membership interest transfer, the actual construction of Pitchfork Road was not complete, and remains incomplete, Zurlo and Laplante both knew that a portion of the roadway known as “Pitch Fork Road” was planned to be located on the Property, although its precise routing was not yet confirmed, which is why it is specifically referenced in the Resolution, Contract for Assignment of Interest and Assignment. At the time of the Maybank membership interest transfer, a fifty (50) foot easement for ingress and egress across about half of the Property to River Road was already in existence and so was Fenwick Hall Allee’, a publicly dedicated street from Maybank Highway that extended into a portion of the Property. Both the fifty (50) foot easement and Fenwick Hall Allee’ are reflected on that certain plat recorded on May 4, 2005 in Plat Book EH, Page 903 in the office of the Charleston County Register of Deeds. It was understood by Zurlo and Laplante before and at the time of the Maybank membership interest transfer and before, that the alignment of a portion of Pitchfork Road would likely follow a portion of the approximate route of the fifty (50) foot easement and connect with a portion of Fenwick Hall Alle’ (Laplante Aff. ¶ 22.);
- xxvi. Laplante lives on and work from Kiawah Island, South Carolina, and has for over thirty (30) years and he is personally familiar with the growth on Johns Island and the traffic congestion at the Maybank Highway and River Road intersection and has been stuck in traffic on them countless times throughout the years (Laplante Aff. ¶ 23.);
- xxvii. Before the time of the Maybank membership transfer and when Laplante was manager of PCA, Laplante intended to have Pitchfork Road run through the Property and attended many planning meetings about it.

Laplante also had many discussions with Zurlo about having Pitchfork Road run through the Property. Zurlo and Laplante agreed to have Pitchfork Road run through the Property given the locations of above-referenced fifty (50) [foot] easement for ingress and egress and Fenwick Hall Allee' (Laplante Aff. ¶ 24.);

- xxviii. At the time of the Maybank membership interest transfer, Laplante's intention as manager of PCA, was to locate the easement from the adjacent lot across the Property to connect with Pitchfork Road once it was completed (Laplante Aff. ¶ 25.);
- xxix. At the time of the Maybank membership interest transfer, Laplante knew that a portion of Pitchfork Road would be located on the Property, although the precise routing was not yet confirmed. The reason why the easement was not specifically located at that time was because of Laplante's duties and obligations to PCA. As manager of PCA, Laplante did not want to permanently locate the easement in a premature and arbitrary fashion during this time to avoid unnecessarily restricting the Property because it was being marketed for sale in dividable parcels. Therefore, having the location and condition of the easement conditioned upon the completion of Pitchfork Road, which would require the determination [of] the precise routing of Pitchfork Road, and by mutual agreement, provided the necessary flexibility to connect with Pitchfork Road, once it was physically constructed, in a reasonable and beneficial manner without being detrimental to the marketing of the Property for sale in divisible parcels (Laplante Aff. ¶ 26.);
- xxx. In or about 2007, while Laplante was manager of PCA, Laplante met with Professor Alex Kieger of the Harvard University Graduate School of Design and members of his class of graduate students over a two-day period. Zurlo's son, Paul Zurlo, also attended this meeting. Later Laplante assisted in arranging a meeting with Professor Keiger and the Mayor of the City of Charleston to present the concept of a public roadway running across the Property as a solution to provide much needed

traffic relief to accommodate growth on Johns Island, and in particular the Maybank Highway and River Road intersection, which is in the vicinity of the Property and adjacent lot (Laplante Aff. ¶ 27.);

- xxxi. The roadway known and described as “Pitch Fork Road” in the Resolution, Contract for Assignment and Assignment, evolved, in part, from a study by the Harvard University students working with the City of Charleston and PCA to create a public roadway to provide much needed traffic relief for Johns Island, including the vicinity of Maybank Highway and River Road. PCA and/or Zurlo even provided funding for the Harvard University study (Laplante Aff. ¶ 28.);
- xxxii. Before the Maybank membership interest transfer, Laplante knew that a portion of Pitchfork Road would be located on the Property by his meeting with Professor Kieger and members of his class of Harvard University graduate students, assisting in arranging a meeting between them and City of Charleston officials, and attendance at approximately at least twenty (20) planning meetings about the creation of Pitchfork Road to accommodate the rapid growth on Johns Island and its attendant traffic problems, which is why Pitchfork Road is specifically referenced as “that certain roadway known as Pitch Fork Road” in the Resolution, Contract for Assignment and Assignment (Laplante Aff. ¶ 29.);
- xxxiii. The easement is necessary for the enjoyment of the adjacent lot because it is presently limited to only one means of ingress and egress, which severely limits its development potential and its use for commercial purposes, and especially in light of the traffic congestion on Johns Island and in the vicinity of Maybank Highway and River Road, which are the reasons why the Maybank membership interest transfer was specifically conditioned on the grant of the easement (Laplante Aff. ¶ 30.);
- xxxiv. Laplante relied upon the grant of the easement reflected in the Resolution, Contract for Assignment and Assignment in proceeding with the Maybank membership interest transfer (Laplante Aff. ¶ 31.);

- xxxv. Based upon Laplante's experience as an architect and real estate developer, limiting commercial real estate to one means of ingress and egress will almost always limit its development potential and value, and which is especially true in an area of high traffic density. The easement was always intended to benefit the commercial utility and value of the adjacent lot, which is commercial real estate. Without the easement, the adjacent lot will be limited in its commercial utility and development potential (Laplante Aff. ¶ 32-4.);
- xxxvi. Maybank was assigned rights to the easement (Laplante Aff. ¶ 35.);
- xxxvii. On December 1, 2019, Laplante saw a sign in his son's neighborhood for a Design Review Board meeting for the next day, December 2, 2019, regarding the development of the Property. Before December 1, 2019, Laplante was not aware of the December 2, 2019 Design Review Board meeting. On December 2, 2019, Laplante attended the Design Review Board meeting relative to the Property and discussed the easement being omitted from the development plans at the meeting. Present at the December 2, 2019 meeting were Alan McMahon, a development manager employed by The Beach Company (The Beach Co.), and Russ Seamon, a director employed by Seamon, Whiteside & Associates, Inc. Laplante discussed the easement with Alan McMahon and Russ Seamon immediately after the December 2, 2019 meeting (Laplante Aff. ¶ 36-9.);
- xxxviii. The foreclosure case referenced by the Defendants, *Wells Fargo Bank, N.A., etc., v. Penny Creek Associates, LLC; et. al.*, Charleston Court of Common Pleas Case # 2014-CP-10-04946, does not name the Plaintiff, John, Marianne, or Peter, as defendants. Although Laplante was personally named as a defendant in the foreclosure case, he was severed from the foreclosure claim, and the foreclosure judgment entered on June 23, 2017, references that fact. Additionally, the subject easement was neither the subject of, nor specifically referenced in, the foreclosure case (Laplante Aff. ¶ 40.)

b. The Plaintiff's Responses to Defendants' [The Beach Entities] Requests for Admissions filed on May 15, 2020 provide at least a scintilla of evidence, and indeed more, to support Plaintiff's claims and raise genuine issues of material fact, thereby making summary judgment improper.

- i. Plaintiff's Responses to Defendants' [the Beach Entities'] Requests for Admissions filed on May 15, 2020 in response # 1. states in relevant part that, "In addition to the Resolution, the Plaintiff claims the right to an easement by virtue of that certain Contract for Assignment dated October 7, 2013, which is referenced in the Resolution, and that Certain Assignment Interest and Written Consent in Lieu of a Special Meeting of the Sole Member of Maybank, 2754, LLC dated October 4, 2013, which is attached to and referenced in the Contract for Assignment of Interest dated October 7, 2013." The Contract for Assignment and Assignment were attached to Plaintiff's Responses to Defendants' [Beach Entities'] Requests for Admissions and filed with the Court.
- ii. The easement that is the subject of this action is described on both pages of the Resolution, Sections 4.5 of the Contract for Assignment, and Paragraph 6. of the Assignment. Like the Resolution, the Assignment references that the grant of an easement is a condition of closing.

c. The Plaintiff's Requests for Judicial Notice of Recorded Documents and City of Charleston Ordinances filed on August 24, 2020 provide at least a scintilla of evidence, and indeed more, to support Plaintiff's claims and raise genuine issues of material fact, thereby making summary judgment improper. Pursuant to Rule 201(d), SCRE, judicial notice is mandatory if requested by a party and supplied with the necessary information. The Order Granting Summary Judgment does not state that the Court took notice as requested by the Plaintiff. Therefore, it is error for the Court not to take judicial notice and especially since they were referenced in Plaintiff's Response in Opposition to the Defendants' Motions for Summary Judgment filed on September 17, 2020. Plaintiff's Requests for Judicial Notice of Recorded

Documents and City of Charleston Ordinances filed on August 24, 2020 requested that the Court take judicial notice of the following documents, which were attached to the request.

- i. Limited Warranty Deed, recorded on May 15, 2006, in Book F583, Page 757, in the office of the Charleston County, South Carolina, Register of Deeds. All subsequent recording references are in the official records of said office. This deed is the vesting deed of Plaintiff's adjacent lot.
- ii. Development Agreement by and between the City of Charleston, and 1776, LLC, recorded on December 2, 2019, in Book 0843, Page 506. The Development Agreement references and attaches certain City of Charleston Ordinances, which shows the subject property and Plaintiff's adjacent lot were zoned as part of a PUD district, which was later amended. The Development Agreement also shows that the Eugene J. Zurlo Living Trust Dated December 11, 1997, is the sole member of 1776, LLC. 1776, LLC is the predecessor of interest of Beach Fenwick, LLC of the subject property upon which Plaintiff claims an easement. The Development Agreement references "Pitchfork Road" and shows that the subject property is primed for development.
- iii. Title to Real Estate (Deed to Beach Fenwick, LLC from 1776, LLC), recorded on December 12, 2019, in Book 0846, Page 268. This deed describes the subject property upon which Plaintiff is claiming an interest and demonstrates that conveyance of the subject property occurred after Beach Fenwick, LLC became aware of the easement by virtue of the discussion between Laplante and agents of Seamon Whitesides & Associates, Inc., and The Beach Company (the Beach Co.), which was after the December 2, 2019 meeting described in the Affidavit.
- iv. Partial Assignment and Assumption of Rights and Obligations Under Development Agreement, recorded on December 12, 2019, in Book 0846, Page 269. This partial assignment references "the contribution of land for Northern Pitchfork Road" in paragraph 2 therein.
- v. A Plat of a Portion of TMS # 346-00-00-004, and -076 Owned by 1776, LLC, recorded in Book L19, Page 0515. This plat shows land owned by 1776, LLC

“for the Northern Pitchfork Road” and also shows its location across the subject property. The Plaintiff’s adjacent lot is also depicted.

- vi. City of Charleston Ordinance, Ratification Number 2019-102. This ordinance the First Amendment to Amended and Restated Planned Unit Development Guidelines. A certain Appendix “M” is attached to this ordinance. Appendix “M” is a drawing that depicts, among other things, Maybank’s adjacent lot, the subject property and contains the words, “ALLOWABLE CONNECTION”, that is linked to and identifies a large arrow from the subject property to Maybank’s adjacent lot. Clearly, there is an inference that Appendix “M” depicts a possible connection point for the easement, which is also evidence of the existence of the easement.
- vii. City of Charleston Ordinance, Ratification Number 2018-164. Among other things, this ordinance references “Pitchfork Road”.

d. The Plaintiff’s Requests for Judicial Notice of Recorded Document and Document filed with the South Carolina Secretary of State filed on September 14, 2020 provide at least a scintilla of evidence, and indeed more, to support Plaintiff’s claims and raise genuine issues of material fact, thereby making summary judgment improper. Pursuant to Rule 201(d), SCRE, judicial notice is mandatory if requested by a party and supplied with the necessary information. The Order Granting Summary Judgment does not state that the Court took notice as requested by the Plaintiff. Therefore, it is error for the Court not to take judicial notice and especially since they were referenced in Plaintiff’s Response in Opposition to the Defendants’ Motions for Summary Judgment filed on September 17, 2020. Plaintiff’s Requests for Judicial Notice of Recorded Document and Document filed with the South Carolina Secretary of State filed on September 14, 2020 requested that the Court take judicial notice of the following documents, which were attached to the request.

- i. A Plat Showing the Subdivision of Tract B-2-1 into Tract B-2-3 and Residual Tract B-2-1, recorded in Plat Book EH, Page 903 on May 4, 2005 in the office of the Charleston County Register of Deeds. This plat is the plat referenced in the Affidavit.

- ii. Articles of Organization of Beach Fenwick, LLC, filed with the South Carolina Secretary of State. This document shows Beach Fenwick, LLC, was created on December 3, 2019, which was after the December 2, 2019 meeting described in the Affidavit where the easement was discussed with an agent of The Beach Company (the Beach Co.), and also shows that The Beach Company (the Beach Co.) is the manager of Beach Fenwick, LLC. Additionally, the Amended Answer on behalf of The Beach Company and Beach Fenwick, LLC, admits that Beach Fenwick is affiliated with the Beach Co. Therefore, knowledge of The Beach Company (the Beach Co.) of the easement is imputed to Beach Fenwick, LLC, despite Beach Fenwick, LLC being created after the December 2, 2019 meeting.

IV. The Erroneous Findings of Fact

The Order Granting Summary Judgment contains erroneous findings of fact which should be amended and/or vacated. The erroneous findings of fact are as follows:

- a. **“The factual history involving the Plaintiff’s claim to a future easement is not in dispute.”** (Order Granting Summary Judgment p. 2).

There is no explanation as to how the Court found that the easement was a “future easement”. The Order Granting Summary Judgment provides no specific evidentiary basis for its conclusion that the easement was a “future easement.” The Resolution, Contract for Assignment and Assignment clearly granted an easement as a condition of the closing of the Maybank membership transfer, which occurred as evidenced by Plaintiff’s Responses to Defendant’s [Zurlo’s] Requests for Admissions filed on March 10, 2020, admits in Request # 12 that “Exhibit F” is the “Buist, Byars & Taylor, LLC Statement of Settlement Purchasers of Maybank 2754, LLC dated October 7, 2013.”

The Resolution states on the first page, “WHEREAS, as a condition of closing, the Company [PCA] has agreed to grant, transfer, sell and convey to Purchasers, their successors and assigns, an access easement...to, from and over...[the subject property]...the location and condition of which shall be mutually agreed upon at the completion of that certain roadway

known as Pitch Fork Road....” The second page of the resolution states, “BE IT FURTHER RESOLVED, that upon the completion of Pitch Fork Road, the Company [PCA] shall grant to Purchasers, their successors and assigns, an access easement...to, from and over...[the subject property]..., the location and condition of which shall be mutually agreed upon at a future date. Section 4.5 of the Contract for Assignment states, “**30’ Access Easement**. Seller shall grant, transfer, sell and convey to Purchaser, its successors and assigns, an access easement...to, from and over...[the subject property]..., the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road....” Paragraph 6 of the Assignment states, “**30’ ACCESS EASEMENT**. As a condition of closing, Transferor [PCA] agrees to grant, transfer, sell and convey to Transferee, its successors and assigns, an access easement...to, from and over...[the subject property]...the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road....”.

An easement by grant is not required to be recorded to be valid, and recording is not necessary if the buyer has actual notice. *See, Frierson v. Watson*, 636 S.C. 60, 68 (Ct. App. 2006). “A purchaser of land with actual, constructive, or implied notice that the property is burdened with an easement ordinarily takes the estate subject to the easement. *Loftis v. South Carolina Elec. and Gas Co.*, 361 S.C. 434, 441 (Ct. App. 2004).

Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus v. Wessinger*, 303 S.C. 412, 415 401 S.E.2d 169 (1991). Therefore, this finding of fact should be amended to provide the specific evidentiary basis for the Court’s conclusion that the easement is a “future easement” or vacated.

b. **“The alleged future springing easement never was recorded, nor was it ever subordinated to the two Wells Fargo mortgages, which were recorded well before the date of the Resolution Plaintiff relies on to establish its easement in October 2013.”** (Order Granting Summary Judgment p. 3) (emphasis added).

There is no explanation as to how the Court found that the easement was a “future springing easement”. Additionally, there is no explanation as to what exactly a “springing”

easement is, or what the Court meant with the word, “springing”. The Order Granting Summary Judgment provides no specific evidentiary basis for its conclusion that the easement was a “future springing easement.” The Resolution, Contract for Assignment and Assignment clearly granted an easement as a condition of the closing of the Maybank membership transfer, which occurred as evidenced by Plaintiff’s Responses to Defendant’s [Zurlo’s] Requests for Admissions filed on March 10, 2020, admits in Request # 12 that “Exhibit F” is the “Buist, Byars & Taylor, LLC Statement of Settlement Purchasers of Maybank 2754, LLC dated October 7, 2013.” Furthermore, Plaintiff relies upon not only the Resolution, but also the Contract for Assignment and Assignment as described above. The Contract for Assignment is even referenced on the first page of the Resolution.

The Resolution states on the first page, “WHEREAS, as a condition of closing, the Company [PCA] has agreed to grant, transfer, sell and convey to Purchasers, their successors and assigns, an access easement...to, from and over...[the subject property]...the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road....” The second page of the resolution states, “BE IT FURTHER RESOLVED, that upon the completion of Pitch Fork Road, the Company [PCA] shall grant to Purchasers, their successors and assigns, an access easement...to, from and over...[the subject property]..., the location and condition of which shall be mutually agreed upon at a future date. Section 4.5 of the Contract for Assignment states, “**30’ Access Easement**. Seller shall grant, transfer, sell and convey to Purchaser, its successors and assigns, an access easement...to, from and over...[the subject property]..., the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road....” Paragraph 6 of the Assignment states, “**30’ ACCESS EASEMENT**. As a condition of closing, Transferor [PCA] agrees to grant, transfer, sell and convey to Transferee, its successors and assigns, an access easement...to, from and over...[the subject property]...the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road....”.

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burdened with an easement ordinarily takes the estate subject to the easement. *Loftis v. South Carolina Elec. and Gas Co.*, 361 S.C. 434, 441 (Ct. App. 2004).

Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus v. Wessinger*, 303 S.C. 412, 415 401 S.E.2d 169 (1991). Therefore, this finding of fact should be amended to provide the specific evidentiary basis for the Court's conclusion that the easement is a "future springing easement" or vacated.

c. **"The Foreclosure Order notes that "all persons whosever claiming an interest under the defendants be forever barred and foreclosed of all right, title, interest, and equity of redemption in the Subject Property" and specifically retained jurisdiction "to do all necessary acts incident to this foreclosure and to hear any post-judgment matters." (Order Granting Summary Judgment p. 3) (emphasis added).**

Even so, Maybank was not named as a defendant, and neither were John, Marianne or Peter. Laplante was named and served with process, but he was severed from the foreclosure claim as set forth on the second page of the referenced Foreclosure Order. Thus, Laplante's rights and interests in the subject property survived the foreclosure. Therefore, the Foreclosure Order did not impact their rights in the property. Therefore, it cannot be said that they are claiming an interest "under the defendants" in the foreclosure case.

Moreover, the Foreclosure Order itself states in Paragraph 3.b. that **"The sale shall be subject to taxes, assessments, existing easements, and easements and restrictions of record."** (emphasis added). Thus, even assuming arguendo that the Foreclosure Order impacted their rights (which it did not because of a failure of due process and lack of jurisdiction as will be later explained herein), the Foreclosure Order itself made the foreclosure sale, subject to the Plaintiff's easement and created an inference that there are two categories of easements that were not affected by the Foreclosure Order: existing easements and easements of record. Therefore, Plaintiff's easement in this case fits squarely within the former category and survived the foreclosure sale.

Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus v. Wessinger*, 303 S.C. 412, 415 401 S.E.2d 169 (1991). Therefore, this finding of fact should be vacated.

d. **“Laplante, individually was a named party to the foreclosure action, and at the relevant time, was the managing partner of PCA. Laplante’s knowledge and conduct is therefore, imputed to Maybank. See *In re Infinity Bus. Grp., Inc.*, 497 B.R. 794, 813 (Bankr D.S.C. 2013); S.C. Code § 33-44-120. (Order Granting Summary Judgement p. 4).**

It is unclear exactly what Laplante’s specific knowledge and conduct was that the Court found was imputed to Maybank. Regardless, Laplante’s knowledge and conduct does not overcome or provide an alternative to service of process. Maybank was not named as a Defendant, and neither were John, Marianne nor Peter, and neither were they served with process. Laplante was named and served with process, but he was severed from the foreclosure claim as set forth on the second page of the referenced Foreclosure Order. Thus, Laplante’s rights and interests in the subject property survived the foreclosure. Therefore, the Foreclosure Order did not impact their rights in the property.

Moreover, the case and page cited in this finding of fact, *In re Infinity Bus. Grp., Inc.*, 497 B.R. 794, 813 (Bankr D.S.C. 2013) cites another case that states “concluding that whether the agent was acting on behalf of the principal and by implication, whether his own knowledge of the activity is imputed to the principal, **is ultimately a genuine issue of material fact for the jury**”. (emphasis added). It is unclear how *In re Infinity Bus. Grp., Inc.*, even applies to this case. Presuming it does, then the motions for summary judgment should have been denied so that this case can be decided by a jury. Just because Laplante was the managing partner of PCA “at the relevant time”, this does not automatically mean that his knowledge and conduct is imputed to Maybank.

Furthermore, “S.C. Code § 33-44-120” does not appear to even exist. Presuming, this is a typo and S.C. Code § 33-44-102 was intended, the fact that Laplante had knowledge of the foreclosure case, this does not overcome the necessity of service of process to properly establish jurisdiction against Maybank, John, Marianne and Peter and to ultimately bind them to the judgment, who were not even named as parties in the foreclosure case. The Master-in-Equity

never had personal jurisdiction over the Plaintiff, John, Marianne and Peter in the foreclosure case, and as a result, their rights and interests in the subject property were never extinguished or impacted by the foreclosure judgment. *See, Green Tree Servicing, LLC v. Adams*, 375 S.C. 583; 654 S.E.2d 100 (S.C. Ct. App. 2007) (“A court may not act against a party without personal jurisdiction...a court should not render a judgment affecting the rights of a party without proper notice.”)

In *Adams*, the Court agreed in part that the circuit court could not bind Adams to a foreclosure action to which he was not a party. However, because the circuit court properly exercised personal jurisdiction over Adams in a subsequent action to add him as a party to the foreclosure action, there was no reversible error. *Id.* at 586-7.

A judgment is void if a court acts without personal jurisdiction. *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). A court generally obtains personal jurisdiction by the service of a summons. *Ex parte S.C. Dep't of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002) (citing *State v. Sanders*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920). (“The purpose of the summons is to acquire jurisdiction of the person of the defendant. . . .”)).

Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus v. Wessinger*, 303 S.C. 412, 415 401 S.E.2d 169 (1991). Therefore, this finding of fact should amended to specifically describe Laplante’s knowledge and conduct and how exactly it was imputed to Maybank or vacated.

e. **“Maybank 2754 is a limited liability company organized pursuant to the laws of the State of South Carolina. Laplante is its managing member.”** (Order Granting Summary Judgment p. 4.).

Pursuant to the Affidavit, Laplante became Maybank’s managing member after the October 15, 2019 death of his son, John. Therefore, this finding of fact should be amended to clarify that Laplante was not the managing member of Maybank at the time of the Resolution, Contract for Assignment and Assignment or the foreclosure case or vacated.

f. **“Maybank relies upon a document entitled Resolution of the Sole Shareholder of Penny Creek Associates, LLC, dated October 7, 2013, for its claim of a future easement across the former PCA property purchased by Beach Fenwick LLC from 1776, LLC (“Subject Property”).”** (Order Granting Summary Judgment p. 4).

As explained herein, Maybank also relies on the Contract for Assignment and Assignment in addition to the Resolution for its claim of an easement across the subject property. Thus, the Resolution is not the only document upon which Plaintiff bases its easement claim. The Resolution references the Contract for Assignment. Therefore, this finding of fact should be vacated.

g. **“Plaintiff avers in its Complaint that Pitch Fork Road has not been completed and admits the “Future Easement” never was recorded. It is the claim of that future easement, and matters attendant thereto, that give rise to this action.”** (Order Granting Summary Judgment p. 4).

Plaintiff has not specifically alleged or admitted a so-called “Future Easement”. Plaintiff incorporates the entirety of its statements in section **III.a.** above as though set forth herein verbatim above. Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus v. Wessinger*, 303 S.C. 412, 415 401 S.E.2d 169 (1991). Therefore, this finding of fact should be amended to provide the specific evidentiary basis for the Court’s conclusion that the easement is a “Future Easement” or vacated.

V. **Erroneous Conclusions of Law**

Under the heading, **CONCLUSIONS OF LAW**, the Order Granting Summary Judgment states that, **“The Court finds as a matter of law there is no legal right to an easement based upon the pleadings, the Motions for Summary Judgment, the affidavits submitted and the able arguments of counsel at the September 24, 2020 hearing...”** (Order Granting Summary Judgment p. 7) (emphasis added). It was error for the Court not to consider The Plaintiff’s

Responses to Defendants' [The Beach Entities] Requests for Admissions filed on May 15, 2020, and Plaintiff's requests for judicial notice. Also, there were no other affidavits besides the Affidavit that was filed.

a. In part "A." of the "CONCLUSIONS OF LAW" section, the Order Granting Summary Judgment explains that because the Resolution was never subordinated to the Wells Fargo Mortgage, it "**was therefore foreclosed upon in 2017, rendering the easement void and of no effect.**" (Order Granting Summary Judgment p. 7-8) (emphasis added).

The entire conclusion of law in part "A." is erroneous. *See, Green Tree Servicing, LLC v. Adams*, 375 S.C. 583; 654 S.E.2d 100 (S.C. Ct. App. 2007) ("A court may not act against a party without personal jurisdiction...a court should not render a judgment affecting the rights of a party without proper notice."). A judgment is void if a court acts without personal jurisdiction. *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). A court generally obtains personal jurisdiction by the service of a summons. *Ex parte S.C. Dep't of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002) (citing *State v. Sanders*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920). ("The purpose of the summons is to acquire jurisdiction of the person of the defendant.. .").

Maybank was never named in the foreclosure case, *Wells Fargo Bank, N.A., etc., v. Penny Creek Associates, LLC; et. al.*, Charleston Court of Common Pleas Case # 2014-CP-10-04946. In the foreclosure case, neither the Plaintiff, John, Marianne, nor Peter, were named as defendants. They were not served with process. Although Laplante was personally named as a defendant in the foreclosure case, he was severed from the foreclosure claim, and the foreclosure judgment entered on June 23, 2017, in that case references that fact. Thus, Laplante's rights and interests in the subject property survived the foreclosure.

The court in the foreclosure case never had personal jurisdiction over the Plaintiff, John, Marianne, or Peter in the foreclosure case, and as a result, its rights and interests in the subject property were never extinguished or impacted by the foreclosure judgment. Therefore, the reservation of jurisdiction in the foreclosure judgment only affects those whom were named as parties and also properly served with process. To conclude otherwise would obviously violate the Plaintiff's due process rights. A judgment is void if a court acts without personal jurisdiction.

Thomas & Howard Co. v. T.W. Graham & Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). A court generally obtains personal jurisdiction by the service of a summons. *Ex parte S.C. Dep't of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002) (citing *State v. Sanders*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920). ("The purpose of the summons is to acquire jurisdiction of the person of the defendant. . . .")). Furthermore, neither Plaintiff, Laplante, John, Marianne nor Peter were named in a subsequent foreclosure action relative to the subject property.

Additionally, the subject easement was neither the subject of, nor specifically referenced in, the foreclosure case. Accordingly, the foreclosure judgment is void against the Plaintiff and cannot properly serve as a basis to grant Defendants' summary judgment against the Plaintiff in this case.

Furthermore, as explained above, the Foreclosure Order itself states in Paragraph 3.b. that **"The sale shall be subject to taxes, assessments, existing easements, and easements and restrictions of record."** (emphasis added).

Additionally, the Order Granting Summary Judgment states, **"Further, the Plaintiff has already judicially admitted that its alleged easement was extinguished in the bank's foreclosure action."** (Order Granting Summary Judgment p. 8). This conclusion of law is incorrect and erroneous. The Plaintiff denies making any admission that the alleged easement was extinguished in the bank's foreclosure action. The Plaintiff respectfully seeks clarification from the Court as to specific factual basis for this conclusion of law. The Order Granting Summary Judgment cites no evidence or facts to support this conclusion of law, which is error.

b. In part B. of the **"CONCLUSIONS OF LAW"** section, the Order Granting Summary Judgment states, **"The October 7, 2013, Resolution on which the Plaintiff relies (The Resolution) never was recorded, nor was there any recording of the intention to place a future easement on the property PCA owned which is now owned by Beach Fenwick, LLC. This prevented actual or constructive Notice of the future easement's alleged existence."** (Order Granting Summary Judgment p. 9) (emphasis added).

The entire conclusion of law in part "B." is erroneous. As explained herein, Maybank also relies on the Contract for Assignment and Assignment in addition to the Resolution for its claim that easement across the subject property was created. Thus, the Resolution is not the only

document upon which Plaintiff bases its easement claim. The Resolution even references the Contract for Assignment.

The Resolution states on the first page, “WHEREAS as a condition of closing, the Company [PCA] has agreed to grant, transfer, sell and convey to Purchasers, their successors and assigns, an access easement...”. The Resolution also states on the second page, “BE IT FURTHER RESOLVED, that upon the completion of Pitchfork Road, the Company [PCA] shall grant to Purchasers, their successors and assigns, an access easement...” Section 4.5 of the Contract for Assignment states, “**30’ Access Easement**. Seller shall grant...an access easement...”. Paragraph 6 of the Assignment states, “**30’ ACCESS EASEMENT**. As a condition of closing, Transferor [PCA] agrees to grant, transfer, sell and convey to Transferee, its successors and assigns, an access easement...”.

An easement by grant is not required to be recorded to be valid, and recording is not necessary if the buyer has actual notice. *See, Frierson v. Watson*, 636 S.C. 60, 68 (Ct. App. 2006). “A purchaser of land with actual, constructive, or implied notice that the property is burdened with an easement ordinarily takes the estate subject to the easement. *Loftis v. South Carolina Elec. and Gas Co.*, 361 S.C. 434, 441 (Ct. App. 2004). Furthermore, Plaintiff has demonstrated at least a scintilla of evidence that Beach Fenwick, LLC had actual and imputed knowledge of the easement before it acquired the property, which creates material issues of fact as to the actual and imputed knowledge of Beach Fenwick, LLC. At the very least, there is an inference that Beach Fenwick, LLC had knowledge of the easement by and through The Beach Company (The Beach Co.) its manager for the reasons described above. Also, the easement was not a “future” easement for the reasons described above.

c. In part C. of the “CONCLUSIONS OF LAW” section, the Order Granting Summary Judgment states, “**The Resolution fails to meet the essential elements required in order to create a property right. The description of the alleged future springing easement lacks any identifiable location or condition, the duration of the easement or its scope.**” (Order Granting Summary Judgment p. 9). The entire conclusion of law in part “C.” is erroneous.

The Plaintiff claims an easement by virtue of the Resolution, Contract for Assignment and Assignment as explained above. “A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments.” *Binkley v. Rabon Creek*

Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) (quoting 28A C.J.S. Easements § 57 (1996)). As the Court of Appeals stated in *Smith*, 441 S.E.2d 331, 335 (S.C. Ct. App. 1994):

Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so as to carry out that intention. *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965); 23 Am.Jur.2d Easements and Licenses § 23 (1966) (**if the language is uncertain or ambiguous in any respect, all surrounding circumstances, including the construction which the parties have placed on the language, may be inquired into and taken into consideration by the court**).

(emphasis added).

After the Court of Appeals in *Smith* found that the agreement established an easement, the court ruled that the easement was to be located in a location as is reasonably necessary for the full enjoyment of the plaintiffs' property. The Court of Appeals stated, "The subject **unlocated** easement must be interpreted, however, in light of good faith, reasonableness **and what was necessarily the intent of the parties to the 1955 agreement.**" *Id.* at 336 (emphasis added). Accordingly, the Court of Appeals in *Smith* remanded the case for a determination of the number of access points and routes to include their width. *Id.* at 337.

In *Douglas v. Medical Investors, Inc.*, 256 S.C. 440, 182 S.E.2d 720 (1971), the South Carolina Supreme Court ruled that an instrument creating an easement was an easement in gross for commercial purposes even though it was not apparent on its face. The Court found that the wording of the instrument "leaves the exact character of the easement in doubt", and stated, "[w]e are therefore presented with a situation where it is impossible to determine the nature or character of the easement from the language used in the reservation. Under such circumstances, parole evidence was properly considered in determining the character of the easement reserved." *Id.* (emphasis added). In reaching its ruling the Court stated, "The fallacy in respondent's argument [that the character of the easement should be determined solely from the working of the instrument and parole evidence also was inadmissible] lies in the fact that...the wording of the present reservation leaves the exact character of the easement in doubt." *Id.* at 447. Thus, the Court ruled that parole evidence was properly admitted to determine the

character of the easement. Therefore, parole evidence is necessary and admissible to determine the intention of the parties relative to the nature or character, extent and location of the easement, and the intention of the parties relative to the reference to “that certain roadway known as Pitch Fork Road”.

Moreover, as to the terminus element, the Court of Appeals in *Williams v. Tamsberg*, 425 S.C. 249, 262-63, 821 S.E.2d 494 (S.C. Ct. App. 2018), stated:

[D]etermining the existence of a terminus is a fact-specific inquiry dependent upon the facts of each individual case...the existence of a terminus on the land of the party claiming an easement appurtenant may be established if the easement meets certain criteria. Intuitively, the dominant estate must have access to the purported easement. In addition, a court could find an easement appurtenant if the purported easement (1) at least touches the dominant estate and (2) in cases where the easement is an adjacent boundary between—or runs parallel to—the dominant and servient estates such as in the instant case, the easement does not extend beyond the purported dominant estate's boundary—i.e., at most, the easement ends at the lot line of the dominant estate.

(citations omitted) (emphasis added).

Additionally, Count II of the Compliant, plead in the alternative to Count I, seeks a declaratory judgment pursuant to South Carolina Code §15-53-10, et. seq., that a restrictive covenant exists over the subject property by virtue of the Resolution. Count II of the instant action is also similar to the situation in *West v. Newberry Electric Cooperative*, 357 S.C. 537 (S.C. Ct. App. 2004). In *West*, the Court of Appeals found that a 1955 written easement agreement was a restrictive covenant despite the fact that the agreement was unrecorded. In so finding, the Court of Appeals stated:

The very language of the 1955 easement reveals it to be a restrictive covenant that runs with the land. In the agreement, NEC promises to relocate the power line should the property ever "be developed." That agreement applies to the land. While the agreement does not specify whether this promise was to be honored only with respect to the Matthews, **it does envision the future of the land** and thus applies to the Wests. *See Marathon*, 325 S.C. at 604, 483 S.E.2d at 765 (explaining that a "restrictive covenant runs with the land, and is thus enforceable by a successor-in-interest, if the covenanting parties intended that the covenant run with the land, and the covenant touches and concerns the land") (citation omitted).

Moreover, the restrictive covenants in the 1955 easement touch and concern the subject property. The Matthews insisted upon several conditions in order to maintain the safety and value of the property. The subject of the covenants is a power line connected to and crossing over the land. Adherence to the covenants by NEC directly affects the nature and value of the easement to both NEC and the Wests. The covenants in the easement also restrict the manner in which NEC can use the easement. **The exact location of the easement on the property is not described in the easement, but its possible relocation is contemplated.** The covenants were obviously intended to touch and concern the subject property.

Id. at 542-3.

Just as the exact location of the easement was not described in *West* and was found to be enforceable as a restrictive covenant, the exact location of the easement is not described in the Resolution, Contract for Assignment and Assignment and should be found to be a restrictive covenant alternative or in addition to an easement. *Id.*

In this case, the first page of the Resolution states, “WHEREAS, as a condition of closing, the Company [PCA] has agreed to grant, transfer, sell and convey to Purchasers, their successors and assigns, an access easement...to, from and over...[the subject property]...the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road....” The second page of the resolution states, “BE IT FURTHER RESOLVED, that upon the completion of Pitch Fork Road, the Company [PCA] shall grant to Purchasers, their successors and assigns, an access easement...to, from and over...[the subject property]..., the location and condition of which shall be mutually agreed upon at a future date. Section 4.5 of the Contract for Assignment states, “**30’ Access Easement.** Seller shall grant, transfer, sell and convey to Purchaser, its successors and assigns, an access easement...to, from and over...[the subject property]..., the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road....” Paragraph 6 of the Assignment states, “**30’ ACCESS EASEMENT.** As a condition of closing, Transferor [PCA] agrees to grant, transfer, sell and convey to Transferee, its successors and assigns, an access easement...to, from and over...[the subject property]...the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road....”.

Thus, the location of the easement being upon the subject property, the servient estate, is clear and obvious. However, the exact location of the easement over the subject property, its condition and scope are inherently ambiguous because they were to be mutually agreed upon at the completion Pitch Fork Road. Thus, the Resolution, Contract for Assignment and Assignment are ambiguous and such ambiguities should be construed together in favor of the Plaintiff as the non-moving party. Furthermore, because the Resolution, Contract for Assignment and Assignment are ambiguous, parole evidence and extrinsic evidence should be considered by a jury to ascertain the parties' intentions at the time the contract was entered.

The exact location of the easement over the subject property, its condition, duration and scope are not "essential elements" to create an easement. *See, Smith v. Commissioners of Public Works of the City of Charleston*, 441 S.E.2d 331, 335 (S.C. Ct. App. 1994); *Douglas v. Medical Investors, Inc.*, 256 S.C. 440, 182 S.E.2d 720 (1971). Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus v. Wessinger*, 303 S.C. 412, 415 401 S.E.2d 169 (1991).

d. In part D. of the "CONCLUSIONS OF LAW" section, the Order Granting Summary Judgment states, "**Assuming for the sake of argument the Resolution created an easement, the easement is one in gross and therefore is not transferrable to the Plaintiff.**" (Order Granting Summary Judgment p. 9).

The entire conclusion of law in part "D." is erroneous. "An easement is the right of one person to use the land of another for a specific purpose. An easement is characterized as either appurtenant, in gross, or in gross for commercial purposes. A restrictive covenant... is contractual in nature and restricts in some particular the free use of land by its owner." *Smith v. Commissioners of Public Works of the City of Charleston*, 441 S.E.2d 331, 335 (S.C. Ct. App. 1994) (citations omitted). "The character of an express easement is determined by the nature of the right and the intention of the parties creating it. An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. In contrast, an appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. It also passes with the

dominant estate upon conveyance.” *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

“Easements in gross are not favored by the courts, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate.” *Smith*, 441 S.E.2d at 336 (S.C. Ct. App. 1994) (citations omitted). “The distinction between an appurtenant easement and an easement in gross involves the extent of a grant of an easement, as opposed to the creation of an easement.” *Williams v. Tamsberg*, 425 S.C. 248-249, 259, 831 S.E.2d 494 (S.C. Ct. App. 2018) (citations omitted). “An easement in gross is of a commercial character when the use authorized by it results primarily in economic benefit rather than personal satisfaction. Easements in gross, if of a commercial character, are alienable.” *Sandy Island Corp v. Rasdale*, 246 S.C. 414, 422 143 S.E.2d 803 (1965). Moreover, as to the terminus element, the Court of Appeals in *Williams v. Tamsberg*, 425 S.C. 249, 262-63, 821 S.E.2d 494 (S.C. Ct. App. 2018), stated:

[D]etermining the existence of a terminus is a fact-specific inquiry dependent upon the facts of each individual case...the existence of a terminus on the land of the party claiming an easement appurtenant may be established if the easement meets certain criteria. Intuitively, the dominant estate must have access to the purported easement. In addition, a court could find an easement appurtenant if the purported easement (1) at least touches the dominant estate and (2) in cases where the easement is an adjacent boundary between—or runs parallel to—the dominant and servient estates such as in the instant case, the easement does not extend beyond the purported dominant estate's boundary—i.e., at most, the easement ends at the lot line of the dominant estate.

(citations omitted) (emphasis added).

There exists material issues of fact as to the nature and character of the easement the parties created. The very language of the Resolution, Contract for Assignment and Assignment make the easement assignable. Furthermore, the Affidavit should be considered so that the character of the easement can be determined. For example, the Affidavit explains that the easement was always intended to benefit the commercial utility and value of the adjacent lot, which is commercial real estate, and without the easement the adjacent lot will be limited in its commercial utility and development potential. Furthermore, Laplante should be considered an expert whose testimony to this effect is relevant and helpful. Thus, the Court erred in finding that no material issues of fact exists as to the type of easement created when “assuming for the

sake of argument.” The easement was not an easement in gross and material issues relative to issue exists.

The Court failed to make any findings of fact to support its conclusion that “assuming for the sake of argument the Resolution created an easement” an easement in gross was created by virtue of the Resolution, or specifically explain why the easement would be an easement in gross. The Court also erred in failing to consider the Contract for Assignment, Assignment and Affidavit. Easements in gross are not favored by the courts, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate. Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus v. Wessinger*, 303 S.C. 412, 415 401 S.E.2d 169 (1991).

e. In part E. of the “CONCLUSIONS OF LAW” section, the Order Granting Summary Judgment states, **“At best, the Resolution creates ‘an agreement to agree’, which does not amount to a contract in South Carolina...The unrecorded Resolution, or more precisely, the unrecorded contract referenced therein but not provided until after the filing of this action, purportedly is a contractual right for the Seller (PCA) and Buyer (Laplante Family) to agree in the future to create an easement. In South Carolina, this agreement to agree does not amount to a contract and cannot detrimentally impact future purchases of the property because the parties ‘subsequently failed to reach an actual agreement on essential terms pertaining to land allocations...and restrictive covenants for the property.’”** (Order Granting Summary Judgment p. 10-11).

The entire conclusion of law in part “E.” is erroneous. *See, Smith v. Commissioners of Public Works of the City of Charleston*, 441 S.E.2d 331 (S.C. Ct. App. 1994); *Douglas v. Medical Investors, Inc.*, 256 S.C. 440, 182 S.E.2d 720 (1971); *Williams v. Tamsberg*, 425 S.C. 249, 821 S.E.2d 494 (S.C. Ct. App. 2018); *West v. Newberry Electric Cooperative*, 357 S.C. 537 (S.C. Ct. App. 2004).

The grant of an easement was a specific condition of closing for the Maybank membership transfer purchase, which occurred as evidenced by Plaintiff’s Responses to Defendant’s [Zurlo’s] Requests for Admissions filed on March 10, 2020, admits in Request # 12

that “Exhibit F” is the “Buist, Byars & Taylor, LLC Statement of Settlement Purchasers of Maybank 2754, LLC dated October 7, 2013.” The membership transfer of Maybank (which occurred) was specifically conditioned on the grant of the easement. Therefore, the doctrines of unclean hands and/or equitable estoppel apply to prevent Defendants from disavowing or denying the existence and validity of the easement. Accordingly, material issues of fact also exist as to these issues.

In this case, the first page of the Resolution states, “WHEREAS, as a condition of closing, the Company [PCA] has agreed to grant, transfer, sell and convey to Purchasers, their successors and assigns, an access easement...to, from and over...[the subject property]...the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road....” The second page of the resolution states, “BE IT FURTHER RESOLVED, that upon the completion of Pitch Fork Road, the Company [PCA] shall grant to Purchasers, their successors and assigns, an access easement...to, from and over...[the subject property]..., the location and condition of which shall be mutually agreed upon at a future date. Section 4.5 of the Contract for Assignment states, “**30’ Access Easement**. Seller shall grant, transfer, sell and convey to Purchaser, its successors and assigns, an access easement...to, from and over...[the subject property]..., the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road....” Paragraph 6 of the Assignment states, “**30’ ACCESS EASEMENT**. As a condition of closing, Transferor [PCA] agrees to grant, transfer, sell and convey to Transferee, its successors and assigns, an access easement...to, from and over...[the subject property]...the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road....”.

Thus, the location of the easement over the subject property, the servient estate, is clear and obvious. However, the exact location of the easement over the subject property, its condition and scope are inherently ambiguous because they were to be mutually agreed upon at the completion Pitch Fork Road. Thus, the Resolution, Contract for Assignment and Assignment are ambiguous and such ambiguities should be construed together in favor of the Plaintiff as the non-moving party. Furthermore, because the Resolution, Contract for Assignment and Assignment are ambiguous, parole evidence and extrinsic evidence should be considered by a jury to ascertain the parties’ intentions at the time the contract was entered.

Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus v. Wessinger*, 303 S.C. 412, 415 401 S.E.2d 169 (1991). The exact location of the easement over the subject property, its condition, duration and scope are not “essential elements” necessary to create an easement. *See, Smith v. Commissioners of Public Works of the City of Charleston*, 441 S.E.2d 331, 335 (S.C. Ct. App. 1994); *Douglas v. Medical Investors, Inc.*, 256 S.C. 440, 182 S.E.2d 720 (1971). For the reasons stated above, the Court erred in granting summary judgment and concluding that no material issues of fact exist in finding that the Resolution fails to meet the essential elements required in order to create a property right and in also concluding the Resolution and Contract for Assignment (which include the Assignment) as a mere “agreement to agree”.

f. In part F. of the “CONCLUSIONS OF LAW” section, the Order Granting Summary Judgment states, **“The Court takes judicial Notice that in a separate legal malpractice action that the Plaintiff has filed against its own former attorney...The Plaintiff cannot take a contrary position in this litigation, rendering its lengthy affidavit and numerous exhibits irrelevant...to conclude, it is well established that ‘courts should be particularly jealous of the integrity of judicial sales....’** (Order Granting Summary Judgment p. 11-12).

The entire conclusion of law in part “F.” is erroneous. The Court appears to be applying the doctrine of judicial estoppel against the Plaintiff, which is error. As the South Carolina Supreme Court stated in *Auto-Owners Insurance Company v. Rhodes*, 405 S.C. 584, 597-8, 748 S.E.2d 781 (2013):

Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). "The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary." *Id.*

For the doctrine of judicial estoppel to apply, the following elements must be satisfied: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the

party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Id.* at 215-16, 592 S.E.2d at 632.

The Court made no findings of fact regarding any of the elements to establish judicial estoppel. Indeed, no elements of judicial estoppel are present here.

In *Maybank 2754, LLC v. Buist, Byars & Taylor, LLC; et. al.*; Charleston County Court of Common Pleas Case # 2020-CP-10-02180 (the “malpractice case”), Plaintiff alleges it has suffered and continues to suffer damages as a result of the Defendants’ legal malpractice and breach of fiduciary duty in failing to properly record a document in the official records to put all future buyers and lenders on notice that the subject property is subject to an easement as would an attorney exercising proper judgment and oversight. The issues and theories of recovery in the malpractice case are different than the issues and theories of recovery present here.

Judicial estoppel does not apply to contradictory positions (which there are none) involving issues of law. *State v. McCall*, 364 S.C. 205, 209, 612 S.E.2d 453 (S.C. Ct. App. 2005). Furthermore, the fact a document was not recorded to put all future buyers and lenders on notice that the subject property is subject to an easement is irrelevant in the instant case (not the malpractice case) because an easement by grant is not required to be recorded to be valid, and recording is not necessary if the buyer has actual notice. *See, Frierson v. Watson*, 636 S.C. 60, 68 (Ct. App. 2006). “A purchaser of land with actual, constructive, or implied notice that the property is burdened with an easement ordinarily takes the estate subject to the easement. *Loftis v. South Carolina Elec. and Gas Co.*, 361 S.C. 434, 441 (Ct. App. 2004).

Furthermore, the complaint in the malpractice case filed after the instant case, even references the instant case. Paragraph 18 of the complaint filed in the malpractice case states, “The Property is in the process of being developed. However, upon information and belief, the development plans for the Property do not have any specific provisions or reservations for the thirty (30) foot private right of way easement upon the completion of Pitchfork Road, a consequence of which is Charleston County Court of Common Pleas Case # 2020-CP-10-00209 [the instant case], wherein Maybank is seeking a declaratory judgment for the existence of the thirty (30) foot private right of way easement, or alternatively, a declaratory judgment for the existence of a restrictive covenant, civil conspiracy and temporary injunction against the current

owner of the Property and others.” Therefore, presuming there was a judicial-estoppel-qualifying position (which there was not), the reference to the instant case in the malpractice cannot support any finding that there was an intentional effort to mislead the court, which is a necessary element the Court must find to apply judicial estoppel. Furthermore, presuming there was a judicial-estoppel-qualifying position (which there was not), there is no finding or evidence that the Plaintiff has been successful in maintaining that position and received some benefit. Again, no elements of judicial estoppel are present here and the Court did not make any such findings of fact.

Moreover, the reference in this conclusion of law that courts should be particularly jealous of the integrity of judicial sales is misplaced because court in the foreclosure case never had personal jurisdiction over the Plaintiff in the foreclosure case, and as a result, its rights and interests in the subject property were never extinguished or impacted by the foreclosure judgment. *See, Green Tree Servicing, LLC v. Adams*, 375 S.C. 583; 654 S.E.2d 100 (S.C. Ct. App. 2007). A judgment is void if a court acts without personal jurisdiction. *See, Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). A court generally obtains personal jurisdiction by the service of a summons. *See, Ex parte S.C. Dep't of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002) (citing *State v. Sanders*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920). (“The purpose of the summons is to acquire jurisdiction of the person of the defendant.. . .”))

It was error for the court to rule that Plaintiff’s “lengthy affidavit and numerous exhibits” was irrelevant on the basis of judicial estoppel. It was error for the Court to apply judicial estoppel in this case. Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus v. Wessinger*, 303 S.C. 412, 415 401 S.E.2d 169 (1991).

g. In part G. of the “CONCLUSIONS OF LAW” section, the Order Granting Summary Judgment states, **“Mitch Laplante, as the manager of PCA and controlling member, now manager, of Maybank 2754, is estopped from having Maybank 2754 raise the issue of an easement because he failed to ever raise its existence in neither the PCA Judicial Dissolution lawsuit of [sic] the Wells Fargo foreclosure action...Laplante was named defendant in the foreclosure action; was Manager of PCA; was the controlling member of**

Maybank...Laplante, as the manager of PCA and controlling member of Maybank and a self-touted real estate developer, failed to mention the existence of the ‘easement’ and now, years later, attempts to relitigate the issue. Collateral estoppel will bar the relitigation of an issue which was actually litigated and necessary to the outcome of a prior lawsuit...Maybank’s ‘absence from the previous...lawsuit does not insulate it from issue preclusion’...The June 23, 2017, Foreclosure Order is now the law of the case because it involves the same parties and the same property.... ” (Order Granting Summary Judgment p. 12-16) (citations omitted).

The entire conclusion of law in part “G.” is erroneous. As set forth in the Affidavit, Laplante was not the manager of Maybank at the time of the foreclosure action, which makes this conclusion of law incorrect and its apparent factual basis misplaced. Pursuant to paragraph 9 of the Assignment attached to the Contract for Assignment, Laplante only had a voting percentage of 25% at the time of the foreclosure action (not a majority of the voting percentage), which makes this conclusion of law incorrect and its apparent factual basis misplaced. The reliance by the Court on the June 23, 2017 Foreclosure Order is error.

The fact that Laplante had knowledge of the foreclosure case does not overcome the necessity of service of process to properly establish jurisdiction against Maybank, John, Marianne and Peter and to ultimately bind them to the judgment. *See, Green Tree Servicing, LLC v. Adams*, 375 S.C. 583; 654 S.E.2d 100 (S.C. Ct. App. 2007) (“A court may not act against a party without personal jurisdiction...a court should not render a judgment affecting the rights of a party without proper notice.”). A judgment is void if a court acts without personal jurisdiction. *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). A court generally obtains personal jurisdiction by the service of a summons. *Ex parte S.C. Dep’t of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002) (citing *State v. Sanders*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920). (“The purpose of the summons is to acquire jurisdiction of the person of the defendant.. .”).

Furthermore, the party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *See, Carolina Renewal, Inc., v. S.C. Dep’t of Transp.*, 285 S.C. 550, 554-5, 685 S.E.2d 779 (S.C. Ct. App. 2009). The issues of

whether the issue of the subject easement was litigated in the foreclosure action, directly determined in the prior action, and necessary to support the prior judgment are existing genuine issues of material fact that should preclude the entry of summary judgment. The issue of the existence of the easement was not actually litigated, directly determined and necessary to support the foreclosure judgment in the foreclosure action. There is no evidence supporting that the easement was actually litigated, directly determined and necessary to support the prior judgment, and to the extent that the Court relied upon the foreclosure judgment, the conclusions therefrom should be construed in favor of the Plaintiff. Furthermore, paragraph 40 of the Affidavit states that the subject easement was neither the subject of, nor specifically referenced in, the foreclosure case. At best, this conclusion of law is an inference that should be construed against the Defendants. Furthermore, as explained above, the Foreclosure Order itself states in Paragraph 3.b. that “**The sale shall be subject to taxes, assessments, existing easements, and easements and restrictions of record.**” (emphasis added). Thus, the elements necessary to establish collateral estoppel do not exist. However, what does exist are material issues of fact as to whether the easement was actually litigated in the prior action, directly determined in the prior action; and necessary to support the prior judgment. Furthermore, there is an inference that because Laplante was severed from the foreclosure claim, and neither Plaintiff, John, Marianne nor Peter were named as parties nor served with process that the existence of the easement was not actually litigated or directly determined in the foreclosure action. Additionally, the existence of the easement was not obviously unnecessary to support the foreclosure judgment as inferred by Laplante’s severance from the foreclosure claim and Plaintiff, John, Marianne and Peter not being named as parties therein.

“Estoppel by silence arises when the estopped party **owes a duty** to speak to the other party but refrains from doing so, thereby leading the other party to believe in an erroneous state of facts.” *Provident Life and Cc. Ins. Co. v. Driver*, 451 S.E.2 924, 928 (S.C. Ct. App. 1994) (emphasis added). Laplante did not owe a duty to speak to anyone about the easement in the dissolution and foreclosure cases and the Order Granting Summary Judgment does not explain from where such duty arises. Furthermore, Zurlo, who was a party in both the dissolution and foreclosure cases, knew about the easement because he signed the Resolution. Thus, even if Laplante owed a duty to inform the opposing parties in the dissolution and foreclosure cases about the easement (which he did not), genuine issues of material fact exist as to whether anyone

was led to believe in an erroneous state of facts and relied upon those facts to their detriment, which therefore preclude the application of estoppel by silence.

The June 23, 2017 Order in the foreclosure case is not the law in this case. To conclude otherwise, is to violate fundamental principles of due process. Again, the Master-in-Equity never had personal jurisdiction over the Plaintiff, John, Marianne or Peter in the foreclosure case, and as a result, its rights and interests in the subject property were never extinguished or impacted by the foreclosure judgment. *See, Green Tree Servicing, LLC v. Adams*, 375 S.C. 583; 654 S.E.2d 100 (S.C. Ct. App. 2007); *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995); *Ex parte S.C. Dep't of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002) (citing *State v. Sanders*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920

Furthermore, assuming arguendo that the June 23, 2017 Foreclosure Order, is the law of the case (which it is not), the Foreclosure Sale did not impact the subject easement. The Foreclosure Order itself states in Paragraph 3.b. that “**The sale shall be subject to taxes, assessments, existing easements, and easements and restrictions of record.**” (emphasis added).

The Court also concluded that the doctrine of laches applies and stated, “**Plaintiff’s unreasonable delay in asserting its rights has resulted and continues to result in prejudice to the Beach Entities and other defendants.**” (Order Granting Summary Judgment p. 13-14 n. 6). The conclusion that laches applies to the Plaintiff is error.

“Laches is the *negligent* failure to act for an unreasonable period of time.” (citation omitted) (emphasis in original). *Siau v. Kassel*, 369 S.C. 631, 642, 632 S.E.2d 888 (S.C. Ct. App. 2006). “In order to establish laches as a defense, a defendant must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the defendant. *Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465 (2007) (citation omitted). “Delay alone is not enough to constitute laches; it must be unreasonable, and the party asserting laches must show prejudice.” *Queens Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 359, 628 S.E.2d 902 (S.C. Ct. App. 2006) (citations omitted). “Laches is a defense in equity, and one who comes to the court seeking equity must come with clean hands.” *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598 (S.C. Ct. App. 2004). (citations omitted).

There is no evidentiary basis for the Court’s conclusion that laches applies against the Plaintiff. There has been no finding by the Court as to how the Plaintiff was negligent to act for

an unreasonable period of time and how the Defendants were prejudiced. Indeed, there are genuine issues of material fact as to the application of laches. For example, genuine material issues of fact exist as to whether Plaintiff was negligent to act, and especially in light of the fact that Pitch Fork Road has not yet been constructed. Zurlo's and The Beach Company's actual knowledge of the easement, which is also imputed to Beach Fenwick, LLC, before 1776, LLC, transferred the subject property to Beach Fenwick, LLC, create material issues of fact as to the prejudice element. Also, 1776, LLC, did not enter into the Development Agreement with the City of Charleston until November 27, 2019, less than two months before this lawsuit was initiated, thereby causing the subject property to be primed for development without any reservation or provision for the Plaintiff's easement, which therefore creates genuine material issues of fact relative to the unreasonable period of time to act element. Furthermore, genuine issues of material fact relative to the application of equitable estoppel and/or unclean hands against the Defendants exist, which should therefore preclude the entry of summary judgment on the basis of laches. Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus v. Wessinger*, 303 S.C. 412, 415 401 S.E.2d 169 (1991).

Conclusion

For the reasons set forth herein, Defendants' motions for summary judgment should be denied as genuine issues of material fact exist. Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus v. Wessinger*, 303 S.C. 412, 415 401 S.E.2d 169 (1991). Plaintiff's Motion to Amend Complaint should be granted. Rule 15(a) "strongly favors amendments and the court is encouraged to freely grant leave to amend." *Patton v. Miller*, 420 S.C. 471, 489-90, 804 S.E.2d 252, 261 (2017) (quoting *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (S.C. Ct. App. 2005)). Furthermore, the Court should rule on the issues raised by Plaintiff as requested herein.

WHEREFORE, Plaintiff requests that the Court enter an order amending or altering the 10.7.20 Order and the 10.8.20 Order to state the Court's findings of fact and conclusions of law (presuming the Order Granting Summary Judgment did not so) and ultimately denying Defendants' motions for summary judgment and granting Plaintiff's Motion to Amend

Complaint; amending or vacating the findings of fact in the Order Granting Summary Judgment as set forth above (presuming the Order Granting Summary Judgment did amend or supplement the 10.7.20 Order and the 10.8.20 Order); amending or altering the Order Granting Summary Judgment to deny Defendants' motions for summary judgment and to grant Plaintiff's Motion to Amend Complaint; ruling on the issues for which Plaintiff has requested a ruling as set forth herein; and granting such further relief as this Court deems just and proper.

Respectfully submitted,

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TAMPA, FL 33679
813-922-5510
jason@tarokhlaw.com

s/ Jason M. Tarokh
JASON M. TAROKH
S. CAROLINA BAR # 72837

October 16, 2020

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP1000209

Maybank 2754 Llc
PLAINTIFF(S)

Eugene J Zurlo et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant Eugene Zurlo's Motion for Summary Judgment is GRANTED. Defendant The Beach Company's Motion for Summary Judgment is GRANTED. Plaintiff's Motion to Amend Complaint is DENIED. Defendant Seamon Whiteside and Associates Inc.'s Motion to Supplement/Motion to Dismiss is GRANTED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/05/2020 .

Mary Roe
John Doe

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Charleston Common Pleas

Case Caption: Maybank 2754 Llc VS Eugene J Zurlo , defendant, et al
Case Number: 2020CP1000209
Type: Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2020-10-05 10:05:35 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP1000209

Maybank 2754 Llc
PLAINTIFF(S)

John Doe et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

The Order is a supplement to the Form 4 filed on October 7, 2020.

Defendant 1776, LLC's Motion for Summary Judgment is GRANTED. Defendants The Beach Company and Beach Fenwick's Motion for Summary Judgment is GRANTED.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/08/2020 .

Mary Roe
John Doe

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCF.



Charleston Common Pleas

Case Caption: Maybank 2754 Llc VS Eugene J Zurlo , defendant, et al
Case Number: 2020CP1000209
Type: Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2020-10-08 11:50:57 page 3 of 3

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ELECTRONICALLY FILED - 2020 Oct 08 12:22 PM - CHARLESTON - COMMON PLEAS - CASE#2020CP1000209

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as
Co-Trustee of the Eugene J. Zurlo Living
Trust Dated December 11, 1997; 1776, LLC;
BEACH FENWICK, LLC; THE BEACH
COMPANY; SEAMON, WHITESIDE &
ASSOCIATES, INC.; PENNY CREEK
ASSOCIATES, LLC; JOHN DOE AND
MARY ROE,

Defendants.

**ORDER GRANTING ALL DEFENDANTS
SUMMARY JUDGMENT**

This case was filed by the Plaintiff on January 13, 2020. The five Defendants all filed Responsive Pleadings in a timely fashion to include Motions to Dismiss, Answers and Motions for Summary Judgment

On June 30, 2020, I referred the entire case to the Master in Equity, who by Order Dated 17, 2020, referred the entire case back to me.

These pending dispositive Motions were heard by me at a Hearing on September 24, 2020.

- Beach Motion to Dismiss filed on February 17, 2020;
- Seamon Whiteside Motion to Dismiss filed on February 20, 2020;
- Zurlo Parties Motion for Summary Judgment filed on August 14, 2020;
- Beach Motion for Summary Judgment filed on August 19, 2020;
- Seamon Whiteside Supplemental Motion to Dismiss/Motion for Summary Judgment filed on August 26, 2020; and

“Exhibit C”

- 1776 Motion for Summary Judgment filed on September 3, 2020.

Plaintiff filed a Motion to Amend its Original Complaint, which was filed after all the pending Motions, except for 1776's Motion for Summary Judgment, which merely incorporated by reference the legal arguments made by all the other Defendants in their filings. Seamon Whiteside also filed its Motion for Summary Judgment after Plaintiff filed its Motion to Amend its Complaint.

The Zurlo Parties requested that the Court hear the Motions to Dismiss and for Summary Judgment based on the original Complaint filed on January 13, 2020. That makes perfect sense to hear the Motions in the order they were filed, and if the Court decides these should be denied, the Court may allow the Amendment to the original Complaint and refiling of Motions to Dismiss and Motions for Summary Judgment.

The Zurlo Parties also requested that the Court rule on the pending Motions in order of filing before the Motion to Amend, which ruling will not affect the currently pending appeal.

The Court takes judicial notice of the fact that the most significant addition to the proposed Amended Complaint is the addition of the City of Charleston as a named Defendant, but no relief is sought from the City. The Plaintiff just wants the City to be bound by whatever final judgment is rendered in this case.

1. FINDINGS OF FACT:

The factual history involving the Plaintiff's claim to a future easement is not in dispute. In summary, based on the Plaintiff's Complaint, the Responsive Pleadings of all Defendants, and the Exhibits attached to the various Motions, in 1999 Mitch Laplante ("Laplante") and the Eugene J. Zurlo Living Trust Dated December 11, 1997 ("Zurlo Trust"), created Penny Creek Associates, LLC ("PCA") to purchase and develop approximately 60 acres of property along Maybank

Highway on Johns Island, South Carolina. Laplante was a 50% voting member, he and his family were 50% members of PCA, and the Zurlo Trust was the other 50% member.

In December of 2013, Zurlo initiated an action, individually and derivatively, on behalf of PCA against Laplante and others seeking several remedies to include an accounting, appointment of a new manager, and judicial dissolution of PCA. That matter ultimately was resolved, with the terms of the settlement placed on the record before Judge Markley Dennis on February 29, 2016. PCA was to wind up its business, sell its real estate, and ultimately terminate its LLC status.

In 2014, Wells Fargo commenced a foreclosure action against PCA and its members based on two mortgages that it had placed on the property in 2000 and 2006. (See, Case No.: 2014-CP-10-04946, filed with the Charleston County Clerk of Court and Order of Foreclosure and Judgment filed in that case on June 23, 2017.) Based upon various allegations and matters set forth in that action, which was referred to the Master-in-Equity for disposition, the Master-in-Equity issued its Order of Judgment of Foreclosure and Sale which was filed June 23, 2017. The question of the 30-foot future easement never was raised in the PCA litigation nor the Foreclosure litigation.

The alleged future springing easement never was recorded, nor was it ever subordinated to the two Wells Fargo mortgages, which were recorded well before the date of the Resolution Plaintiff relies on to establish its easement in October 2013.

The Foreclosure Order notes that “all persons whosoever claiming under the defendants be forever barred and foreclosed of all right, title, interest, and equity of redemption in the Subject Property” and specifically retained jurisdiction “to do all necessary acts incident to this foreclosure and to hear any post-judgment matters.”

Pursuant to this Order, certain properties of PCA were sold in August 2017 to 1776, LLC. In December of 2019, Beach Fenwick, LLC purchased a certain 22-acre tract of the referenced

property from 1776, LLC. Laplante, individually was a named party to the foreclosure action, and at the relevant time, was the managing partner of PCA. Laplante's knowledge and conduct is, therefore, imputed to Maybank. See *In re Infinity Bus. Grp., Inc.*, 497 B.R. 794, 813 (Bankr. D.S.C. 2013); S.C. Code § 33-44-120.

Maybank 2754 is a limited liability company organized pursuant to the laws of the State of South Carolina. Laplante is its managing member. Maybank relies upon a document entitled Resolution of the Sole Shareholder of Penny Creek Associates, LLC, dated October 7, 2013, for its claim of a future easement across the former PCA property purchased by Beach Fenwick, LLC from 1776, LLC ("Subject Property"). The referenced resolution provides, inter alia:

...the Company [PCA] has agreed to grant transfer, sell and convey to Purchasers [Laplante, John H. Laplante, Peter F. Laplante, Marianne Laplante-Scarlata], their successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of Seller [PCA] known as "Residual Tract B-2-2"...the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road ("Pitch Fork Road"). Upon the completion of Pitch Fork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30' Private R/W. ("Future Easement")

Plaintiff avers in its Complaint that Pitch Fork Road has not been completed and admits the "Future Easement" never was recorded.

It is the claim of that future easement, and matters attendant thereto, that give rise to this action.

2. SUMMARY JUDGMENT STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as

a matter of law.”¹ With respect to an issue upon which the non-moving party bears the burden of proof, the moving party may discharge his initial responsibility by pointing out to the Court the absence of evidence to support the non-moving party’s case.² After the moving party has met his initial burden, Rule 56(e) requires the opposing party to “do more than simply show that there is some metaphysical doubt as to the material facts.”³ In response to a properly supported motion for summary judgment, the opposing party “must come forward with specific facts showing there is a genuine issue of material fact.”⁴ In 2015, a unanimous South Carolina Supreme Court explained (in an opinion reversing the appellate court’s reversal of summary judgment and reinstating the trial court’s summary judgment ruling):

““In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party.”” *Quail Hill, L.L.C. v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (emphasis added) (quoting *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006)). Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, “it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.” *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) (citing *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct.App.2006)).⁵

Courts are reluctant to dismiss cases at the Summary Judgment stage, even if there is no legal or factual basis for the case to proceed. However, reviewing just the Plaintiff’s Complaint and Responses to the Zurlo Parties’ Request to Admit in this case, there is no genuine issue as to the very material fact that the Wells Fargo foreclosure action voided any recorded or unrecorded

¹ Rule 56, *SCRCP*.

² *Baughman v. American Tel & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

³ *Id.*

⁴ *Id.*; see also Rule 56(e), *SCRCP*.

⁵ *Grimsley v. S.C. Law Enft Div.*, 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015).

easement not subordinated to the Wells Fargo mortgages, and Plaintiff admits there is no written, recorded easement so all the parties are entitled to summary judgment as a matter of law.

With no facts to support a claim, and no law on Plaintiff's side, then the court should dismiss the case to avoid prolonged futile time and expenses to all the parties. See *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 150, 810 S.E.2d 41, 45 (Ct. App. 2018), *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) (citing *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct.App.2006)).

“Although summary judgment is a drastic remedy which should be cautiously invoked, where a verdict is not reasonably possible under the facts presented, summary judgment is proper.” *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006)

3. THE COURT HAS THE JURISDICTION AND DISCRETION TO HEAR THE DISPOSITIVE MOTIONS NOW

The Court has the discretion, jurisdiction and ability to address all dispositive Motions filed to date before addressing the Plaintiff's Motion to Amend its Complaint for the following reasons:

- A. The Appeal does not stay matters not affected by the appeal and the lower Court retains jurisdiction over matters not affected by the appeal. SCACR 225 and SCACR 241 (a).

See also Judge Scarborough's bench rulings: Transcript of 8/10 Hearing, Pages13-14. "Filing an Appeal does not stay the Court's jurisdiction to hear Motions to Dismiss and Motions for Summary Judgment." TRANSCRIPT attached as Exhibit A to Zurlo parties supplemental Memorandum of Law

- B. All parties except PCA have filed Motions to Dismiss or Motions for Summary Judgment. The issue of the existence of an easement or not is legal -also possibly a jury- matter. The court agrees with Judge Scarborough who says the threshold

issue of whether there is legally enough evidence for an easement to exist is a matter of law threshold question. See: Transcript of 8/10 Hearing, Page 14.

- C. The court also takes judicial notice that the Plaintiff alleges that his former lawyer and law firm failed to legally prefect the easement by putting it in written form and failing to record the easement in the ROD office for Charleston County so as to provide actual and or constructive notice to the public and these Defendants of the alleged 30 foot private right of way easement. See Complaint: Maybank 2754, LLC v Buist, Byars & Taylor, LLC; Custis M. Byars (2020-CP-10-02180) and Affidavit of Lisa Brown averring the agreement to create an easement should have been recorded in October 2013 "...to put all future buyers and lenders on notice that Tract -B-2-2 is subject to an easement." See: Complaint and Affidavit attached as EXHIBIT B to the Zurlo parties Supplemental Memo.
- D. The threshold legal issue is whether there is a legally enforceable easement. This legal issue will have to be heard by the Court before trial - so waiting for the Court of Appeals to decide to send the case back to Circuit Court for a jury trial only will prolong this question.

4. CONCLUSIONS OF LAW

The Court finds as a matter of law there is no legal right to an easement based on the pleadings, the Motions for Summary Judgment, the affidavits submitted and the able arguments of counsel at the September 24, 2020 hearing, for the following reason:

- A. Assuming for the sake of argument the October 2013 Resolution created some form of an easement, it never was subordinated to the Wells Fargo Mortgage and was therefore foreclosed upon in 2017, rendering the easement void and of no effect.

See S.C. Code Ann. § 30-7-20 (“The recordation of any contract in the nature of a subordination, waiver or extension of any lien on real property, created by law or by agreement of the parties, shall be upon the record of the recorded mortgage or other written instrument...”). Even if there was an easement, it did not survive the recent foreclosure of first-in-time, prior-recorded, bank-owned mortgages arising in 2000 and 2006 that never were subordinated by the bank to the later-in-time, unrecorded purported easement, alleged by the Plaintiff to have arisen in 2013 by way of a Resolution referencing the grant of a future easement. See S.C. Code Ann. § 30-7-20 (“The recordation of any contract in the nature of a subordination, waiver or extension of any lien on real property, created by law or by agreement of the parties, shall be upon the record of the recorded mortgage or other written instrument...”) (emphasis added).

These facts are all matters of record over which there can be no factual or legal dispute. See Complaint at ¶14; Wells Fargo v. Penny Creek Associates, et al., Civil Action No. 2014-CP-10-4946 (Charleston County, Filed May 26, 2014); Mortgage recorded in the Register of Deeds in Charleston County on August 8, 2000, in Book P-532, at Page 613; Mortgage recorded in the Register of Deeds in Charleston County on April 7, 2006, in Book G-579, at Page 249.

Further, the Plaintiff already had judicially admitted that its alleged easement was extinguished in the bank’s foreclosure action.

While A above is reason enough to grant Summary Judgment to all Defendants, ending the case, the Court notes but does not rely on the following Additional Sustaining Grounds for granting Summary Judgment to all defendants.

- B. The October 7, 2013, Resolution on which Plaintiff relies (The Resolution) never was recorded, nor was there any recording of the intention to place a future easement on the property PCA owned which is now owned by Beach Fenwick, LLC. This prevented actual or constructive Notice of the future easement's alleged existence.

If the instrument under which rights are claimed is not recorded within a specific time, a subsequent creditor, or purchaser for value without actual notice, will not be affected. *Epps v. McCallum Realty Co.* 139 S.C. 481, 138 S.E. 297, 302 (1927);

- C. The Resolution fails to meet the essential elements required in order to create a property right.

The description of the alleged future springing easement lacks any identifiable location or condition, the duration of the easement or its scope. "A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) (citing 28A C.J.S. Easements §57, at 235 (1996));

- D. Assuming for the sake of argument the Resolution created an easement, the easement is one in gross and therefore is not transferrable to the Plaintiff.

An easement is either appurtenant or in gross. *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965). An appurtenant easement inheres in the land,

concerns the premises, has one terminus on the land of the party claiming it, *and* is essentially necessary to the enjoyment thereof. *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997); *Windham v. Riddle*, 381 S.C. 192, 672 S.E.2d 578, (2009) (citations omitted) (emphasis added). It also passes with the dominant estate upon conveyance. *Id.* (citing *Carolina Land Co., Inc. v. Bland*, 265 S.C. 98, 217 S.E.2d 16 (1975)). Unless an easement has all the elements necessary to establish an appurtenant easement, it will be characterized as an easement in gross. *Id.* (citing 12 S.C. Juris. *Easements* § 3(c)). “An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer.” *Id.* 381 S.C. at 201-02, 672 S.E.2d at 583. Where language in a plat reflecting an easement is capable of more than one construction, that construction which least restricts the property will be adopted. *Hamilton v. CCM, Inc.*, 274 S.C. 152, 263 S.E.2d 378 (1980);

- E. At best, the Resolution creates “an agreement to agree”, which does not amount to a contract in South Carolina.

An “agreement to agree” does not amount to a contract under South Carolina law. *BCD LLC v. BMW Mfg. Co., LLC*, 360 F. App'x 428, 435 (4th Cir. 2010) (citing *Trident Constr. Co., Inc. v. Austin Co.*, 272 F.Supp.2d 566, 575 (D.S.C.2003)). “The parties merely agreed to enter into negotiations to reach an agreement, but subsequently failed to reach an actual agreement on essential terms pertaining to land allocations, divisions of parcels, and restrictive covenants for the property.” *Id.* This is precisely what happened here, and Plaintiff admits as much. See June 25, 2020 Tr., 47:20 – 48:1 (Exhibit 1). The unrecorded Resolution, or more

precisely, the unrecorded contract referenced therein but not provided until after the filing of this action, purportedly is a contractual right for the Seller (PCA) and Buyer (Laplante Family) to agree in the future to create an easement. In South Carolina, this agreement to agree does not amount to a contract and cannot detrimentally impact future purchases of the property because the parties “subsequently failed to reach an actual agreement on essential terms pertaining to land allocations ... and restrictive covenants for the property.” *BCD LLC*, at 435; *see also Burbach Broadcasting Co. of Delaware v. Elkins Radio Corp.*, 278 F.3d 401, 407 (4th Cir.2002) ;

F. The Court takes judicial Notice that in a separate legal malpractice action that the Plaintiff filed against its own former attorney, the Plaintiff alleged:

21. BBT and Byars were careless and negligent failing to record the Resolution, or failing to prepare and record a document, in the office of the Register of Deeds (formerly, Register of Mesne Conveyance) of Charleston County, South Carolina so as to provide constructive knowledge to the public of the existence of the thirty (30) foot private right of way easement.

22. As a direct and proximate result of the Defendants’ breach of the above-described duty owed to Maybank, Maybank has suffered, and continues to suffer, damage.

23. Additionally, Maybank has suffered special damages in that its adjacent lot has lost the value of a (30) foot private right of way easement across the Property.

Maybank 2754, LLC v. Buist, Byars & Taylor, LLC et al., Civil Action No. 2020-CP 1001811 (Charleston County, Filed April 13, 2020).

The affidavit that the Plaintiff filed in support of its legal malpractice claim stated: “...the agreement should have been recorded at the time of closing to put all future buyers and lenders on notice that [the property] is subject to an easement.” Id. (Affidavit of Lisa Brown, Filed May 14, 2020).

The Plaintiff cannot take a contrary position in this litigation, rendering its lengthy affidavit and numerous exhibits irrelevant. See *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410, 416 (1964) (“[A]llegations, statements or admissions contained in a pleading are conclusive as against the pleader.”); *Quinn v. Sharon Corp.*, 540 S.E.2d 474, 480, 343 S.C. 411, 423 (Ct. App. 2000) (“[T]he fact a litigant is using the court as a forum for his inconsistent statements injures the judicial system; therefore, such abuse must be avoided under all circumstances.”); see also *Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co., Inc.*, 976 F.2d 58, 61 (1st Cir. 1992) (“plaintiff should not be allowed to contradict its express factual assertion in an attempt to avoid summary judgment”).

To conclude, it is well established that “courts should be particularly jealous of the integrity of judicial sales” and should not “rewrite the terms of sale after the sale.” *Ex Parte Johnson*, 640 S.E.2d 887 (Ct. App. 2006) (quoting *In re Wilson*, 141 S.C. 60, 63, 139 S.E. 171, 172 (1927));

- G. Mitch Laplante, as the manager of PCA and controlling member, now manager, of Maybank 2754, is estopped from having Maybank 2754 raise the issue of an

easement because he failed to ever raise its existence in neither the PCA Judicial Dissolution lawsuit of the Wells Fargo foreclosure action.

Wells Fargo commenced a foreclosure action in 2014 against PCA and its members, pursuant to which it foreclosed its lien upon the Original Tract. (*See*, Case No.: 2014-CP-10-04946, filed with the Charleston County Clerk of Court). The Master-in-Equity's Foreclosure Order dated June 23, 2017, foreclosed and barred all future claims related to the property or any interest in the property in question.

Laplante was a named defendant in the foreclosure action; was Manager of PCA; was the controlling member of Maybank; was represented by counsel; filed cross claims in the foreclosure action; and was present at the June 19, 2017, hearing when testimony and exhibits concerning the foreclosure were presented to the Court. The June 23, 2017, Foreclosure Order made no exception or mention for an easement and there was no easement noted on any plat. Indeed, the Master-In-Equity further entered a Consent Order amending the property description of the Original Tract because the parties identified a mistake in the legal description. (Exhibit 2). Laplante, as the manager of PCA and controlling member of Maybank and a self-touted real estate developer, failed to mention the existence of the "easement" and now, years later, attempts to relitigate the issue. "Collateral estoppel will bar the relitigation of an issue which was actually litigated and necessary to the outcome of a prior lawsuit." *McNaughton–McKay Elec. Co. of N.C. v. Andrich*, 324 S.C. 275, 279, 482 S.E.2d 564, 566 (Ct. App. 1997).⁶ Maybank's "absence from the

⁶ "Laches is an equitable doctrine defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.'" *Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469

previous ... lawsuit does not insulate it from issue preclusion.” *Carolina Renewal, Inc. v. S.C. Dep’t of Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009).

Here, Laplante’s knowledge is imputed to Plaintiff. S.C. Code Ann. § 33-44-102. Maybank, through its manager, Laplante, had a “full and fair opportunity to previously litigate the issue” in the foreclosure action. *See Carolina Renewal, Inc.*, at 555, 684 S.E.2d at 782. Maybank was not a party to the foreclosure action because it did not possess a real property interest in the Original Tract, including the Subject Property. The record of the foreclosure action reveals that Laplante actively participated in that proceeding, making no mention in any of his pleadings or at the foreclosure hearing of any alleged property interest of Maybank.

This issue of a description of property rights and existing easements on the Original Tract, including the Subject Property, was actually litigated in the foreclosure; the Master-In-Equity fully determined the property rights to be sold, leaving no question what the buyer was acquiring. The breadth of the property rights was further solidified upon the revision of the original Order to amend the property description. Lastly, estopping Plaintiff is necessary to support the prior judgment/foreclosure order because the sale of the subject property could be revisited if the rights acquired/sold through the foreclosure subsequently changed. Moreover, “it is a well-established principle in South Carolina that estoppel by silence arises when one party observes another dealing with his property in a

(2007) (citation omitted). Plaintiff’s unreasonable delay in asserting its rights has resulted and continues to result in prejudice to the Beach Entities and other defendants.

manner inconsistent with his rights and makes no objection while the other party changes his position based on the party's silence.” *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 358, 628 S.E.2d 902, 911 (Ct. App. 2006) (citing *Seabrook Island Property Owners Association v. Pelzer*, 292 S.C. 343, 356 S.E.2d 411 (Ct.App.1987)). Maybank’s silence, through its controlling member and current manager, Laplante, constitutes estoppel by silence. Laplante maintained silence through the Dissolution Action as to any purported right of Maybank to an easement, and likewise maintained silence through the Foreclosure Action, thus constituting estoppel by silence, preventing Maybank from making claims at this point, in this action, as to an easement.

The June 23, 2017, Foreclosure Order is now the law of the case because it involves the same parties and the same property. By bringing this action, Maybank seeks to have a circuit court judge collaterally attack the Master’s Foreclosure Order. It is a cardinal rule in South Carolina that one Circuit Court should not overrule another, especially when the other circuit court judge has retained jurisdiction. *See Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003) (holding that a family court judge could not overrule the prior unappealed order of another family court judge because it had become law of the case); *In re Morrison*, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *Cooper Tire & Rubber Co. v. Perry et al.*, 261 S.C. 538, 201 S.E.2d 245 (1973) (holding that where a ruling on a demurrer to complaint is not appealed from, it becomes the law of the case); *Watkins v. Hodge*, 232 S.C. 245, 247–48, 101 S.E.2d 657, 658 (1958) (refusing to

consider jurisdictional matter of underlying case where issue had been ruled upon and not challenged on appeal). *Judy v. Martin*, 381 S.C. 455, 458–59, 674 S.E.2d 151, 153 (2009).

ORDER

No genuine issue of material fact exists to prolong this litigation; therefore, it is Ordered that the Defendants’ Motions for Summary Judgment are hereby granted, and this matter is dismissed in its entirety.

AND IT IS SO ORDERED.

Bentley Price
Presiding Judge-Ninth Judicial Circuit

Charleston, S.C.

October _____, 2020



Charleston Common Pleas

Case Caption: Maybank 2754 Llc VS Eugene J Zurlo , defendant, et al
Case Number: 2020CP1000209
Type: Order/Summary Judgment

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2020-10-09 11:43:22 page 17 of 17

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	2020-CP-10-00209
MAYBANK 2754, LLC, Plaintiff, v. EUGENE J. ZURLO, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997; 1776, LLC; BEACH FENWICK, LLC; THE BEACH COMPANY; SEAMON, WHITESIDE & ASSOCIATES, INC.; PENNY CREEK ASSOCIATES, LLC; JOHN DOE AND MARY ROE, Defendants.	DEFENDANT EUGENE J. ZURLO, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997's RESPONSE TO PLAINTIFF'S MOTION TO AMEND OR ALTER JUDGMENT

Eugene J. Zurlo, individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997 ("Zurlo Parties"), by and through counsel, responds to the Plaintiff's Motion to Amend or Alter Judgment filed on October 16, 2020.

THE COURT HAD JURISDICTION TO HEAR ALL THE MOTIONS FOR SUMMARY JUDGMENT PENDING AT THE TIME OF THE SEPTEMBER 24, 2020 HEARING

South Carolina Rules of Appellate Procedure 205 and 241 (a) gave the Court the right to hear the pending Summary Judgment Motions and Plaintiff's Motion to Amend the Complaint on September 24, 2020, a fact conceded by the Plaintiff on Page 6, lines 9-24 of the September 24, 2020, Hearing transcript and again on Page 10, lines 23-25, and Page 11, lines 1-4 where Plaintiff's counsel stated on the record that even though an appeal of an earlier order referring this case to the Master-in-Equity was technically still active, "*... regardless of the fact that it's (i.e. the Appeal) pending, we're ready to proceed and address the issues related to their summary judgment and my motion to amend the complaint.*"

So, under these circumstances, if the Court is ready to proceed, we're here and ready to proceed on all those other motions.”

THE COURT SHOULD NOT RECONSIDER ITS PRIOR RULING, NOR SHOULD IT ALTER OR AMEND ITS JUDGMENT

Even though the Plaintiff's Managing Member, Mitch LaPlante (“Laplante”), has been involved with the Subject 22 acre property over which a future springing 30 ft. ROW easement is sought, initially as a 50% voting member of Penny Creek Associates, LLC (PCA) since 1999, and then as a member and then managing member of Maybank 2754 since 2005, even though LaPlante alleges that he and his family have a “contentious history” with his former PCA 50% partner the Zurlo trust (Complaint, P. 21), he still seeks to avoid: (1) a South Carolina statutory requirement that requires the recordation of a subordination agreement for an easement to survive a mortgage foreclosure (SC Code Ann. 30-7-20), (2) the settlement of the 2013 Judicial Dissolution litigation he was a party to as a member and manager of PCA, and (3) the 2014 Wells Fargo foreclosure litigation.

SC Code Ann. 30-7-20 alone is reason for granting Summary Judgment since it requires “The recordation of any contract in the nature of a subordination, waiver or extension of any lien on real party, created by law or agreement of the parties, **shall** be upon the record of the recorded mortgage or other written instrument...” (emphasis added to show this is a mandatory, not precatory, requirement).

LaPlante testified in the foreclosure hearing that “I am a big guy. I have accepted that.”, acknowledging that PCA was going to lose all its property and unsubordinated, unrecorded rights in the foreclosure (Foreclosure Hearing Transcript, June 19, 2019, P. 24, lines 19-22. “...he (the other member of PCA) was going to force it into foreclosure, buy it, and squeeze me out. That

looks like what's happening. I'm a big guy. I've accepted that". (Wells *Fargo, NA v PCA, et. al.*, Case No. 2014-CP-10-04946).

Not only was the alleged 30 ft ROW future springing easement over former PCA land not legally effective, but giving the Plaintiff an unwarranted assumption that it may have been intended, it was never recorded nor subordinated to the two prior Wells Fargo mortgages, rendering the purported easement void and of no force and effect.

Maybank has filed a legal malpractice case against its former law firm, admitting there is no legally valid easement, "as a result of that law firm ...careless and negligent failing to record the Resolution, or failing to prepare and record a document in the ROD office of Charleston County so as to provide constructive knowledge to the public of the existence of the thirty (30) foot private right of way easement" (Complaint: P.21 -23 *Maybank 2754 v Buist, Byars & Taylor, et. al.* Case No. 2020-CP-10-02180). The Plaintiff cannot take a contrary position in this litigation, rendering its lengthy affidavit and numerous exhibits in the malpractice case irrelevant. See *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410, 416 (1964) ("[A]llegations, statements or admissions contained in a pleading are conclusive as against the pleader."); *Quinn v. Sharon Corp.*, 540 S.E.2d 474, 480, 343 S.C. 411, 423 (Ct. App. 2000).

LaPlante just cannot accept the fact that Maybank has no case here. As the Court stated in its October 16, 2020, Order, "...*reviewing just the Plaintiff's Complaint and Responses to the Zurlo Parties' Request to Admit in this case, there is no genuine issue as to the very material fact that the Wells Fargo foreclosure action voided any recorded or unrecorded easement not subordinated to the Wells Fargo mortgages, and Plaintiff admits there is no written, recorded easement so all the parties are entitled to summary judgment as a matter of law.*"

The Court's October 7, 2020 Form 4 Order; October 8, 2020 Supplemental Form 4 Order; and October 16, 2020 supplemental comprehensive Order all are part of the Court's comprehensive findings that all Defendants should be granted Summary Judgment and that the underlying case should be dismissed in its entirety.

While the Plaintiff's managing member, Mitch LaPlante (he verified this Complaint as managing member of Maybank 2754, LLC and was a member of both PCA and Maybank from their inception), was a party to both the earlier Judicial Dissolution lawsuit and the Wells Fargo foreclosure action, therefore his knowledge as a member of both PCA and Maybank 2754 is imputed to him under a specific SC statute (SC Code Ann 33-44-120) and the case law made and provided, this actually is not the basis for the Court's ruling, nor is it factually important. What is important is that, as the Court held in its October 16th Order, the Resolution mentioning the alleged 30-foot ROW future springing easement never was recorded (Complaint, P. 19), never was subordinated on the record of the recorded prior Wells Fargo mortgages and was clearly extinguished by the June 16, 2016 Order of Foreclosure and Sale, which bars "...all persons whosoever claiming under the defendants be forever barred and foreclosed of all right, title, interest, and equity of redemption in the Subject Property."

As the Court concluded, failure to subordinate the alleged 30-foot ROW future springing easement was legally fatal. The June 23, 2017 Foreclosure Order notes that "all persons whosoever claiming under the defendants be forever barred and foreclosed of all right, title, interest, and equity of redemption in the Subject Property." The alleged easement runs directly across "the Subject Property."

"All" means all.

So the Court's Conclusion of Law that there is no legal right to an easement since the alleged future springing ROW easement never was recorded, nor was it ever subordinated to the two Wells Fargo mortgages, both of which were recorded well before the date of the Resolution Plaintiff relies on to establish its easement in October 2013, is correct .

THE COURT WAS CORRECT IN NOT ALLOWING THE PLAINTIFF'S MOTION TO AMEND ITS COMPLAINT

The Court takes judicial notice of the fact that the most significant addition to the proposed Amended Complaint is the addition of the City of Charleston as a named Defendant, but no relief is sought from the City. The Plaintiff just wants the City to be bound by whatever final judgment is rendered in this case. Thus on the matter of the Plaintiff's Motion to Amend its Complaint, while Plaintiff voluntarily allowed the Defendants to argue their respective Summary Judgment Motions before the court took this up (September 24, 2020 Hearing transcript: Page 6, lines 10-13, Pages 10-11, lines 25 on Page 10 - line 4 on Page 11), since the case was dismissed in its entirety by the Court granting Summary Judgment, the issues of the Plaintiff amending its pleadings to add another party - the city of Charleston-became moot.

THE ZURLO TRUST RESERVES THE RIGHT TO FILE A MOTION FOR SANCTIONS PURSUANT TO SCRPC 11 AND SC CODE ANN. 15-36-10

Finally, this is one of those unusual cases where Plaintiff's knowledge in pursuing a frivolous civil remedy should result in sanctions. Mitch LaPlante individually and as a member and manager of PCA and a member and now manager of Maybank 2754 has harassed the Zurlo Trust and Eugene Zurlo with many claims and counterclaims, appeals of Court Orders and other vexatious actions since 2013, and as a result the Zurlo Trust put Maybank on notice in this action that it reserved the right to move for Sanctions, to include costs, expenses and attorney's fees, in the Wherefore section of its Answer.

CONCLUSION

The Plaintiff is not entitled to have this court alter or amend its judgment as set forth in the two Form 4 Orders and the October 16, 2020 supplemental comprehensive Order. The court correctly denied Plaintiff's Motion to Amend its complaint. Therefore, all of Plaintiff's post September 24, 2020 Hearing Motions should be denied

Respectfully Submitted,

s/ J. Rutledge Young, Jr. _____

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Individually and as Co-Trustee of the Eugene J.
Zurlo Living Trust Dated December 11, 1997*

October 28, 2020
Charleston South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
MAYBANK 2754, LLC,	)	CASE NO.: 2020-CP-10-00209
	)	
Plaintiff,	)	
	)	
v.	)	1776, LLC'S OPPOSITION
	)	TO PLAINTIFF'S MOTION
	)	FOR RECONSIDERATION
EUGENE J. ZURLO, Individually and as	)	
Co-Trustee of the Eugene J. Zurlo Living	)	
Trust Dated December 11, 1997; ET AL.,	)	
	)	
Defendants.	)	
	)	

Defendant 1776, LLC ("1776") submits this opposition to Plaintiff Maybank 2754, LLC's motion for reconsideration.

The other Defendants have aptly set forth the many reasons that the Court should deny Plaintiff's motion for reconsideration. In the interest of brevity, rather than restate those reasons here, 1776 incorporates the other Defendants' briefs by reference.

1776 takes this opportunity only to add emphasis to the point that this costly lawsuit should have never been filed. As a fundamental and simple matter of law, the alleged easement (assuming that it existed, which it did not) could not possibly have survived the prior foreclosure action, given the absence of a subordination agreement. There is no room for argument on this point. Plaintiff's prosecution of this action was therefore unreasonable from the start and manifestly constitutes an abuse of the legal process. This baseless lawsuit has encumbered the development of the property and wasted the time and resources of an excessive number of blameless defendants, as well as the Court. After disposing of Plaintiff's motion for reconsideration, the Court should consider issuing sanctions, to include costs and attorneys' fees. 1776 reserves its right to so move.

/s/ Brian A. Hellman
Brian A. Hellman (72399)
Jason S. Smith (80700)
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Attorneys for Defendant 1776, LLC

Charleston, South Carolina
November 2, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

MAYBANK 2754, LLC,
Plaintiff,

Case No. 2020-CP-10-00209

vs.

EUGENE J. ZURLO, Individually and as
Co-Trustee of the Eugene J. Zurlo Living
Trust Dated December 11, 1997; 1776,
LLC; BEACH FENWICK, LLC; THE BEACH
COMPANY; SEAMON, WHITESIDE &
ASSOCIATES, INC.; PENNY CREEK
ASSOCIATES, LLC; JOHN DOE AND
MARY ROE,

BEACH FENWICK, LLC AND THE
BEACH CO.'S MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S MOTION
TO ALTER OR AMEND

Defendants.

Defendants The Beach Company [sic] ("Beach Co.") and Beach Fenwick, LLC ("Beach Fenwick") (sometimes collectively referred to as the "Beach Entities"), by and through their undersigned attorneys, incorporating those arguments made in response to Plaintiff's Motion to Alter or Amend Order; Motion to Amend and/or Vacate Findings of Fact ("Motion to Amend") entered on behalf of Co-Defendants herein, respectfully request this Court deny Plaintiff's Motion to Amend its Orders entered in this matter on October 7, 2020, October 8, 2020 and October 12, 2020. (collectively, the "Order"), and to likewise deny Plaintiff's Motion to Amend and/or Vacate Findings of Fact.

I. Plaintiff's Motion to Amend submits no new, significant or different facts or evidence to support that a change is warranted.

A Rule 59(e) motion to alter or amend a judgment, also commonly referred to as a motion for reconsideration, may be used to raise an issue that was presented to the court, but not ruled upon, in order to preserve the issue for appeal, or to present a new issue to

the court, that could not have been presented before, such as a change in the controlling law or the discovery of previously unavailable evidence. See *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995) (stating that an issue upon which the trial judge never ruled must be raised in a Rule 59 motion in order to preserve it for appeal); see also *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993) (noting that a Rule 59 motion may be used to “account for new evidence not available at trial” or “correct a clear error of law or prevent manifest injustice”); *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983) (noting that a motion for reconsideration may be used to advise the court of a “controlling or significant change in the law or facts since the submission of the issue to the court”).

In this case, however, Plaintiff has not presented any previously unavailable evidence or change in controlling law. Plaintiff does not argue there has been “an intervening change in controlling law,” nor does it seek to “account for new evidence” previously unavailable. Rather, Plaintiff’s Motion to Amend merely reflects its hollow insistence that the Court’s entire conclusion “is incorrect and erroneous.” Plaintiff merely restates—once again—wholly conclusory arguments lacking reference to the record in its thinly veiled attempt to relitigate issues raised at the summary judgment stage, duly considered by the Court and appropriately ruled upon by the Court, pursuant to Defendants’ Motions for Summary Judgment.

Moreover, at various times throughout Plaintiff’s 43-page memorandum,¹ it relies on new arguments not previously raised in its memorandum in opposition. A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to

¹ The Supreme Court of South Carolina issued an Order limiting initial briefs to 35 pages. Supreme Court Order 2015-09-10-01.

judgment but did not. *Stevens & Wilkinson of South Carolina, Inc., v. City of Columbia*, 409 S.C. 563, 762 S.E. 2d 693 (2014), citing *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (holding a party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not).

Nevertheless, all of the salient information was before the Court at the time of the hearing, and Plaintiff has no evidence that the Court did not consider all of the information before it. The Court, after having considered briefing by the parties and hearing argument, determined no easement exists and, therefore, all of Plaintiff's claims fail as a matter of law. More importantly, the Order is based upon legal arguments, specifically a finding that, as a matter of law, Plaintiff cannot sustain its claims. The Order granting Defendants' Motions for Summary Judgment in this case is fully supported by the evidence of record and the applicable law. Plaintiff cannot establish any error of law or fact in the Order or otherwise establish any prejudice or injustice to it. Accordingly, Plaintiff's Motion to Amend should be denied.

II. The Court's Order did not have to address every issue presented.

Plaintiff's scattershot, diatribe Motion to Amend criticizes the Court for not considering every argument put forward by Plaintiff. However, the Court did not need to do so. Once the Court determined no easement or property right exists², there is no other possibility but to dismiss Plaintiff's case.

Rule 52, SCRCP provides that "[f]indings of facts and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56...." *Woodson v. DLI*

² Plaintiff fails to inform the Court of the negative impact upon *Carey v. Snee Farm Community Foundation*, 388 S.C. 229, 694 S.E. 2d 244 (Ct. App. 2010), resulting from the ruling by the *Woodson* Court.

Properties, LLC, 406 S.C. 517, 527, 753 S.E.2d 428, 433 (2014); *see also Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding an appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding). Therefore, the Order did not have to issue findings of fact or conclusions of law on every issue. Indeed, once it ruled on the main issue – whether an easement exists – the Court could dispose of all other issues. The Court clearly articulates, in its Order, that there are no genuine issues of material fact as to the existence of an easement and ultimately held, as a matter of law, no easement or property right exists in favor of Plaintiff.

This is all to say – the Court did not owe Plaintiff a responsibility to expand on every issue alleged by Plaintiff and as re-alleged in Plaintiff's 43-page Motion to Amend. Instead, the Court correctly found there is no genuine issue of material fact and the Plaintiff's claims fail as a matter of law.³

III. CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court deny Plaintiff's Motion to Amend.

³ Consistent with the Beach Entities incorporation of the Response to Plaintiff's Motion to Amend or Alter Judgment entered on behalf of Defendant Eugene J. Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997, the Beach Entities assert this Court had not only the discretion, but the obligation to consider Defendants' dispositive motions prior to consideration of Plaintiff's Motion to Amend. Because the Court found Plaintiff has no easement or other property right, the Court properly exercised its discretion in denying Plaintiff's Motion to Amend. *See Patton v. Miller*, 420 S.C. 471, 804 S.E.2d 252 (2017), "*If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief*, he ought to be afforded an opportunity to test his claim on the merits." (emphasis added). "A motion to amend is within the sound discretion of the trial judge..." *See, Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013).

/s/ Cheryl D. Shoun

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Attorneys for Defendants
The Beach Company and
Beach Fenwick, LLC

November 2, 2020

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

MAYBANK 2754, LLC,

Plaintiff,

vs.

EUGENE J. ZURLO, INDIVIDUALLY AND
AS CO-TRUSTEE OF THE EUGENE J.
ZURLO LIVING TRUST DATED
DECEMBER 11, 1997, 1776, LLC, BEACH
FENWICK, LLC, THE BEACH COMPANY,
SEAMON, WHITESIDE & ASSOCIATES,
INC., PENNY CREEK ASSOCIATES, LLC,
JOHN DOE AND MARY ROE,

Defendants.

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
)

) CASE NO.: 2020-CP-10-00209
)

) **DEFENDANT SEAMON, WHITESIDE &
) ASSOCIATES, INC.'S RESPONSE TO
) PLAINTIFF'S MOTION TO AMEND OR
) ALTER JUDGMENT**

COMES NOW, Defendant Seamon, Whiteside & Associates, Inc. ("SWA"), by and through its undersigned counsel, and opposes Plaintiff's Motion to Amend or Alter Judgment. SWA hereby joins Eugene J. Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997 ("Zurlo") and 1776, LLC's Responses to Plaintiff's Motion to Amend or Alter Judgment. Defendant SWA hereby adopts and otherwise incorporates by reference the arguments made by Zurlo and 1776, LLC in their Responses/Memoranda and arguments to be made before this Court. The Court should deny Plaintiff's Motion to Amend or Alter Judgment.

Respectfully submitted,

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**Counsel for Defendant Seamon, Whiteside &
Associates, Inc.**

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE #: 2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as Co-Trustee
of the Eugene J. Zurlo Living Trust Dated December
11, 1997; 1776, LLC; BEACH FENWICK, LLC;
THE BEACH COMPANY; SEAMON, WHITESIDE
& ASSOCIATES, INC.; PENNY CREEK ASSOCIATES,
LLC; JOHN DOE AND MARY ROE

Defendants,

**PLAINTIFF'S RESPONSE IN OPPOSITION TO THE DEFENDANTS', THE BEACH
COMPANY AND BEACH FENWICK, LLC MOTION FOR SANCTIONS**

Plaintiff, MAYBANK 2754, LLC, by and through its undersigned attorney, subject to the disposition of the pending appeals, and while maintaining the pending appeals, hereby responds in opposition to the Defendants', THE BEACH COMPANY and BEACH FENWICK, LLC (herein "Beach Entities"), Notice of Motion and Motion for Sanctions Pursuant to S.C. Code Ann. § 15-36-10, *et seq.* and Rule 11, SOUTH CAROLINA RULES OF CIVIL PROCEDURE (herein "Motion for Sanctions"), and in support thereof states as follows:

1. The Court's Orders entered on October 7, 2020, October 8, 2020, and October 12, 2020, granted Defendants' motions for summary judgment and denied Plaintiff's Motion to Amend Complaint (herein the "Orders"). Together, the Orders comprise the basis for the Beach Entities' Motion for Sanctions.

2. The Orders are all pending appellate review. If after the conclusion of appellate review the Orders are reversed, then the entire basis of the Motion for Sanctions will collapse and the Motion for Sanctions will become moot. Therefore, in the interest of justice and judicial economy, the Court should consider the Motion for Sanctions after the appellate process is concluded and if necessary.

3. Plaintiff denies the arguments and assertions in the Motion for Sanction and relies upon and incorporates by reference all its prior filings, including its filed Verified Complaint; Plaintiff's Motion to Amend Complaint (and proposed Amended Verified Complaint), filed on August 24, 2020; Plaintiff's Request for Judicial Notice of Recorded Documents and City of Charleston Ordinances, filed on August 24, 2020; Plaintiff's Request for Judicial Notice of Recorded Document and Document filed with the South Carolina Secretary of State, filed on September 14, 2020; Plaintiff's Response in Opposition to the Defendants' Motions for Summary Judgment, filed on September 17, 2020; Affidavit of Michel F. Laplante, filed on September 17, 2020; Plaintiff's Motion to Alter or Amend Order Entered on October 7, 2020, Order Entered on October 8, 2020, and Order Granting All Defendants Summary Judgment, etc., filed on October 16, 2020; all Notices of Appeal filed in this case; and the Affidavit of Lisa Brown, filed in Charleston County Court of Common Pleas Case # 2020CP1002180, and which is attached hereto and incorporated herein as "Exhibit A".

4. The record establishes a basis to proceed with litigation, or to assert or controvert issues therein, that are not frivolous.

5. It is simply not true that Plaintiff's "claims were clearly not warranted under existing law and its purpose was merely to harass or injure the Beach Entities" as is contended and the record does not support such a conclusion.

6. Plaintiff did not initiate and maintain this action in violation of the applicable law and rules of this Court.

7. Plaintiff's Verified Complaint is not frivolous and frivolous arguments were not maintained.

8. Plaintiff's filing of this lawsuit was not brought to harass or injure the Beach Entities as they claim. Beach Entities had knowledge of the unrecorded easement before the subject property was purchased from 1776, LLC, who also had knowledge of the easement by virtue of Eugene J. Zurlo. Eugene J. Zurlo signed the Resolution. Also, see copy of December 3, 2019 e-mail attached hereto and incorporated herein as "Exhibit B", and copy of December 4, 2019 e-mail attached hereto and incorporated herein as "Exhibit C".

9. This lawsuit is necessary to protect Plaintiff's easement because the subject property is primed for development without any reservation or provision for Plaintiff's easement. Furthermore, if the lawsuit was not filed, Beach Fenwick, LLC could have transferred the

property to a true innocent or bona fide purchaser thereby putting the unrecorded easement in further jeopardy.

10. This action was filed on January 13, 2020, which was forty-two (42) days after the December 2, 2019 Design Review Board meeting referenced in the Affidavit of Michel F. Laplante. Beach Fenwick, LLC, was organized with the South Carolina Secretary of State on December 3, 2019, the day after the meeting.

11. Plaintiff has not had a full and fair opportunity to complete discovery as explained in its previous filings.

12. Plaintiff's action is warranted under existing law. For example, an easement by grant is not required to be recorded to be valid, and recording is not necessary if the buyer has actual notice. *See, Frierson v. Watson*, 636 S.C. 60, 68 (Ct. App. 2006). "A purchaser of land with actual, constructive, or implied notice that the property is burdened with an easement ordinarily takes the estate subject to the easement. *Loftis v. South Carolina Elec. and Gas Co.*, 361 S.C. 434, 441 (Ct. App. 2004).

13. Furthermore, the argument that the Resolution, Contract for Assignment and Assignment do not amount to a mere agreement to agree is supported under existing law. *See, Ten Woodruff Oaks , LLC v. Point Development, LLC*, 385 S.C. 174, 180 683 S.E.2d 510 (Ct.App. 2009):

[Appellant] "**contends that the letter agreement that CICC and TWO signed was a best a contract evidencing the parties' intent to create an easement upon the preparation and recording of various legal documents.** [Appellant] further asserts CICC and TWO failed to follow through on numerous issues that were either required or contemplated by the letter agreement, such as the preparation of reciprocal easement agreements and a specific description of the easement terms. **We disagree.**

'As a general rule, to constitute a grant of an easement, any words clearly showing the intention to grant an easement are sufficient.' 25 Am.Jur.2d Easements and Licenses § 15, at 512 (2004). "Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so as to carry out that intention." *Smith v. Comm'rs of Pub. Works of City of Charleston*, 312 S.C. 460, 466, 441 S.E.2d 331, 335 (Ct.App.1994). "If the language is uncertain or ambiguous in any respect, all the surrounding circumstances, including the construction which the parties have placed on the language, may be considered by

the court, to the end that the intention of the parties may be ascertained and given effect." 25 Am.Jur.2d Easements § 18, at 516 (2004).

We recognize the letter agreement has language suggesting the agreement to establish an easement could be executory in nature; however, contrary to what [Appellant] argues, this language does not indicate the easement CICC intended to grant to TWO was contingent on the completion of the various tasks enumerated in the letter. As a practical matter, enjoyment of the interest would require physical preparation of the grounds subject to the easement, and legal work would have been necessary to ensure that the easement remained enforceable as to subsequent title holders of the estates involved.

(footnotes omitted) (emphasis added).

14. "A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) (quoting 28A C.J.S. Easements § 57 (1996)). As the Court of Appeals stated in *Smith*, 441 S.E.2d 331, 335 (S.C. Ct. App. 1994):

Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so as to carry out that intention. *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965); 23 Am.Jur.2d Easements and Licenses § 23 (1966) (**if the language is uncertain or ambiguous in any respect, all surrounding circumstances, including the construction which the parties have placed on the language, may be inquired into and taken into consideration by the court**).

(emphasis added).

15. After the Court of Appeals in *Smith* found that the agreement established an easement, the court ruled that the easement was to be located in a location as is reasonably necessary for the full enjoyment of the plaintiffs' property. The Court of Appeals stated, "The subject **unlocated** easement must be interpreted, however, in light of good faith, reasonableness **and what was necessarily the intent of the parties to the 1955 agreement.**" *Id.* at 336 (emphasis added). Accordingly, the Court of Appeals in *Smith* remanded the case for a determination of the number of access points and routes to include their width. *Id.* at 337.

16. Additionally, in *Douglas v. Medical Investors, Inc.*, 256 S.C. 440, 182 S.E.2d 720 (1971), the South Carolina Supreme Court ruled that an instrument creating an easement was an easement in gross for commercial purposes even though it was not apparent on its face. The Court found that the wording of the instrument “leaves the exact character of the easement in doubt”, and stated, “[w]e are therefore presented with a situation where it is impossible to determine the nature or character of the easement from the language used in the reservation. Under such circumstances, parole evidence was properly considered in determining the character of the easement reserved.” *Id.* (emphasis added). In reaching its ruling the Court stated, “The fallacy in respondent’s argument [that the character of the easement should be determined solely from the working of the instrument and parole evidence also was inadmissible] lies in the fact that...the wording of the present reservation leaves the exact character of the easement in doubt.” *Id.* at 447. Thus, the Court ruled that parole evidence was properly admitted to determine the character of the easement.

17. Moreover, the argument that the foreclosure action upon which the Beach Entities rely did not impact the rights of Plaintiff (or John H. Laplante, Peter F. Laplante, or Marianne Laplante-Scarlata) is supported under existing law for the reasons explained in Plaintiff’s previous filings. *See, Green Tree Servicing, LLC v. Adams*, 375 S.C. 583; 654 S.E.2d 100 (S.C. Ct. App. 2007) (“A court may not act against a party without personal jurisdiction...a court should not render a judgment affecting the rights of a party without proper notice.”).

18. In *Adams*, the Court agreed in part that the circuit court could not bind Adams to a foreclosure action to which he was not a party. However, because the circuit court properly exercised personal jurisdiction over Adams in a subsequent action to add him as a party to the foreclosure action, there was no reversible error. *Id.* at 586-7. A judgment is void if a court acts without personal jurisdiction. *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). A court generally obtains personal jurisdiction by the service of a summons. *Ex parte S.C. Dep’t of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002) (citing *State v. Sanders*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920). (“The purpose of the summons is to acquire jurisdiction of the person of the defendant.. .”).

19. Additionally, Michel F. Laplante was severed from the foreclosure claim, which means the foreclosure case did not impact his rights, and the Foreclosure Order itself states in

Paragraph 3.b. that “**The sale shall be subject to** taxes, assessments, **existing easements**, and easements and restrictions of record.” (emphasis added).

20. Also, in the foreclosure case, the issue of the existence of the easement was not actually ligated, directly determined and necessary to support the foreclosure judgment in the foreclosure action. There is no evidence supporting that the easement was actually litigated, directly determined and necessary to support the foreclosure judgment.

WHEREFORE, Plaintiff respectfully requests that the Court withhold considering the Motion for Sanctions until after appellate review concludes and if necessary; deny the Motion for Sanctions if after conclusion of appellate review the orders granting Defendants’ motions for summary judgment and denying Plaintiff’s Motion to Amend Complaint are affirmed; and grant such further relief as this Court deems just and proper.

Respectfully submitted,

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jason@tarokhlaw.com

s/ Jason M. Tarokh
JASON M. TAROKH
S. CAROLINA BAR # 72837

November 17, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
MAYBANK 2754, LLC,	)	CASE #:
	)	
Plaintiff,	)	
	)	
vs.	)	AFFIDAVIT OF LISA BROWN
	)	
BUIST, BYARS & TAYLOR, LLC;	)	
CUSTIS M. BYARS,	)	
	)	
Defendants.	)	

I, Lisa Hostetler Brown, having been first duly sworn, deposes and states that:

1. I am the managing attorney of the law firm of LawyerLisa, LLC.
2. I am licensed to practice law in South Carolina and North Carolina and I have been practicing continuously in the area of South Carolina real estate law since 2007.
3. I have handled thousands of real estate closings including residential and commercial transactions.
4. I am a co-presenter of the South Carolina Bar Real Estate Essentials CLE, a Real Estate Transactions II guest lecturer at USC School of Law, and co-author of the upcoming Real Estate Bar Book for South Carolina Attorneys.
5. I have reviewed the pertinent documentation related to the October 2013 transfer of Maybank 2754, LLC by Penny Creek Associates, L.L.C. (hereafter "Seller") to John H. Laplante, Michel F. Laplante, Peter F. Laplante, Marianne Laplante-Scarlata (hereafter "Purchaser").
6. I have reviewed the terms of the agreement whereby Seller agreed to grant to Purchaser a thirty (30') foot access easement across Seller's tract known as B-2-2 to the future roadway known as Pitch Fork Road.
7. It is my professional and expert opinion that the Defendant breached the applicable standard of care owed to a client and committed professional negligence in violating that standard of care as set forth below:
 - a. The Contract For Assignment of Interest (hereinafter "Agreement"), which upon information and belief was prepared by the Defendant for the benefit of Plaintiff,

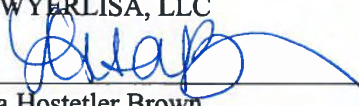
gth

sets forth the terms upon which Seller would convey it's 100% interest in Maybank 2754, LLC to Purchaser

- i. The Agreement states that the Conveyance Documents will be the legal, valid and binding obligations of Seller and enforceable against Seller. (Section 3.1 of Agreement).
 - ii. The Agreement states that the Seller shall execute the Conveyance Documents in form and substance customary and usual for their intended purpose and reasonably satisfactory to Purchasers and its counsel. (Section 4.4 of Agreement).
 - iii. The Agreement states that Seller shall grant an easement across its Tract B-2-2 to Pitch Fork Road. The Agreement fails to state the beginning point of the easement, but upon information and belief, the parties intended the beginning point to be Tract B-3 which was and is owned by Maybank 2754, LLC. Upon completion of Pitch Fork Road, the parties intended to define the exact location and execute and record an Easement Agreement indicating the specifics of the right of way. (Section 4.5 of Agreement).
 - b. The Assignment of Membership Interest and Written Consent in Lieu of a Special Meeting of the Sole Member of Maybank 2754, LLC (hereinafter "Assignment"), which upon information and belief was prepared by the Defendant for the benefit of Plaintiff, transfers the Seller's membership interest in Maybank 2754, LLC to Purchaser
 - i. The Assignment states that "as a condition of closing", Seller agrees to grant the above described 30' access easement (Section 6 of Assignment).
 - c. Based upon my review of the documentation, the Defendant never prepared the agreed upon access easement in recordable format and no agreement was ever recorded in the Charleston County Register of Deeds Office.
 - d. Even though Pitch Fork Road was not yet complete, the agreement should have been recorded at the time of closing to put all future buyers and lenders on notice that Tract B-2-2 is subject to an easement.
 - e. An attorney exercising proper judgment and oversight would have prepared documentation of the agreement between the parties and recorded it with the Charleston County Register of Deeds Office to protect the Plaintiff's interest.
8. My professional opinion is based on my actual experience, general research, and review of the pertinent documentation related to this matter. I hold this opinion to a reasonable degree of legal certainty with the results being more probable than not.
9. I have been retained as an expert witness by the Plaintiff and give my opinion in that capacity. This opinion is based on the allegations of the Complaint, which I assume to be true because of the supporting documentation I have reviewed. My opinions are subject to expansion and modification as further evidence or issues develop.
10. This affidavit is given in compliance with South Carolina Code of Laws § 15-36-100, which does not require me to state all negligent acts, omissions, or wrongdoing by Defendant.

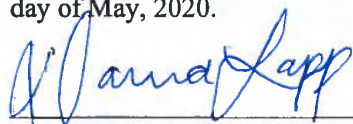
FURTHER, AFFIANT SAYETH NOT.

LAWYERLISA, LLC



Lisa Hostetler Brown

SWORN to and subscribed before me on this 13th
day of May, 2020.



Notary Public for South Carolina

My Commission Expires: 2/7/2028

From: Alan McMahon amcmahon@thebeachcompany.com
Subject: RE: Recorded Development Agreement
Date: December 3, 2019 at 12:04 AM
To: 1776 Management 1776management@gmail.com, Dan Doyle ddoyle@thebeachcompany.com, Eddie Hughes ehughes@thebeachcompany.com
Cc: Gene Zurlo egzurlo@gmail.com, Andrew Dennis ADennis@thebeachcompany.com

Thanks Dennis and Gene. We are in receipt and reviewing. We'll let you know if we have any questions.

On another note, we received Conceptual Approval at DRB this evening despite opposition voiced from your former business partner, Mr. LaPlante. So that you're aware, his comments included reference and attempted persuasion of the board to deny us based on a written agreement that he claims to have with Mr. Zurlo to allow access from a property he owns on Maybank (dental office) to Pitchfork Road which would cut through and interfere with our plans.

Alan



Alan McMahon
 Development Manager

m: 843.412.2739
 t: 843.277.3026
 e: amcmahon@thebeachcompany.com
 www.TheBeachCompany.com



From: 1776 Management <1776management@gmail.com>
Sent: Monday, December 2, 2019 8:16 PM
To: Dan Doyle <ddoyle@thebeachcompany.com>; Alan McMahon <amcmahon@thebeachcompany.com>; Eddie Hughes <ehughes@thebeachcompany.com>
Cc: Gene Zurlo <egzurlo@gmail.com>
Subject: Recorded Development Agreement

See below.

One down, one to go.

Begin forwarded message:

From: Brian Hellman <bh@hellmanyates.com>
Subject: Development Agreement attached
Date: December 2, 2019 at 6:50:44 PM EST
To: 1776 Management <1776management@gmail.com>, Gene Zurlo <genezurlo@aol.com>

From: Tapley, Rhonda R. RTapley@nexsenpruet.com
Subject: RE: PSA
Date: December 4, 2019 at 10:35 AM
To: Brian Hellman bh@hellmanyates.com, Andrew Dennis ADennis@thebeachcompany.com, Slough, David C. DSlough@nexsenpruet.com
Cc: 1776 Management 1776management@gmail.com, Gene Zurlo genezurlo@aol.com, Hoyle, Justin M. JHoyle@nexsenpruet.com

Hey Brian,

Attached please find a few comments on the resolution. Beach is taking the property as Beach Fenwick, LLC, a South Carolina limited liability company. Also, with regard to the below documents, if there is a Certificate of Trust on record, we can rely on that document?

Thank you,
 Rhonda

From: Tapley, Rhonda R.
Sent: Wednesday, December 4, 2019 8:48 AM
To: 'Brian Hellman' <bh@hellmanyates.com>; Andrew Dennis <ADennis@thebeachcompany.com>; Slough, David C. <DSlough@nexsenpruet.com>
Cc: 1776 Management <1776management@gmail.com>; Gene Zurlo <genezurlo@aol.com>; Hoyle, Justin M. <JHoyle@nexsenpruet.com>
Subject: RE: PSA

Hey Brian,

Can we get a copies of the Articles, Operating Agreement and the Trust Agreement for the sole member? Will you also be providing a current certificate of existence?

Thank you,
 Rhonda

From: Brian Hellman <bh@hellmanyates.com>
Sent: Tuesday, December 3, 2019 8:43 PM
To: Andrew Dennis <ADennis@thebeachcompany.com>; Slough, David C. <DSlough@nexsenpruet.com>; Tapley, Rhonda R. <RTapley@nexsenpruet.com>
Cc: 1776 Management <1776management@gmail.com>; Gene Zurlo <genezurlo@aol.com>
Subject: Re: PSA

{EXTERNAL EMAIL}

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Maybank 2754, LLC,	)	CASE NO. 2020-CP-10-00209
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	ORIGINAL
	)	
Eugene J. Zurlo, et al.,	)	
	)	
DEFENDANTS.	)	
	)	

June 16, 2020

Charleston, South Carolina, via Zoom

B E F O R E:

The Honorable Bentley Price

A P P E A R A N C E S:

For the Plaintiff:

Jason M. Tarokh, Esquire

For the Defendants:

Cheryl D. Shoun
 Brian A. Hellman
 J. Rutledge Young
 Andrew Dennis
 Blake McKie
 Marilyn Trevino
 Doug MacKelcan
 Jason Smith

Certified Transcript Provided For: Jason Tarokh, Esq.

Phyllis Norton, CVR-Master, Nationally Certified Verbatim Court Reporter
 636 Long Point Road, Unit G, #74, Mt. Pleasant, South Carolina 29464
PNorton@sccourts.org

I N D E X

HEARING -- 03

CERTIFICATION OF TRANSCRIPT -- 28

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

D E F E N S E E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>MARKED</u>	<u>ADMIT</u>
1	South Carolina Articles of Organization	26	26
2	Development Guidelines	26	--
3	Order & Judgment of Foreclosure & Sale	26	26

1

1 THE COURT: Good morning, everyone. So the way we are
2 going to go in order is just for the record and just for
3 Phyllis to take everything down, if you will just start with
4 the plaintiffs and introduce yourself and who you represent.
5 If it is your motion, tell me it is your motion and what it
6 is. And then we will move onto the defense and we will do the
7 same. And if you have outstanding motions I will be happy to
8 hear them all.

9 All right. I'm going to moot myself now and we will
10 start with the plaintiffs.

11 MR. TAROKH: Good morning, Your Honor. Jason Tarokh on
12 behalf of the plaintiff Maybank 2754, LLC. Your Honor, we
13 have a motion for temporary injunction that has been noticed
14 for today. We would ask the Court to continue the hearing on
15 the motion for temporary injunction for the following reasons.

16 Before the injunction was filed I propounded discovery
17 about a week before we filed the motion; and I propounded
18 against four parties, two of which were the former owner and
19 the current owner of the property that is subject to the
20 easement dispute; and I was met with a motion for a protective
21 order because of the COVID-19 pandemic.

22 And in response to the discovery -- in response to my
23 motion for temporary injunction the current owner, Beach
24 Fenwich, LLC, filed a memorandum in opposition yesterday
25 afternoon referencing facts and at least one document for

1 which I have sought discovery. And I haven't seen a
2 certificate of service, so I don't know if that discovery was
3 mailed to me last week or not; but I haven't received anything
4 via e-mail.

5 And at this point given the issues at play and the
6 importance of this case we would ask for a brief continuance
7 to allow the discovery before having the hearing. I think
8 that is fair and that prevents any prejudice to my client
9 considering all of the issues we have raised.

10 THE COURT: So do you even know if you still need the
11 injunction; is that what you are saying based on the
12 information that potentially was provided?

13 MR. TAROKH: No, Your Honor, we still want the
14 injunction. We rest upon the -- at this point the verified
15 complaint. But there's a lot of issues that they have raised
16 such as bona fide purchaser status, due diligence, and things
17 of that nature. And my discovery requested that type of
18 information and those types of documents.

19 And it helps us establish that -- if we do court analysis
20 it analyzes whether or not to grant a temporary injunction,
21 whether there is a great likely -- a good likelihood that my
22 client will prevail ultimately.

23 So before we have a little mini trial as to the merits
24 upon which the Court will base its decision on the motion for
25 temporary injunction I should at least have that discovery.

1 And, you know, the way this was started I asked for
2 discovery from the very beginning back in March. And then
3 that was after I filed the -- served the discovery that I
4 filed the motion for temporary injunction.

5 There's two current pending motions for protective order
6 filed by two different defendants based upon the COVID-19
7 pandemic. And what's interesting, Your Honor, is we sue -- my
8 client sues what we will reference as the Beach entities.
9 That is the Beach Company and their subsidiary Beach Fenwick,
10 LLC.

11 It is my understanding that the Beach Company is a very
12 large corporation with a southeastern presence and for some
13 reason because of the COVID-19 pandemic that couldn't give me
14 discovery; they couldn't respond to the interrogatories nor
15 could they give me the documents I sought in my request for
16 production.

17 So they file a motion for protective order. And then
18 yesterday they filed this memorandum in opposition referencing
19 facts and some of the same documents -- or at least one of the
20 same documents that I have requested in my discovery.

21 THE COURT: All right. And when you say they, whom of
22 which on this Zoom meeting is they, the attorney?

23 MR. TAROKH: Yes, Your Honor. It is Beach Fenwick, LLC;
24 and the Beach Company is represented by Ms. Cheryl Shoun.

25 THE COURT: All right.

1 All right, Ms. Shoun, so do you have any opposition or do
2 you want to have -- I mean do we need to hear your motion for
3 a protective order, or what do you think that we need to do?

4 MS. SHOUN: No, sir, I don't think you need to hear the
5 motion for protective order. Frankly, that motion for
6 protective order was filed with the court basically out of an
7 abundance of caution because despite what Mr. Tarokh says
8 about the size and the significance of my client, the pandemic
9 spared no individuals or no businesses and they were not even
10 coming into their offices whatsoever, so no documents could be
11 retrieved.

12 They have been back in their offices for a short period
13 of time now. We have -- we have completed the initial review
14 of all of the documents in our document repository system, and
15 those will be going out to plaintiff this week.

16 But the protective order was filed, Your Honor, because I
17 requested an extension from plaintiff's counsel which was
18 denied or was granted only contingent on some representations
19 which I didn't feel like I could ethically meet. So that is
20 why the protective order was filed.

21 I'm sorry?

22 And so it was actually just out of an abundance of
23 caution, Your Honor. I don't need that heard. We are not
24 going to take up the court's time with that. We are ready.
25 We are going to turn over the -- like I said, we just finished

1 the discovery. Because they have been back in their offices
2 for a couple of weeks now.

3 And as far as the continuance on the motion for the
4 temporary injunction, that relief was actually sought
5 originally in the complaint. There was a subsequent motion
6 filed, but the relief was sought in the complaint.

7 THE COURT: All right. So Mr. Tarokh, what was the
8 benefit of filing -- if you alleged it in your complaint what
9 was the benefit of filing a motion for the injunction as well?

10 MR. TAROKH: Well, Your Honor, the goal of the injunction
11 is to prevent development of the property which would
12 essentially, you know, make my client's easement almost an
13 impossibility by virtue of the construction, the buildings
14 that the plans set forth.

15 I should also add, Your Honor, we also requested
16 discovery from the former owner, 1776, LLC. They are
17 represented by the law firm I think - correct me if I am wrong
18 please counsel - Hellman and Tisdale. And we were met with
19 the same response. Motion for protective order was filed.
20 They have alleged that the principles of the corporation are
21 in a class that is most susceptible to the Coronavirus and
22 therefore they couldn't respond to the discovery, and they've
23 also filed a motion for a protective order.

24 THE COURT: All right.

25 MR. TAROKH: So ---

1 THE COURT: Does that motion need to be heard?

2 MR. HELLMAN: Your Honor, Brian Hellman on behalf of
3 1776, LLC. Our -- my client is a single member LLC. Its
4 single member is comprised of a trust which has two trustees.
5 One is 82 years old. The other is 78 years old and has
6 multiple sclerosis.

7 They are actually in Maine right now to avoid being in
8 any close contact with people. All of the documents that they
9 have regarding this transaction are located in Charleston. We
10 are trying to figure a way to get these documents and to get
11 some information from them, but I promise you it is not easy
12 when we are dealing with folks that are elderly and don't have
13 access to many of the things that are being requested. So we
14 are certainly trying. We wish we could get some kind of
15 reasonable extension here. And hopefully at some -- you know,
16 at some point we will be able to produce all of this
17 information.

18 THE COURT: All right. When did you file your motions
19 for production and interrogatories and stuff, Mr. Tarokh?

20 MR. TAROKH: Yes, Your Honor, the specific date was March
21 4th. I propounded on multiple defendants. It was March 4th
22 of 2020.

23 THE COURT: Okay. So 14 days before everything shut
24 down?

25 MR. TAROKH: Roughly, Your Honor. Yes.

1 THE COURT: All right. What do you consider to be a
2 reasonable extension, Mr. Hellman?

3 MR. HELLMAN: Well, Your Honor, that is a good question.
4 My clients don't expect to be back in Charleston until the end
5 of the summer. And they have no way to really get back here.
6 They don't want to fly commercial. So I am not certain what
7 the best way to get this information together would be. We
8 can certainly produce as much as we can get from them
9 verbally, but as relates to documents that may be -- that may
10 be substantially more difficult.

11 THE COURT: All right. Well, I certainly don't want to
12 put any elderly people in peril over some documents; but
13 obviously we need to have some way of moving this case
14 forward.

15 Here is what we will do. Mr. Tarokh, you have got to
16 understand that, you know, they are dealing with a lot of
17 people. They -- these are large corporations. Mr. Hellman's
18 clients have indicated that obviously they are not even
19 around, and things are certainly not back to normal. So you
20 are going to have to kind of work with them as best you can to
21 try to keep the case moving.

22 So here is what we are going to do. I will continue your
23 motion for the temporary injunction until later -- some time
24 late next week, maybe like Wednesday or Thursday. And we will
25 just reach out and just let you know another date and time.

1 That will give you the opportunity to take a look at the
2 documents that were filed and produced yesterday.

3 And if you do not need the motion -- or if you don't need
4 the motion heard, just indicate that. And at that time if
5 y'all could just get together and get a scheduling order
6 together and present that to me at that time. If not then I
7 will just make a decision and I will make a scheduling order,
8 okay.

9 MR. TAROKH: Yes, Your Honor, and just to clarify, no
10 documents in response to the discovery was filed or served
11 yesterday; it was their memorandum in opposition that was
12 filed. And Ms. Shoun indicated at the hearing a few minutes
13 ago that those documents should be forthcoming. So if that
14 can happen this week, that should be sufficient for a hearing
15 next week.

16 THE COURT: All right. That sounds great. And I will
17 give you more than ample time if you want to do any type of
18 response as well I will take a look at it, okay.

19 MR. TAROKH: Thank you, Judge.

20 THE COURT: All right. We will just reach out and let
21 you know a good date and time next week and we will send out a
22 link and everything just like we have in the past.

23 MR. TAROKH: Thank you.

24 THE COURT: All right. Are there any other motions on
25 behalf of anyone else?

1 MR. YOUNG: Your Honor, this is Rutledge Young along with
2 Blake McKie and myself at Duffy and Young. We represent the
3 first named defendant which is Eugene J. Zurlo individually
4 and as co-trustee of the Eugene J. Zurlo Living Trust dated
5 December 11th, 1997.

6 And the motion that we have is a motion to refer this
7 entire matter to the master in equity, which is joined in by
8 all of the defendants except for Siemens Whiteside Associates
9 whose only cause of action against them in the complaint is
10 one for conspiracy. And everybody else basically believes
11 this case - except for the plaintiff - believes this case
12 should be referred by the Court to the master in equity.

13 And I am happy to argue that motion now, or if you want
14 everybody else to introduce themselves. But I would suggest
15 to the Court that that is a motion, a threshold motion, and
16 once the Court decides that if everything or almost everything
17 goes to the master in equity then it gets set up over there to
18 get taken care of and anything that should go back to you as a
19 jury matter comes back to you from the master.

20 Otherwise, there are I think 16 separate motions pending.
21 But the motion to refer to the master in equity in our regard
22 is a threshold motion.

23 THE COURT: All right. I will be happy to hear from you.
24 I will mute myself.

25 MR. YOUNG: All right. Well, may it please the Court.

1 First off I would like to thank you and the Clerk of Court for
2 accommodating us. We have been trying to get this matter
3 heard since March and because of COVID and other issues you
4 all have worked with us and I want to thank the Court and I
5 would like to thank specifically the Clerk of Court for doing
6 so.

7 Now there have been at my last count about 17 or 18
8 motions or responses to motions concerning this master in
9 equity referral. And I know the Court has read those. I am
10 sure your law clerk has ready those and you are ready to rule
11 on that.

12 With a lot of eloquence from me and the other lawyers I
13 am happy to answer any questions. But if you would like to
14 have a little background information, I have been involved in
15 this case with these same exact parties since 2012. And I
16 have filed some reply briefs and a response brief that sets it
17 out more specifically, but I can certainly educate the Court
18 as to what I know and represent to you what I believe the
19 facts and the procedure to be.

20 THE COURT: Sure.

21 MR. YOUNG: All right. Here we go. We have moved to
22 refer this matter to the master in equity, Your Honor: Under
23 Rule 39(b) which allows legal issues to be referred to the
24 master in equity, under Rule 53 which allows the Court to
25 refer legal issues to the master in equity, under Rule 71

1 which is the master in equity deals with all foreclosure
2 matters because a question of whether or not this so-called
3 springing easement signed in a -- or noted in only in a
4 resolution in October of 2013 legally constitutes what is
5 necessary as a matter of law to actually be regarded as an
6 easement.

7 The final statutory case statute we rely on in addition
8 to the cases in our briefs, Your Honor, is SC Code 14-11-10
9 which is a master in equity statute which sets forth basically
10 that the master in equity should handle all matters involving
11 real estate.

12 Now I filed yesterday three proposed exhibits. And the
13 first one is the certificate of existence for Penny Creek
14 Associates, LLC, filed on January the 18th, 1999. That was
15 basically a two-member LLC. The Zurlo Trust, my client, was a
16 50-percent voting member. And Mr. Mitch LaPlante who is a
17 defendant in this case because he is the manager of Maybank --
18 plaintiff, I'm sorry, Maybank 2754, was the other 50-percent
19 voting member.

20 From 1999 -- that is Exhibit Number 1, Your Honor. And I
21 would ask the court reporter if she doesn't have it to mark
22 that into evidence. And I can hold it up here. It is this
23 certificate of existence from the Secretary of State's Office
24 dated January 18th, 1999.

25 THE COURT: She will tell you how to do that at the end.

1 MR. YOUNG: Thank you, sir. So the LLC got started in
2 1999. Its purpose was to buy and then develop 60 acres of
3 land basically from this Stono Bridge on Maybank Highway up to
4 the Bi-Lo Shopping Center.

5 And that acreage was broken down into a single-family
6 subdivision called the Preserve owned by Penny Creek
7 Associates, LLC - PCA, LLC - of which Mr. LaPlante was a
8 50-percent member and also the manager. It is a member
9 managed LLC.

10 So from about 1999 until 2012 the infrastructure loans
11 were taken out. PCA actually bought an apartment complex
12 across the road on River Road, sold that, began to sell lots
13 in the Preserve. And there were three basically pretty large
14 pieces of property outside of the residential subdivision that
15 PCA, LLC, owned.

16 Those are shown, Your Honor, in Exhibit Number 2 that I
17 filed yesterday, which is an October 15th, 2015, application
18 done by Seamon Whiteside Associates for Mitch LaPlante as the
19 applicant and for Penny Creek Associates, LLC, for which Mr.
20 LaPlante was the member and the manager; for Fenwich LA, LLC,
21 a piece of property that Mr. LaPlante and his family bought
22 from Penny Creek Associates; and for 2754 Maybank, LLC,
23 another very small .55 acre piece of property that the
24 LaPlante family bought from PCA in October 2013.

25 MR. TAROKH: Your Honor, pardon the interruption. We

1 object to Exhibit 2 coming into evidence. I don't -- and
2 pardon the interruption, Your Honor. I just feel I have to
3 assert the objection. This is not an evidentiary hearing.

4 Exhibit 1, I have no objection. Exhibit 3 I have no
5 objection. Exhibit 2, I don't know -- on its face I can tell
6 what it may be, but there are authentication issues and things
7 of that nature as to Exhibit 2. It is also incomplete.

8 So if the Court is -- if we are taking evidence - and I
9 don't think we should be taking evidence for a motion
10 hearing - we object to the admission of Exhibit 2 into
11 evidence.

12 THE COURT: All right.

13 MR. YOUNG: I move that it be marked for identification
14 only then, Your Honor. And we will tie it in later if we need
15 to. But I will represent to you that this is something that
16 Mr. LaPlante as manager of Penny Creek Associates, Fenwick LA,
17 LLC, and 2754 Maybank participated in back in October of 2015;
18 and it was produced in the judicial dissolution suit that I am
19 getting ready to come to in a minute or two.

20 So at any rate in October of 2015 -- I'm sorry, October
21 2013, when this springing easement supposedly came to being in
22 terms of a questionable resolution, Penny Creek Associates
23 owned 22.93 acres of developable land along Maybank Highway.
24 Fenwick Hall LA owned 12.25 acres. PCA owned another 12.64
25 acres. And then Maybank 2754, the plaintiff in this case,

1 owned a very small .55 acre tract of land with a curb cut and
2 a driveway off of Maybank Highway where there is a dentist
3 office with parking and PCA's regular managerial office with
4 parking.

5 So in 2012 after about 10 or 12 years worth of
6 development in which Mr. Zurlo and his trust put in \$700,000
7 and cosigned all of the notes for the property, Zurlo became
8 suspicious that Mr. LaPlante as manager was not managing the
9 LLC properly; and as a result in December of 2013 a derivative
10 action was brought by the 50-percent owner of PCA, the Zurlo
11 Trust, against Mr. LaPlante as manager, against Penny Creek
12 Associates, against Mr. LaPlante individually. And in that
13 judicial dissolution matter Mr. Zurlo's trust saw an
14 accounting, the appointment of a receiver, sued Mr. LaPlante
15 for conversion of funds, breach of fiduciary duty, unjust
16 enrichment. And Judge Markley Dennis handled that case from
17 beginning to end as a case -- complex case assigned to him.

18 So there's no issue raised, interestingly, in any of the
19 pleadings that Mr. LaPlante filed himself or on behalf of PCA
20 as its manager about this easement at that time. No easement
21 in question that Mr. Tarokh has brought this action for.

22 We did a fair amount of discovery for a couple of years.
23 And then in February of 2016 -- and I filed this with one of
24 our pleadings on February 29th, a Monday morning. We drew a
25 jury and the case got settled on the record. And in that

1 settlement, among other things, Penny Creek Associates agreed
2 to pay back Mr. Zurlo's trust \$3.25 million by way of signing
3 a note and a second mortgage behind the roughly \$5.5 million
4 Wells Fargo mortgage.

5 So as a specific part of that settlement Mr. LaPlante,
6 the Zurlo Trust, each 50-percent members of Penny Creek
7 Associates, agreed to sell the remaining property, to put it
8 on the market and to sell it and to continue selling
9 individual lots in the subdivision.

10 I am going to fast-forward for a minute or two. The
11 22-acre lot that PCA owned at that time of the settlement has
12 now been sold to the Beach Company and is owned by Beach
13 Fenwick, LLC. That took place I believe on December the 19th
14 last year.

15 The 12-acre parcel of property, again owned by PCA, has
16 been sold to the City of Charleston for work force, low-cost
17 housing. And I believe that closing took place last week.
18 And both of those closings and the sale and the transfer of
19 the property were done pursuant to a planned-unit development
20 agreement signed with the City and the County of Charleston
21 who is going to build a pitchfork road agreed to.

22 So the property is gone. It no longer belongs to PCA.
23 But it did at the time of this alleged springing easement.

24 So that case was settled on the record February 29th,
25 2016. Mr. LaPlante was supposed to sign some papers. He

1 refused to do it, even though his lawyers had approved them.
2 And I moved to have the settlement enforced. And Judge Dennis
3 removed Mr. LaPlante as manager of PCA on May the 16th, 2016,
4 and appointed Chris Lanning the manager of PCA.

5 Now I am getting ready to get to the motion to refer.
6 But that basically is the background. Thomas Prichard
7 represents PCA now. In the judicial dissolution lawsuit PCA
8 was represented by Jay Seibels and Jason Luck of the Seibels
9 firm. So Mr. LaPlante has always been represented either by
10 Seibels -- and he is currently represented by Jason Tarok.

11 Now Wells Fargo after the judicial dissolution case was
12 started in December of 2013 became concerned about that suit.
13 It was an element of default, among other things, and their
14 note and mortgage, so they started a foreclosure suit on the
15 \$5.5 million owed in -- let me get the right date for you
16 there. In 2014. August the 14th, 2014.

17 There were some forbearance agreements entered into.
18 Wells Fargo basically hoped that some of the property would
19 sell. It didn't sell. So ultimately in 2017 Wells Fargo
20 moved to get it back onto the active docket, moved to refer it
21 to the master in equity. And it was referred to Judge
22 Scarborough, Master in Equity, in April of 2017.

23 So there were -- and this was all recorded in Judge
24 Scarborough's order which is Exhibit Number 3 which Mr. Tarokh
25 has no objection to that I filed yesterday and move into

1 evidence.

2 So all of the -- in much more detail everything I just
3 told you is in that order. Judge Scarborough has a hearing on
4 June 29th, 2017. Mr. LaPlante is present. I am present. Mr.
5 Zurlo is present. Brian Hellman is present. Thomas Prichard
6 is present. Brian Hellman is present. And that \$3.25 million
7 note that PCA and mortgage PCA had given to the Zurlo Trust
8 got assigned to a single member LLC, 1776, represented by
9 Brian Hellman.

10 So Judge Scarborough after the hearing and looking at all
11 of the exhibits that had been involved, both in the judicial
12 dissolution settlement and in the foreclosure case, ordered
13 that the property be sold in an order of foreclosure -- this
14 is Exhibit Number 3 I submitted yesterday, dated June 21st,
15 2017, and filed June 23rd.

16 1776 comes in and represents that it will pay at least
17 the first mortgage amount to Wells Fargo; and Wells Fargo then
18 takes Mr. LaPlante and Mr. Zurlo, the guarantors of the note,
19 separates them out of the lawsuit and agrees to sell it and it
20 is ultimate ultimately sold for the \$5.5 million to 1776.

21 Now I'm almost at the end, Your Honor, you will be glad
22 to hear. But all of this is set forth in Exhibit 3. So that
23 the question in the case basically and the reason to refer it
24 to the master in equity is, one, Joe Scarborough retained
25 jurisdictions to hear all post-foreclosure matters involving

1 this specific property and this .55 acres owned then at the
2 time of the foreclosure order by Maybank 2754 was a PCA
3 property originally. So he retained jurisdiction to hear any
4 post-foreclosure matters involving all of this property that
5 was at one time owned by PCA.

6 Secondly, the master in equity has got full power; and
7 under Rule 53(b) you can refer all or a part of this case to
8 the master in equity. And I would suggest to you that the
9 initial issue as to whether or not there are sufficient
10 factual documents or basis as a matter of law to determine
11 whether or not an easement even exists should be referred to
12 the master in equity.

13 If a master in equity decides that the easement exists
14 and that a jury questions about its extent and its scope and
15 whether it was recorded and whether there is a written
16 document and whether it is a prescriptive easement or an
17 easement by necessity, all that he can send back to the court
18 to you for a jury trial.

19 If the master in equity decides as a matter of law that
20 there are not sufficient facts either under the motion to
21 dismiss already filed by the Beach Company or summary judgment
22 motions to be filed, to constitute an easement, this document,
23 this res- ---

24 (WHEREUPON, audio lost momentarily).

25 THE COURT: Hold on. Mr. Young, you have muted yourself

1 somehow.

2 (WHEREUPON, speaker button re-engaged.)

3 THE COURT: There you go.

4 MR. YOUNG: I got tired of hearing myself, Your Honor.

5 THE COURT: That's okay. That makes two of us.

6 We have only got one more minute before the next hearing
7 starts. We do them every 30 minutes.

8 Let me just ask Mr. Tarokh. I always ask this question,
9 and only one person has ever given me an honest response. So
10 I am going to see what your response is. Why not refer it to
11 the master? It is ten times faster and much more convenient.

12 MR. TAROKH: Your Honor, my client requests a jury trial.
13 We requested a jury trial from the very beginning. The
14 existence -- and as we state in our opposition filings the
15 existence of whether or not -- the existence of an easement is
16 a legal question. The court -- the master -- which requires a
17 jury. We have requested it. The master in equity does not
18 have authority to empanel and hear a jury trial.

19 We state -- in support of that we filed a notice of
20 filing authority with three cases from the South Carolina
21 Supreme Court on Friday. And the first case stands for the
22 proposition that the master in equity does not have
23 jurisdiction to hold jury trials.

24 THE COURT: You are right. You are right. I mean I am
25 the one who holds jury trials. He is the one that handles

1 the -- he can handle the legal question as to, you know, the
2 real estate issue. I mean there's no reason to just keep -- I
3 mean you are going to either get this thing resolved either --
4 either in your favor or not. Potentially it could be in your
5 favor.

6 MR. TAROKH: Your Honor ---

7 THE COURT: Now or probably -- I mean the jury trial is
8 probably going to be about 2024 or 2025, or you may can get a
9 resolution in this case in the next four months. It is
10 your -- that is the only concern that I would have.

11 MR. TAROKH: Your Honor, my client demands a jury trial.
12 We requested it in the complaint. And something to pay
13 attention to all of us, Your Honor, is I wasn't involved in
14 the underlying foreclosure action. And I bring this up -- I
15 bring this up for this case -- exhibits, for this reason.
16 Mitch LaPlante they have placed great emphasis on the current
17 manager of my client. My client is not an individual. My
18 client is a corporation. Mitch LaPlante was severed from the
19 foreclosure action.

20 They failed to mention -- and I don't know why. But it
21 is a complicated case and there are a lot of filing in the
22 foreclosure case. But back on June 21st, 2017, Judge
23 Scarborough entered an order granting plaintiff's motion to
24 sever. And that is in the underlying foreclosure case. And
25 just to cite for the record, that is in 2014-CP-10-4946.

1 And in it, Your Honor, the court said, quote: The
2 individual guarantors are not necessary parties to the
3 foreclosure portion of the case and are therefore severed as
4 parties from the foreclosure proceedings as well. The
5 foreclosure shall proceed as against defendant Penny Creek
6 Associates, LLC, and the defendant property owners
7 association.

8 So the first argument along that line, Your Honor, is,
9 yes, they have served Mr. LaPlante; yes, he was named as a
10 defendant in the foreclosure; but he was subsequently severed
11 out.

12 And in recognition of that severance, Your Honor, on
13 Exhibit 3 that was filed by Mr. Young -- or admitted into
14 evidence by Mr. Young, on Page 2 of that same order it says
15 defendant Mitchell F. LaPlante, which is Mitch LaPlante,
16 parentheses, severed from the foreclosure claim.

17 So this whole notion of, well, because Mitch was named in
18 the foreclosure and served with process therefore every entity
19 with whom he had an interest was also on notice and was also
20 foreclosed out is incorrect. It is fundamentally a due
21 process issue.

22 Yes, Judge Scarborough has jurisdiction over the
23 property; but that jurisdiction is limited to only those
24 parties that have been served in the foreclosure case.

25 My client wasn't named in the foreclosure case. In

1 addition, the resolution which we attached to the complaint
2 references four individuals. One of them is deceased, John
3 LaPlante. But Mitch is named on there. Marianne LaPlante and
4 Peter LaPlante. And John who is now deceased, Marianne and
5 Peter, were never named in the foreclosure action; and neither
6 was my client.

7 So, yes, the case should go to the master in equity once
8 the jury determines whether or not an easement exists. And
9 whether or not an easement exists -- and I cited case law in
10 opposition to these motions to dismiss for failure to state a
11 cause of action where even though an easement agreement was
12 unrecorded the court still found that you have to look to the
13 intent of the parties. And it is those facts for which we
14 seek a jury trial.

15 And once a jury determines that a -- the -- the easement
16 exists then it should be referred down because the scope of
17 the easement is an equitable action.

18 So we agree it should go down. But after a jury
19 determines that there is an easement. And in support of that
20 we have filed -- I filed cases that are cited in a previous
21 motion on Friday.

22 THE COURT: All right. Here is what we are going to do.
23 In an abundance of caution to be fair to everybody what I am
24 going to do is I want to take a look at the exhibit. By the
25 way, for the record, Exhibits 1 and 3 are admitted without

1 objection and Number 2 is for identification purposes only.
2 And Phyllis will tell you how to make sure that that becomes a
3 part of the clerk's record.

4 (WHEREUPON, Defense Exhibit Number 1, S.C. Articles of
5 Organization, marked for identification)

6 (WHEREUPON, Defense Exhibit Number 2, development guidelines,
7 marked for identification)

8 (WHEREUPON, Defense Exhibit Number 3, order and judgment of
9 foreclosure and sale, marked for identification)

10 (WHEREUPON, Defense Exhibit Number 1 admitted into evidence.)

11 (WHEREUPON, Defense Exhibit Number 3 admitted into evidence.)

12 THE COURT: But what I am going to do is I want to take a
13 look at Exhibit 3 in detail. And so I am going to just hold
14 my ruling on this in abeyance until we have the hearing next
15 Thursday and give Mr. Tarokh an opportunity to take a look at
16 what was filed; and we will just reconvene then, and I will
17 make my ruling on that day. All right. So you will know
18 something ---

19 MR. TAROKH: Yes, Your Honor -- Your Honor, just to
20 clarify. I will go ahead and file the order of severance so
21 it will be of record as well. Because that ties into the
22 final judgment relative to the severance issue of Mitch
23 LaPlante.

24 THE COURT: All right. And I will make a ruling on that
25 as well.

1 MR. TAROKH: Thank you.

2 THE COURT: All right. Well, thank y'all so very much.
3 Sorry to be hasty, but we have got another group waiting right
4 behind you. So we'll get back together next week and get it
5 sorted out.

6 (WHEREUPON, court reporter confirmed with the Clerk's Office
7 that exhibits were received and made a part of the record.)

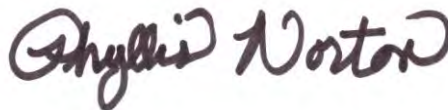
8 (WHEREUPON, the hearing concluded.)

(*NOTE:* Please contact the court reporter for additional copies or certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on June 16, 2020.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

A handwritten signature in dark ink that reads "Phyllis Norton". The signature is written in a cursive, flowing style.

PHYLLIS NORTON, CVR

Date: June 23, 2020

Certified Transcript Provided For: Jason Tarokh, Esq.

Certification Reference #062320 Original

PROCEEDINGS

THE COURT: All right. So, good afternoon. This group seems familiar. So, what motion is this today?

MS. SHOUN: Well, Your Honor, Cheryl Shoun here. I represent the Beach Company and Beach Fenwick in this action. And present with me today just for disclosure to the Court and everybody involved is Andrew Dennis and Alan McMahon who are representing my client and Marilyn Trevino, my paralegal.

I think, Your Honor, if we look at the motions in the order in which they were filed that my client's Motion to Dismiss and Motion to Refer to the Master were the first two filed.

THE COURT: All right. What other remaining motions are there that are outstanding?

MR. TAROKH: Good afternoon, Your Honor. Jason Tarokh on behalf of the plaintiff, Maybank 2754, LLC. Your Honor, I represent the plaintiff. We have a pending Motion for Temporary Injunction. I also have my client on the hearing as well.

Mitch Laplante is manager of Maybank 2754, LLC. I represent Mr. Laplante in other matters but in this matter my client is the corporation. And I have a development, Your Honor, that I believe would make moot all pending motions.

1 THE COURT: All right. Well, let's hear it then
2 because if we don't need to hear the motions then we
3 don't need to hear the motions.

4 MR. TAROKH: Yes, Your Honor. If you recall last
5 week we were before Your Honor on this same case. It was
6 last Tuesday. Counsel for the Beach Company and Beach
7 Fenwick, LLC; Beach Fenwick, LLC is the current owner.
8 They stated that I should be -- the discovery that was
9 overdue was to be given to me last week. It was supposed
10 to be going out last week.

11 I didn't receive the discovery until Tuesday, this
12 past Tuesday night around 8 o'clock; I think it was a
13 little after 7:45 p.m. They were responses to
14 interrogatories and requests for production. And I
15 didn't have an opportunity to fully review those
16 documents until yesterday afternoon and last night. And
17 my client didn't have an opportunity to review those
18 documents until this morning and the review is still
19 incomplete.

20 It is a huge volume of documents, which we're
21 appreciative of and I managed to put eyes on every single
22 one of them but I was not able to undergo an in depth
23 review of each one. My point is, Your Honor, we would
24 ask the Court for leave to file an amended complaint. We
25 base this on the discovery that I've seen so far. We

1 believe we have at least one additional claim we can add
2 and that would be a declaratory judgment declaring that
3 the amended PUD, the PUD is the planned unit development,
4 which is the basis of the development agreement that we
5 cite in our original complaint. The current owner Beach
6 Fenwick, LLC and the City of Charleston have this
7 development agreement which seek to develop the property
8 without any reservation for my client's easement.

9 My client has the adjacent lot, it's a commercial
10 property. And what I can tell based upon a quick review
11 of the discovery and even though we allege the
12 development agreement in the original complaint it has
13 become clear that my client never signed the amended PUD.

14 And that's important because there is an ordinance
15 which requires that all, this is my summary of it, all
16 adjacent land owners sign the PUD. My client didn't do
17 that so we believe we have facts to support and allege
18 that the amended PUD should be voided out and be held as
19 unenforceable.

20 In addition, Your Honor, because the City of
21 Charleston is a party to the development agreement we
22 believe we should also add the City of Charleston as a
23 party defendant. In addition to that, Your Honor, based
24 upon some of the documents that I reviewed and I filed
25 one of them in anticipation of going forward on my Motion

1 for Temporary Injunction that was filed with exhibit 3 we
2 believe we can better state the allegations surrounding
3 my client's easement right and the alleged civil
4 conspiracy. In this particular case, Your Honor, we
5 allege that this conspiracy was orchestrated by an
6 individual in concert with all the other defendants.

7 We now have evidence that will be helpful to support
8 that theory and we'll be able to flesh out those
9 allegations. The substance of the Motions to Dismiss,
10 Your Honor, basically some I think they all, if I'm not
11 mistaken they almost all are the same in substance. They
12 attack the civil conspiracy count. They allege that I
13 didn't specifically state that there was a specific
14 intent to harm my defendant.

15 We believe if Your Honor was to go forward on the
16 Motions to Dismiss today, we sufficiently pled them, if
17 we didn't sufficiently pled them, Your Honor, dismiss my
18 client's complaint for failure to state a cause of action
19 and we believe we should be entitled to amend the
20 complaint. And even if the motions went forward and we
21 were successful in getting the Motions to Dismiss denied
22 we would be asking the Court to amend the complaint
23 anyways.

24 So, in sum, we believe we can better after receiving
25 the discovery, and we'll try to do this as quickly as we

1 can, if Your Honor recalls we propounded discovery back
2 in March. I was expecting discovery last week. That
3 didn't happen; I got it close to 8 p.m. a day and a half
4 ago. I'm doing my best to review everything so we don't
5 waste the Court's time and to be as efficient as
6 possible.

7 As Your Honor knows the law and the rules
8 surrounding Motions to Amend the Complaint they should be
9 given with great liberality. This is the first request
10 to amend the Complaint. The case is relatively new.
11 It's very new; it was filed in January. And I'm just
12 receiving discovery responses.

13 So for those reasons we would ask the Court to grant
14 us 30 days leave to amend to add additional counts, at
15 least one additional count, to add the City of Charleston
16 and possibly other parties and to better state the
17 allegations we've previously stated.

18 THE COURT: All right. So, just stay unmuted, who
19 did you receive the discovery from; which party?

20 MR. TAROKH: Yes, Your Honor. It was the Beach
21 entities; the Beach Company and Beach Fenwick, LLC
22 represented by Ms. Shoun.

23 THE COURT: All right. Ms. Shoun, do you have any
24 objection to allowing him to have more opportunity to
25 look at the discovery and amend his complaint?

1 MS. SHOUN: Yes sir, actually I do Your Honor.

2 THE COURT: All right. I'll be happy to hear from
3 you.

4 MS. SHOUN: Thank you. And Your Honor this is
5 going to get into, and I'm going to try to be as brief as
6 I can because I know the Court has scheduled 30 minutes
7 for this. And where I'd really love to be is in the
8 courtroom to be able to make this argument to Your Honor
9 and among other counsel.

10 This is a completely unsupported claim across my
11 client's property. And what's going on is this LLC has
12 filed a lis pendens on my client's property. It is
13 seeking an order of this Court imposing an injunction on
14 my client's property which is effectively holding up a
15 multimillion dollar plan to develop this piece of
16 property.

17 The documents to which counsel refers is a
18 development agreement. This development agreement has
19 been public record with the City of Charleston. This was
20 no new disclosure to him. Additionally, he put the lis
21 pendens on the property and he asked this Court for
22 injunctive relief before he served discovery.

23 He made the representation to this Court that he had
24 sufficient facts at the time that filing was made to
25 support his claim for this relief. This is a further

1 attempt to delay this, Your Honor. Furthermore, Mr.
2 Tarokh made a point of pointing out to the Court that his
3 client is the corporation, Maybank 2754, LLC. Well, if
4 Your Honor will take a moment to look at the filings,
5 multiple filings that have made before this Court, even
6 if we took the resolution which purportedly granted some
7 easement to be true that easement was granted to
8 individuals in the Laplante family.

9 It was not granted to Maybank 2754. It shouldn't
10 even be a party to this action because if that easement
11 is valid, which we vehemently object that it is, it would
12 have gone to those individuals, Your Honor. That makes
13 it an easement in gross that can't be assigned.

14 It could not go from those individuals to a
15 corporate entity. So what's happening is this is holding
16 up my client's development. We want this moved. We want
17 the lis pendens lifted. We want this to be heard before
18 the Court.

19 And the additional documents he says he needs to
20 review are all documents -- the portion of the
21 development agreement that Mr. Tarokh filed with this
22 Court yesterday comes from the development agreement to
23 which he objected the Court take in as evidence last week
24 when it was presented by Mr. Young. And that development
25 agreement was submitted by his client, Mitch Laplante.

1 And I would suggest, Your Honor, going back to the Motion
2 to Refer which Your Honor briefly addressed last week is
3 the reason Maybank 2754 so aggressively objects to the
4 referral of this matter to the Master in Equity is
5 because that's exactly where this case should be.

6 Maybank 2754 was not a party to that foreclosure and it
7 was not a party to the foreclosure because it has no
8 interest in this property.

9 Mitch Laplante was a party to that foreclosure and
10 that's why he's not shown as a plaintiff in this
11 particular action. It is further attempts to attenuate
12 that individual and this lawsuit from the judge who is
13 familiar with these properties and familiar with these
14 individuals. Your Honor, this is causing grave harm to
15 my client. Mr. Laplante knows this.

16 MR. YOUNG: Your Honor, my name is Rutledge Young
17 along with Blake McKee. I represent the 1987 Zurlo
18 Trust. And it seems to me that what's before the Court
19 is what has been filed. The fact that the plaintiff may
20 want to amend the complaint and do all that they have to
21 file a proper motion; not spring it on us at the time
22 that we're having a motion hearing before you on
23 everybody except for Seamon Whiteside's Motion to Refer
24 this matter to the Master in Equity for the reasons that
25 we argued last time and which of course is in all the

1 papers that we filed. So if the matter gets to the
2 Master in Equity and he decides that there is some reason
3 to grant the plaintiff's motion once it gets filed, if it
4 gets filed, then there is no reason the Master can't
5 handle that.

6 THE COURT: The only motions before the Court today
7 are Ms. Shoun's Motion to Dismiss and Motion to Refer?

8 MR. YOUNG: Yes, sir ---

9 MS. TEICH: --- no, Your Honor ---

10 MR. TAROKH: --- no, Your Honor, that's incorrect.
11 Motion for Temporary Injunction; plaintiff's Motion for
12 Temporary Injunction ---

13 MS. TEICH: --- Your Honor, that's incorrect. This
14 is Jordan Teich on behalf of Seamon Whiteside. We also
15 have a Motion to Dismiss a Civil Conspiracy Claim.

16 THE COURT: All right ---

17 MS. SHOUN: --- Your Honor ---

18 MR. TAROKH: --- that's my point ---

19 MR. HELLMAN: --- Your Honor, Brian Hellman on
20 behalf of 1776, LLC. We have a motion ---

21 THE COURT REPORTER: --- Judge, I'm sorry; I'm
22 sorry ---

23 THE COURT: --- hold on ---

24 THE COURT REPORTER: --- if everyone could not talk
25 over one another, please. Thank you.

1 MS. TEICH: Yes, ma'am.

2 THE COURT REPORTER: Thank you.

3 MR. HELLMAN: I'm sorry; should I go now? I just
4 want to say Brian Hellman on behalf of 1776, LLC. We
5 have a Motion to Dismiss and a Motion to Refer to the
6 Master as well.

7 THE COURT: All right. Hold on for a second
8 because I didn't know there was all these motions. We
9 only have three on our roster; that's the problem so
10 that's where it's getting out from up under me. I don't
11 know if we're going to have enough time. I agree with
12 them, Mr. Tarokh. I'm not going to take your Motion to
13 Amend at this point in time. You're going to have to
14 file the motion and we'll have to hear it at a later
15 date. But I want to make sure that we're getting today's
16 cases resolved.

17 [Whereupon, the Court confers with the law clerk]

18 MR. TAROKH: Your Honor, if you recall last week I
19 thought we were going to revisit my Motion for Temporary
20 Injunction today. And I'm prepared to proceed on my
21 Motion for Temporary Injunction ---

22 THE COURT: --- hold on. We're reading the notes
23 from last week's hearing. Hold on; let me put you on
24 mute.

25 MR. TAROKH: Yes, Your Honor.

1 [Whereupon, the Court reviews notes]

2 MR. YOUNG: Your Honor, Rutledge Young. I sent an
3 email to Julie and the Court on June the 11th listing the
4 16 motions that were pending as of June the 11th. There
5 have been some filed since then. But maybe Julie can
6 find that because that had a list of what the motions
7 were and when they were filed.

8 THE COURT: Okay.

9 [Whereupon, the Court continues to review notes]

10 THE COURT: All right. You're right. What ended
11 up happening is my fault. I looked at the roster and
12 when I'm reviewing and getting ready for each day I read
13 what's normally going to be for today not realizing that
14 I continued the other ones until today and that there
15 were these other ones outstanding.

16 I thought there was just three motions so that's why
17 I only gave you 30 minutes. Obviously, we can't hear 16
18 motions in 30 minutes. So what I'm going to do is what
19 was the one you indicated Mr. Tarokh that was held over
20 from last week?

21 MR. TAROKH: Yes, Your Honor. There were two. If
22 you recall Mr. Rutledge spent approximately 20 minutes or
23 so and I was given a minute to respond to the Motion for
24 an Order of Referral.

25 THE COURT: All right.

1 MR. TAROKH: And Your Honor indicated that we would
2 hear that issue. In addition, we would hear plaintiff's
3 Motion for Temporary Injunction. And I am prepared to
4 proceed on the Motion for Temporary Injunction. I have
5 my client present.

6 THE COURT: All right. We're going to do that one
7 because I do remember that now and then Ms. Shoun I'll
8 get back to you, okay?

9 MS. SHOUN: Yes, sir.

10 THE COURT: All right. Yes sir, Mr. Tarokh.

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1 MR. TAROKH: Yes, Your Honor. This is plaintiff's
2 Motion for Temporary Injunction. We based our motion on
3 the allegations set forth in the verified complaint.
4 Specifically that my client was given an easement across
5 the property that is subject to a development agreement
6 with the City of Charleston.

7 In addition Your Honor, we will establish that my
8 client will suffer irreparable harm because after this
9 agreement had become known before the purchase of the
10 property by Beach Fenwick, LLC my client met with the
11 Beach Company and the engineer, Seamon Whiteside who is
12 also named as a defendant to discuss where to place this
13 easement. And my client will testify that they said it
14 was impossible based upon the current plan. And I have a
15 witness to support that, Your Honor.

16 In addition, I filed three exhibits. The first
17 exhibit is plaintiff's exhibit 1 which was attached to
18 the complaint. That's a resolution. It provides for the
19 easement described in the verified complaint. Exhibit
20 number 2 is the contract for assignment of interest.

21 This also is referenced in the resolution we
22 attached and it also provides for the easement upon which
23 our claims are based. In addition, I filed yesterday
24 afternoon as soon as I can -- as soon as I could right
25 before 5 o'clock plaintiff's exhibit number 3. And

1 plaintiff's exhibit number 3 is an email from the Beach
2 -- it's an email chain between a member of the Beach
3 Company and a member of Seaman Whiteside discussing my
4 client's claim of an easement and also depicts what my
5 client will testify to as his property and as a possible
6 location point for the easement. The whole point being,
7 Your Honor is everyone knew about this easement before
8 the purchase of the property.

9 And the property was developed with a complete
10 omission of my client's easement rights. We allege this
11 by saying that the defendant led by Zurlo submitted
12 various documents and made various representations that
13 omitted my client's easement right. Now the easement is
14 unrecorded but I also provided in numerous filings
15 sufficient case law to where the Court can find an
16 easement exists.

17 And it's a legal question for a jury and we've
18 requested a jury. So long as we can demonstrate based
19 upon the documents that an easement exists and based upon
20 the facts and circumstances that an easement exists. And
21 with that background, Your Honor, I can call my witness
22 if Your Honor will hear.

23 THE COURT: Sure. Not a problem.
24
25

1 MR. TAROKH: The plaintiff calls Mr. Michel
2 Laplante. Mr. Laplante, are you on the line?

3 MR. LAPLANTE: Yes, I am.

4 MR. TAROKH: Okay. I guess you need to be sworn
5 in. Madame Court Reporter, will you swear in the
6 witness?

7 THE COURT: I'll do it, Joy. Raise your right
8 hand.

9 [Whereupon, the witness is duly sworn by the Court]

10 THE COURT: All right. I'll be happy to hear from
11 you.

12 - - - - -

13 MICHEL LAPLANTE,

14 Having been first duly sworn,

15 Was examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. TAROKH:

18 Q. Mr. Laplante, please state your full name for the
19 record?

20 A. My name is Michel Francois Laplante, but I go by
21 Mitch.

22 Q. Mr. Laplante, what is your position with the
23 plaintiff at this time?

24 A. I'm a partner in Penny Creek Associates. It has not
25 been closed up yet --

1 THE COURT REPORTER: I'm sorry; repeat that answer.
2 I'm sorry; he was breaking up a little. Repeat the
3 answer.

4 THE WITNESS: Could you give the question again,
5 Jason?

6 Q. [Mr. Tarokh] Yes. What is your position with the
7 plaintiff in this case?

8 A. Oh, I'm sorry. I'm the managing partner of 2754,
9 LLC.

10 Q. And how long have you been the managing partner of
11 the plaintiff?

12 A. Since my son died in October. October 15th, he
13 died; shortly after that.

14 Q. What was your position with Maybank before the
15 passing of your son?

16 A. I was a minority share holder.

17 Q. Are you familiar with the allegations in the
18 verified complaint?

19 A. Yes.

20 Q. And to the best of your knowledge and belief are
21 they true?

22 A. Absolutely.

23 MR. TAROKH: Your Honor, we would ask that the
24 verified complaint be admitted into evidence as
25 plaintiff's 1.

1 THE COURT: I would ask if there is any objection
2 but I don't want to hear -- so I'll let it in. Whoever
3 Marianne's iPhone is would you mute yourself; you keep
4 coming on.

5 THE WITNESS: To be honest I'm new to this
6 technology. I'm at my daughter's house. She had to get
7 her iPhone to call you. We couldn't get you. I
8 apologize; I'm not a technology person.

9 THE COURT: Okay. I didn't realize that was you
10 because it's highlighted ---

11 THE WITNESS: --- because ---

12 THE COURT: --- as Marianne's iPhone so I thought
13 that was person was the one. That's completely fine.
14 Not a problem Mr. Laplante ---

15 THE WITNESS: --- I apologize. I'm just not a tech
16 guy.

17 THE COURT: Me either. I still have a hotmail
18 account.

19 THE WITNESS: I still draw with a pencil.

20 THE COURT: I understand. So, I'll be happy to
21 hear from you. Yes, it's in I guess over any objections.

22 THE COURT REPORTER: Judge, can you tell me what
23 that is again just for my notes? What is that document?

24 MR. TAROKH: And I'll send it to you. It's the
25 filed verified complaint an exhibit in this case of

1 plaintiff's number 1. I guess -- I'm sorry; not to
2 confuse you. We should call it plaintiff's number 4. I
3 already have premarked a plaintiff's exhibit 1 so let's
4 call it plaintiff's number 4 if that's okay for the sake
5 of the record.

6 THE COURT: All righty.

7 [Whereupon, Plaintiff's exhibit number 4 is entered
8 into evidence by the Court]

9 Q. [Mr. Tarokh] Mr. Laplante, could you please give the
10 Court a brief, the benefit of your education. Please be
11 brief.

12 A. I went to Oklahoma State University, a degree in
13 Architecture. I've been licensed since 1975 as an
14 architect in many states.

15 I'm currently licensed in the state of South
16 Carolina, North Carolina, and I've also done development
17 in numerous places across the country.

18 Q. Can you give the Court an example of a local
19 development project with which you were affiliated?

20 A. Yes. On Kiawah we purchased from the Beach Company
21 about three and a half acres of property that we
22 developed 24 cottages called the Cottages at Cypress
23 Point.

24 My son John and I did that development together and
25 it was very successful. We also did another development

1 off Eugenia Avenue when we purchased property from the
2 new owners of Kiawah, the new partners and did a
3 development there as well.

4 Q. Thank you, Mr. Laplante. Can you please describe
5 for the Court your relationship with one of the
6 defendants, Eugene Zurlo? Please be brief.

7 A. I designed his homes. I've known him for probably
8 20 or 25 years and we did a number of ventures together
9 both on Kiawah and Massachusetts. He's invested in a
10 number of projects and we were partners with Penny Creek
11 for some 20 years or so.

12 Q. And are you partners with Mr. Zurlo in his capacity
13 as trustee of his Trust?

14 A. No.

15 Q. You're not partners with Mr. Zurlo?

16 A. I'm partners with Mr. Zurlo but not part of the
17 Trust. I'm sorry; I didn't understand the question. I
18 apologize.

19 Q. Okay. Okay. Just to clarify you and Mr. Zurlo --
20 Mr. Zurlo, Mr. Zurlo's Trust is partners with you with
21 Penny Creek Associates, LLC is that accurate?

22 A. Yes. Yes, 50-50 partners.

23 Q. Okay. Okay. And the co-trustees of the Trust you
24 understand that to be Mr. Zurlo and his wife, Ms.
25 Charlotte Zurlo, is that correct?

1 A. That's what I understand. I don't know for a fact
2 but that's what I understand.

3 Q. Okay. Do you have documents in front of you Mr.
4 Laplante? Do you have what I identified as plaintiff's
5 exhibit number 1?

6 A. Yes sir, I do.

7 Q. Okay. And can you describe for the Court what this
8 document is?

9 A. This is a Resolution of Penny Creek Associates that
10 was prepared by Curtis Byars of Buist & Byars to
11 memorialize the fact that the property 2754 which was
12 owned by Penny Creek was being sold to my family, my
13 children and I.

14 Q. Okay. And it's true the Resolution references the
15 members of your family to whom the property was being
16 sold, is that true?

17 A. That's correct.

18 Q. And can you tell the Court for the record who those
19 individuals are?

20 A. It was my John who is not with us anymore, my
21 daughter Marianne Scarlata, and my son Peter Laplante.

22 Q. And yourself?

23 A. Yes, I'm sorry.

24 Q. Okay. And can you describe what was the intent of
25 this document?

1 A. The intent of the document was to ---

2 MS. SHOUN: --- Your Honor, I'm just going to
3 object here. There hasn't been a sufficient foundation
4 laid to go to the intent of the document and outside the
5 four corners of it.

6 THE COURT: I agree. It's speculation, so move on.

7 Q. [Mr. Tarokh] Is your signature on this document, Mr.
8 Laplante?

9 A. Yes, it is.

10 Q. And is Mr. Zurlo's signature on this document?

11 A. Yes, it is.

12 Q. And it's true this document is a Resolution of Penny
13 Creek Associates, LLC, is that correct?

14 A. That's correct.

15 MR. TAROKH: Your Honor, at this time we ask the
16 Court to move into evidence what has been marked as
17 plaintiff's exhibit number 1.

18 THE COURT: It will be exhibit number 5, correct?

19 MR. TAROKH: Your Honor, I'm sorry; what I said
20 originally was exhibit 1. The verified complaint should
21 have been exhibit 4. But this could be number 1. I have
22 a total of four exhibits today.

23 THE COURT: Right. Okay. Those are the three that
24 you indicated earlier you've already filed 1, 2, and 3?

25 MR. TAROKH: Yes, Your Honor.

1 THE COURT: All right. I'll allow it in over any
2 objections.

3 MR. TAROKH: Thank you, Your Honor.

4 [Whereupon, Plaintiff's exhibit number 1 is entered
5 into evidence by the Court]

6 Q. [Mr. Tarokh] And Mr. Laplante, could you just tell
7 us what was the intent of this doc -- of the Resolution.

8 MS. SHOUN: Again, Your Honor, same objection.

9 THE COURT: Same ruling. Move to the next
10 question.

11 Q. [Mr. Tarokh] Does the document -- does the
12 Resolution reference another document?

13 A. Yes.

14 Q. And what is that document?

15 A. It is the contract for assignment of interest.

16 Q. Okay. Mr. Laplante, if you could please look to
17 what I identified as plaintiff's exhibit number 2. Do
18 you have that in front of you?

19 A. Yes, sir.

20 Q. Is plaintiff's exhibit number 2 the document
21 referenced in the Resolution?

22 A. Yes.

23 Q. And can you tell me what plaintiff's exhibit number
24 2 is?

25 A. It is a detailed contract for transfer of this

1 interest from Penny Creek Associates to my children
2 including all the conditions that go with it.

3 Q. Okay. And can you please -- does it make references
4 to the easement upon which the lawsuit is based?

5 A. Very specifically. That was a major reason for all
6 these transactions that we identify ---

7 MS. SHOUN: --- Your Honor? I'm sorry Your Honor;
8 I'm going to object again and move to strike. Again,
9 we're getting behind the four corners of the document and
10 that foundation has not been laid.

11 THE COURT: You're talking about outside the four
12 corners of the complaint or of the...

13 MS. SHOUN: Of the document the witness is
14 referencing. He is going to it's supposed to mean this
15 or admit that. We need to look at the document.

16 THE COURT: I agree. So I'll sustain the
17 objection.

18 Q. [Mr. Tarokh] Mr. Laplante, will you please go back
19 to plaintiff's exhibit 1 the Resolution?

20 A. Yes, sir.

21 Q. Are you on the first page?

22 A. Yes, sir.

23 Q. Can you please read for the record the part that
24 says whereas as a condition of closing?

25 A. Yes. [Reading] Whereas, as a condition of closing

1 the Company has agreed to grant, transfer, sell and
2 convey to Purchasers, their successors and assignees an
3 access easement for pedestrian and vehicular ingress and
4 egress and access to, from and over the portion of the
5 land of Seller known as Residual Tract B-2-2 as ---

6 THE COURT REPORTER: --- I'm sorry, I'm sorry. I'm
7 sorry; I need you to read slower because I'm getting some
8 feedback from your -- through the phone so if you could
9 read slower please.

10 THE WITNESS: I'm so very sorry.

11 THE COURT REPORTER: That's okay. Thank you.

12 THE WITNESS: You want me to start from the
13 beginning?

14 THE COURT REPORTER: Yes, please. Thank you.

15 A. Whereas, as a condition of the closing the Company
16 has agreed to grant, transfer, sell and convey to the
17 Purchasers, their successors and assignees an access
18 easement for pedestrian and vehicular ingress and egress
19 and access to, from and over that portion of the land of
20 the Seller known as Residual Tract B-2-2 as shown on that
21 plat by Richard D. Lacy entitled -- you want me to read
22 the entire paragraph?

23 Q. [Mr. Tarokh] Yes, please.

24 A. Okay. [Reading] Plat showing that the subdivision
25 of Tract C-1 TMS number 346-00-00-077, Tract B-2-1 TMS

1 346-00-00-004 and Tract B-2-2 TMS 346-00-00-076 to create
2 an extension of Fenwick Hall Allee containing 2.72 [sic]
3 acres and creating residual Tract C-1 TMS 346-00-00-077
4 containing 15.45 acres, residual Tract B-2-1 TMS number
5 -- let me get on the right line -- 346-000-004 [sic]
6 containing 24.895 acres, and residual Tract B-2-2 TMS
7 number 346-000-076 [sic] containing 22.856 acres having
8 been recorded in Plat Book EH, page 817 in Charleston
9 County RMC Office on March 25, 2005 parenthesis 30 foot
10 private right of way, the location and condition of which
11 shall be mutually agreed upon at the completion of
12 certain roadway known as the Pitch Fork Road parenthesis
13 Pitch Fork Road.

14 Upon the completion of the Pitch Fork Road the
15 parties herein shall execute and record an Easement
16 Agreement to memorialize the 30 foot private right of
17 way.

18 Q. Thank you. The beginning of the paragraph stated
19 whereas as a condition of closing. What closing? What
20 did it refer to?

21 A. The purchase of 2754 LLC from Penny Creek.

22 Q. And so Penny Creek owns Maybank 2754, LLC at the
23 time of this Resolution?

24 A. That's correct. It purchased it from a Doctor Swann
25 [phonetic] named. And it was a separate LLC that it

1 created. It was a wholly owned subsidiary of Penny
2 Creek.

3 Q. Okay. Okay. And the Laplante family as a result of
4 this resolution bought the property from Penny Creek,
5 bought Maybank 2754, LLC from Penny Creek, is that
6 correct?

7 A. Yes.

8 Q. Okay. Let's go back to plaintiff's exhibit 2
9 please, sir.

10 A. Okay.

11 Q. If you could look at page 6; it's the signature
12 page.

13 A. Yes.

14 Q. You see where it says Seller Penny Creek Associates,
15 LLC?

16 A. That's correct, yes.

17 Q. Is that your signature on behalf of Penny Creek
18 Associates, LLC?

19 A. Yes, as the manager.

20 Q. Okay. And the purchasers are set forth below?

21 A. Yes.

22 Q. I see that your name didn't sign as a purchaser but
23 John's signature is on there, Mr. Laplante, John
24 Laplante's signature is on there and so is the other
25 members of your family, is that correct?

1 A. Yes.

2 Q. Okay. And if you can please look to the next to
3 last page -- I'm sorry, the next page, page 7?

4 A. Yes.

5 Q. It says Company Maybank 2754, LLC?

6 A. Yes.

7 Q. Is that your signature on behalf of Penny Creek
8 Associates, LLC?

9 A. Yes.

10 Q. Okay. If you look to the next page it says Exhibit
11 A?

12 A. Yes, sir.

13 Q. What does it say in parenthesis underneath Exhibit
14 A?

15 A. Assignment of Membership Interest and Written
16 Consent in Lieu of Special Meeting of Sole Member of
17 Maybank 2754, LLC.

18 Q. And is that document the next, the next, the
19 remaining pages if you turn the page? When I reference
20 that document ---

21 A. --- yes, yes. Yes, sir.

22 Q. Okay. What is the title of that document for the
23 record?

24 A. Assignment of Membership Interest and Written
25 Consent in Lieu of a Special Meeting of the Sole Member

1 of Maybank 2754, LLC.

2 Q. And can you please turn to page 11 of that document?

3 A. Yes, sir.

4 Q. And can you look at paragraph 6? Are you there?

5 A. Yes.

6 Q. And can you read paragraph 6 into the record?

7 A. Yes. Its capitalized 30 Foot Access Easement in
8 bold print. And then it says: [Reading] As a condition
9 of closing, Transferor agree to grant, transfer, sell and
10 convey to Transferee it's successors and assignees an
11 access easement for pedestrian and vehicular ingress and
12 egress to and from and over the portion of the land of
13 Transferor known as Residual Tract B-2 [sic] as shown on
14 that plat by Richard D. Lacy entitled Plat Showing the
15 Subdivision of Tract C-1 TMS 346-000-077 [sic], Tract B-
16 2-1 TMS 346-000-004 [sic], Track B-2-2 TMS 346-00-00-076
17 to create extension of Fenwick Hall Allee containing
18 1.272 [sic] acres and creating residual tract C-1 TMS
19 number 346-00-00-076 [sic] containing 14.454 [sic] acres,
20 residual Tract B-2-1 TMS number 346-00-00-004 containing
21 24.895 acres and residual Tract B-2-2 TMS number 346-00-
22 00-076 containing 22.856 acres, having been recorded in
23 Plat Book EH, page 817 in the Charleston County RMC
24 office on March 25, 2005 parenthesis 30 foot private
25 right of way -- R/W; I'm sorry -- close parenthesis, the

1 location and condition of said [sic] mutually agreed upon
2 at the completion of that certain roadway known as Pitch
3 Fork Road parenthesis Pitch Fork Road.

4 Upon the completion of the Pitch Fork Road the
5 parties herein [sic] shall execute and record an Easement
6 Agreement to memorialize the 30 foot private right of
7 way.

8 Q. Now, can you go to paragraph 9 of the same document?

9 A. Yes.

10 Q. The ownership interest.

11 A. Yes, sir.

12 Q. Can you state the members that are listed and the
13 corresponding voting percentage of each?

14 A. John H. Laplante, 50 percent; Michel F. Laplante, 25
15 percent; Peter Laplante, 12.5 percent; Marianne Laplante-
16 Scarlata 12.5 percent.

17 Q. And can you please turn to page, the last page, page
18 14?

19 A. Yes, sir.

20 Q. And you see where it says transferring member Penny
21 Creek Associates, LLC?

22 A. Yes.

23 Q. Did you sign it on behalf of Penny Creek?

24 A. Yes, sir.

25 Q. Did you have the authority to sign it on behalf of

1 Penny Creek?

2 A. Yes, I was the manager.

3 Q. Okay. And did that authority arise from the
4 resolution that's marked as exhibit 1?

5 A. Yes.

6 Q. And the transferees listed below are they all signed
7 by the members of your family; John Laplante, you, Peter
8 Laplante, and Marianne Laplante-Scarlata?

9 A. Yes.

10 MR. TAROKH: Your Honor, we ask that what has been
11 identified as plaintiff's exhibit number 2, the Contract
12 for Assignment of Interest be entered into evidence.

13 THE COURT: All right. It's in over any objection.

14 [Whereupon, Plaintiff's exhibit number 2 is entered
15 into evidence by the Court]

16 Q. [Mr. Tarokh] Now Mr. Laplante, what was the purpose
17 of these documents?

18 A. To ---

19 MS. SHOUN: --- again Your Honor, I'm going to
20 object to the extent that calls for any testimony outside
21 the four corners of the documents.

22 THE COURT: I agree. I'll sustain the objection.

23 MS. SHOUN: Thank you, Your Honor.

24 Q. [Mr. Tarokh] If I could point you to plaintiff's
25 exhibit number 3?

1 A. Yes, sir.

2 Q. If you look to the second page of exhibit number 3?

3 A. Yes, sir.

4 Q. What is this document?

5 A. The top half is a partial copy of the PUD
6 application that was done. It's a copy that's in four or
7 five exhibits attached to that PUD document of the
8 original PUD application.

9 Q. And does it reflect -- does this image reflect the
10 Maybank 2754, LLC property?

11 A. Yes.

12 Q. And can you describe the best you can where that is
13 reflected on there?

14 A. It's a rectangular piece of land that backs up to a
15 retail center, the Food Lion, it fronts on Maybank
16 Highway. At the north side there is a wetland and to the
17 east is the residual tract of this tract of Penny Creek
18 Associates.

19 Q. And you see where it says allowable connection?

20 A. Yes.

21 Q. What is this pointing to?

22 A. It's pointing to the only place that a connection
23 could be made due to the limits of the wetlands ---

24 MS. SHOUN: --- Your Honor, I'm going to object to
25 the extent this calls for speculation. There hasn't been

1 a sufficient foundation laid to establish that this
2 witness can opine as to this is the only way, the only
3 place a connection can be made.

4 MR. TAROKH: Your Honor ---

5 MS. SHOUN: --- we don't even have the entire
6 document in front of us.

7 MR. TAROKH: Your Honor, this was a document given
8 to me in discovery marked by the defendant -- Ms. Shoun's
9 Bates stamp number. It was given to me Tuesday night
10 approximately 8 p.m. My client will testify can testify
11 that this is an image he recognizes of part of a PUD that
12 reflect his property and also reflect the possible
13 connection point for the easement upon which this suit is
14 based.

15 And what is does it operates to reflect that
16 everyone who had anything to do with the PUD and the
17 development of the property knew this existed and knew
18 this was the easement upon which we are suing.

19 THE COURT: All right. I'll let it in over the
20 objection.

21 MR. YOUNG: Your Honor, Rutledge Young. I also
22 object. Many of these documents that the plaintiff is
23 presenting today I've never seen them. I've never had
24 chance to look at them and can't effectively cross-
25 examine the plaintiff on them because I don't have copies

1 of them.

2 THE COURT: I understand. I'm going to allow it.
3 This is just for his Motion for Temporary Injunction so
4 I'm going to allow him to continue to purport whatever
5 evidence he wants pertaining to that so that's the only
6 reason I'm going to consider it. But I'll allow the
7 document in over the objection.

8 [Whereupon, Plaintiff's exhibit number 3 is entered
9 into evidence by the Court]

10 THE COURT REPORTER: Judge, is that plaintiff's 3,
11 I just want to double-check, that you're speaking about?

12 MR. TAROKH: Yes, ma'am.

13 THE COURT REPORTER: Okay.

14 MR. TAROKH: And Your Honor, just for the record
15 these documents were filed, plaintiff's exhibit 1 and 2
16 were filed with the Court sometime last week were e-filed
17 so they are in the Court record and plaintiff's exhibit
18 number 3 was filed yesterday afternoon.

19 THE COURT: I saw it this morning.

20 Q. [Mr. Tarokh] Okay. So Mr. Laplante, back to the
21 words allowable connection what is that pointing to?

22 [Whereupon, recording interrupted by feedback noise]

23 A. I'm sorry; I don't know if that was me or something.

24 THE COURT: No, it was somebody else unmuted
25 themselves and it makes the mics hot so only one of them

1 can be unmuted ---

2 THE WITNESS: --- again, this is all new to me so I
3 apologize.

4 THE COURT: It's not you. It's okay.

5 A. Yes. It identifies what is logical. Again, I've
6 done land development optics a long time. The only place
7 that it could be, that was drawn by Seamon Whiteside as
8 identified in the plan by them as the logical connection
9 point to the road.

10 MS. SHOUN: Your Honor again, my objection. There
11 is no foundation laid that this witness can testify first
12 of all outside the four corners of the document and
13 certainly not that he can testify that this is the only
14 logical place especially in light of the excerpts from
15 the Resolution and from the other documents that this
16 witness just spent a great deal of time reading into the
17 record that clearly reflects that any easement, if there
18 should be one to which we vehemently object, is to be
19 determined by agreement of the parties. So for him to
20 now say it's the only logical place certainly goes
21 outside the four corners of the document.

22 MR. TAROKH: Your Honor, this document indicates an
23 allowable connection on its face. My client has already
24 testified and if he hasn't he'll testify that he's
25 familiar with this image. I believe he's already said

1 its part of a PUD application. He recognizes it. He was
2 giving explanation until he was cut off as to what it
3 means and why it's on there.

4 THE COURT: I'll take it as to what he -- that he
5 believes it shows but not as a dispositive issue as to
6 what it actually is. I understand that is still in
7 dispute. So I'll allow it ---

8 MS. SHOUN: --- thank you, Your Honor.

9 THE COURT: Yes, ma'am.

10 MR. TAROKH: Yes, Your Honor.

11 Q. [Mr. Tarokh] So back to the allowable connection Mr.
12 Laplante, what is it pointing to and why is it there?

13 A. It's pointing to a connection point between the
14 residual tract in 2754. And if you look at the drawing
15 there's a footprint of the building.

16 It's really limited but this was not determined by
17 us at 2754. This was determined by Seamon Whiteside.
18 They put that location on, not us.

19 Q. The crisscross pattern to the right of the arrow
20 what do those words say?

21 A. The crisscross that's part of -- the scope of the
22 PUD boundary. So, it's ---

23 Q. --- is that -- go ahead; I'm sorry.

24 A. [No response]

25 Q. The crisscross pattern is that part of the PUD?

1 A. Yes. That's the limits of the PUD.

2 Q. Okay. And the PUD is owned or this property is
3 currently owned by Beach Fenwick, LLC?

4 A. Not 2754 but the adjacent parcel is, yes.

5 Q. Got it. Where it's outlined in black? There is
6 like a black border if you will to the right.

7 A. Well, that black border I think represents a nature
8 trail. But the entire -- area is the area of the PUD
9 boundaries. It's a corner of the PUD; it goes much
10 larger than that obviously.

11 Q. Got it. Okay. And why does it say future road
12 extension next to the arrow?

13 A. Because that was ---

14 MS. SHOUN: --- again, Your Honor, objection. Its
15 calling for the witness's interpretation and the witness
16 just said he didn't even prepare the document.

17 MS. TEICH: --- Your Honor, can you hear me?

18 THE COURT: Yes, ma'am.

19 MS. TEICH: Thank you very much. I've been trying
20 to object. He's reading from a document that he's not
21 even a party to; its hearsay, Your Honor. He's
22 speculating as to what is included in the document ---

23 THE COURT REPORTER: --- I'm sorry; I don't know
24 who's speaking now. I'm sorry.

25 MS. TEICH: Jordan Teich. He's reading from an

1 email that doesn't even include him and he's speculating
2 as to what is included in the document you know ---

3 MR. TAROKH: --- Your Honor, he recognizes this
4 image. He's not reading -- yes, he's not a party to the
5 email but he recognizes the image that is in the email.

6 THE COURT: Let's move on to the Motion for
7 Temporary Injunction. We need to get moving. We don't
8 have all day on this. I've already cancelled two other
9 hearings. So we need to get down to what we're here for.

10 MR. TAROKH: Yes, Your Honor.

11 Q. [Mr. Tarokh] Now Mr. Laplante, when did you first
12 discover that the property was being developed without
13 any reservation for your easement, for Maybank's
14 easement?

15 A. On December 1st I was in my daughter's home in the
16 Preserve neighborhood and I saw a small red sign in the
17 woods. I stopped to see what it said and it announced a
18 meeting the very next night for an A-R-B hearing for that
19 site.

20 Being concerned I went to the A-R-B meeting and was
21 shocked to find a full development before me. We were
22 never noticed of any development period.

23 Q. The A-R-B meeting you referenced was that the
24 following day on December 2nd in front of the City of
25 Charleston Design Review Board?

1 A. Yes, sir.

2 Q. And who was -- did you speak at that meeting?

3 A. Yes, I did.

4 Q. And what did you speak about?

5 A. For the first -- I saw the site plan and noticed
6 there was no connection and I raised that question to the
7 Board. And they advised me they were there to review
8 design issues.

9 Q. And who was present, I guess I should ask was a
10 representative of the Beach Company present at the
11 meeting?

12 A. Yes, Alan McMahon.

13 Q. And was a representative of Seamon Whiteside and
14 Associates, Incorporated at the meeting as well?

15 A. There were two or three engineers but I know Russ
16 Seamon was there.

17 Q. Okay. And after the meeting did you discuss this
18 easement with those two individuals?

19 A. I discussed -- yes, I did.

20 Q. And what did you tell them?

21 A. I asked them where is the connection and they both
22 acted like they didn't know anything about it. But that
23 didn't make sense from Russ because he's very familiar
24 with it.

25 Q. And how was Russ; was Seamon Whiteside very familiar

1 with the easement?

2 A. Two or three years ago maybe four years ago we were
3 looking to develop or replace the building at 2754
4 Maybank with a doctor's office building. We had a
5 meeting with Russ on site, my son John and I, and we
6 reviewed all factors including this second means of
7 egress.

8 And as a matter of fact we received a proposal from
9 them referencing that second means of egress. But also a
10 year or two ago or three years ago Greystar Group was
11 looking to buy that site and they were concerned about
12 the access easement and we talked about it at that time
13 with all the real estate agents, etcetera that all had
14 not been resolved was the alignment and we ---

15 MR. YOUNG: --- Your Honor, objection ---

16 MS. SHOUN: --- Your Honor ---

17 MR. YOUNG: --- this is all hearsay all hearsay ---

18 MS. SHOUN: --- yes. Thank you.

19 MR. TAROKH: Your Honor, admission against the
20 party opponent there is an exception to that. We named
21 Seamon Whiteside as a defendant. We named the Beach
22 Company as a defendant, the Beach Company subsidiary, the
23 Beach Fenwick, LLC as a defendant. It's an exception to
24 hearsay admission by a party opponent.

25 MR. YOUNG: He's talking about Greystar which is

1 not a party ---

2 MS. SHOUN: --- right.

3 THE COURT: We're not at trial. This is a Motion
4 for Temporary Injunction. He can say what he said but
5 not what anybody else said so I'll sustain the objection.

6 Q. [Mr. Tarokh] Mr. Laplante, did you meet with the
7 Beach Company and Seamon Whiteside after the December
8 2nd, 2019 meeting?

9 A. Yes. After a call to John Darby it took a while but
10 we finally had a meeting at 2754 offices with Alan
11 McMahon, Russ Seamon and my daughter, Marianne Scarlata.

12 Q. And who is John Darby?

13 A. John Darby as I know heads the Beach Company, yes.

14 Q. Is he the CEO to your knowledge?

15 A. I think so. I know him because our sons played
16 basketball together a million years ago.

17 Q. Okay. And what was discussed at this meeting; the
18 meeting after December 2nd when you met with Alan McMahon
19 and Russ Seamon?

20 A. Possible alignments on where this access road could
21 be put. Russ brought full drawings for the development
22 and it was clear to me, but Russ and Alan made it -- they
23 said it was impossible to put the access easement in per
24 the plan that was done already.

25 Q. Did they explain why it was impossible?

1 A. No, they did not. They just said it could not be
2 done. In looking at the land plan it made sense. I
3 couldn't figure out how they were going to do it because
4 part of the issue also is they've located a holding, a
5 water a retentionary for water directly adjacent to the
6 full property line of 2754 Maybank.

7 So you'd have to put a bridge over the water. So as
8 the plans were done there is physically no way to get
9 access to that road; access to our site.

10 Q. Okay. And let me ask you this. How have you, how
11 have you been damaged by the development plans having
12 omitted your easement?

13 A. We would have never purchased 2754 if we didn't have
14 the second means of egress. We'd have no interest in
15 owning a small office building.

16 We had long term development plans for that site and
17 that's why we made it a condition of purchase that we
18 have the second means of egress that was agreed to.

19 Q. And in your opinion is it possible to locate the
20 easement from Maybank 2754, LLC to across the property of
21 Beach Fenwick, LLC?

22 MS. SHOUN: Your Honor, I would object on a couple
23 of grounds. First of all there is not a sufficient basis
24 laid to establish any beginning point or any end point of
25 this purported easement. Next, he's asking for a lay

1 opinion which is not allowed under our rules.

2 MR. TAROKH: Your Honor, if I could briefly
3 respond? Exhibit number 3 was testified to as a possible
4 connection point. And I'm asking as a party, he was part
5 of the transaction that led to the resolution. He can
6 certainly tell us exactly where the easement was going to
7 go; what the intent was.

8 And the whole four corners argument if it's
9 ambiguous as to where the easement is the Court can
10 certainly look outside of the four corners. So, if the
11 argument is well you know the four corners doesn't say it
12 doesn't stop there. The Court should undertake if it's
13 ambiguous the Court should take evidence to determine the
14 intention of the parties.

15 And my client can testify to the intention of the
16 entire transaction was to make the purchase of the
17 property contingent upon an easement across Beach
18 Fenwick, LLC. So ---

19 THE COURT: --- I'll let him testify as to what his
20 intentions or what his beliefs was. I don't have a
21 problem with that but just keep it to that. So I'll
22 overrule the objection.

23 MR. TAROKH: Yes, Your Honor.

24 Q. [Mr. Tarokh] Mr. Laplante, what was your intention
25 with the easement and where would it have been located?

1 A. To be honest we didn't care where it was located
2 along that line that abutted our property and accessed
3 our property. So the location that is on the drawing was
4 again was set by Seamon Whiteside.

5 But as long as we have a connection from our
6 property line to the pitch fork -- and that routing we
7 did not want to encumber the sale as a manager of Penny
8 Creek if we located the exact alignment we would have
9 encumbered the sale of that property and I would not have
10 met my fiduciary duties to Penny Creek by subdividing the
11 property in that fashion.

12 Q. Just to clarify at the time of this easement you
13 were the manager of Penny Creek Associates, LLC, correct?

14 A. Yes, sir.

15 Q. And then you also ---

16 A. --- I --

17 Q. --- go ahead; I'm sorry.

18 A. Go ahead.

19 Q. So, go ahead.

20 A. I had been for 18 or 19 years; a long time, yes sir.

21 Q. Okay. And at the same time as the purchase you
22 became a member of Maybank 2754, LLC is that correct?

23 A. Yes, with my children.

24 Q. And the reason the easement was conditioned upon the
25 completion of pitchfork road was why?

1 MS. SHOUN: Again, Your Honor, I would object to
2 the extent -- I understand Your Honor has indicated that
3 he may be able to testify what his intent was to the
4 previous two questions but I think we've gone way beyond
5 that. And that's not what this question seeks.

6 THE COURT: All right. Rephrase ---

7 MS. SHOUN: --- he's asking for the intent.

8 MR. TAROKH: I can rephrase, Your Honor. I can
9 rephrase.

10 Q. [Mr. Tarokh] What was the intent of the location of
11 the easement at the time of the easement agreement, at
12 the time of the resolution of the contract for assignment
13 what was your intent on behalf of Maybank? What was the
14 intent of Maybank?

15 A. The intent was to have an access point to the
16 pitchfork which would make the development of the
17 potential site match what we'd, what was always -- what
18 was sold to us, we were just doing what was told to us
19 and we could connect.

20 And we were flexible on that and that's why it said
21 that we mutually agreed. I understand that if in fact it
22 was set in one location it would make marketing that site
23 very, very different if it was set so that's why we
24 agreed. And that's why when the previous buyer looked at
25 it we were looking at alignments for them. They wanted

1 to know the exact alignment. Everyone was familiar with
2 that including all the real estate agents ---

3 MS. SHOUN: --- Your Honor, I'm sorry. Again,
4 we're going way outside the scope of this witness's
5 knowledge. There is no foundation of ---

6 MR. TAROKH: --- Your Honor, he's testifying as to
7 his intent and he is consistently being cut off. We're
8 having to restart these questions because of these
9 objections that are frankly baseless. He can testify as
10 to his knowledge, his intent. The Court already said he
11 could.

12 And he's describing to the Court what was the
13 purpose of making this contingent on the completion of
14 pitch fork road. It's in the face of the document. That
15 can be an ambiguous phrase, it is an ambiguous phrase.
16 What was the intention upon completion of pitch fork
17 road? Why was that?

18 He was a party to the transaction by virtue of being
19 manager -- by virtue of being manager of Penny Creek at
20 the time. He was also a member -- he also became a
21 member of Maybank 2754, LLC. That's sufficient knowledge
22 to testify as to those facts.

23 THE COURT: All right. But is that your argument
24 for your Motion for Temporary Injunction?

25 MR. TAROKH: Yes, Your Honor. In sum, it's the

1 property and it's primed for development right now
2 without any reservation for my client's easement right.
3 And my client will be irreparably harmed if the property
4 were to be developed without any reservation for my
5 client's easement.

6 It's continuing, it's primed to go forward and we
7 believe this is all a conspiracy orchestrated by the
8 defendant, namely by Mr. Zurlo and we believe we can
9 prove it.

10 THE COURT: All right.

11 [Whereupon, the witness is excused]
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1 THE COURT: All right. Ms. Shoun, I want to get to
2 your, we have 30 minutes left so I want to get to your
3 motion to -- you were the original one it seems I believe
4 from what was sent to me from the February 17th, 2020
5 filing, which is the Beach Company's Motion to Dismiss
6 and Motion to Refer to the Master, is that correct?

7 MS. SHOUN: Yes sir, Your Honor.

8 THE COURT: I'll be happy to hear from you.

9 MS. SHOUN: Yes sir, Your Honor. And if I might go
10 back and circle a little bit back to where I first
11 started when we got on this particular hearing, Your
12 Honor. And it flip flops the order of my motion because
13 the order of reference is the one that I am incredibly
14 interested in for a number of reasons which I will
15 articulate to the Court not necessarily in any order of
16 priority.

17 But if Your Honor will recall that last week when we
18 gathered the counsel, counsel for the plaintiff indicated
19 that he made a point of saying to the Court when the
20 Court asked for an honest answer to why he does not want
21 this matter referred to the Master the response was well
22 because I want my trial by jury.

23 And as we sit before Your Honor today, this Court,
24 the plaintiff is now making a motion again asking this
25 Court for injunctive relief against my client which is

1 going to prohibit its use of this property that it
2 purchased. This property over which there is no easement
3 for many reasons but none the less if I might go back to
4 the order for the Motion of Reference, Your Honor.

5 Mitch Laplante from whom this Court has heard today
6 was a party to the foreclosure action. Again, Maybank
7 2754 was not a party to the foreclosure action. None the
8 less Mr. Laplante as its member but Maybank 2754 was not
9 a party to the foreclosure action because Maybank 2754
10 had no interest in the property.

11 Now keep in mind Your Honor the property to which I
12 am referring is the property that was foreclosed upon by
13 Wells Fargo. It was then bought at the foreclosure sale
14 by 1776, Mr. Hellman's client, and then purchased by my
15 client, Beach Fenwick.

16 At no point during that foreclosure, and Mr.
17 Laplante was a party to that foreclosure, at no point did
18 Mr. Laplante or any of the Laplante family members to
19 whom this easement, this alleged easement, was
20 purportedly conveyed did they raise an issue about this
21 issue.

22 Judge Scarborough as the Master in Equity heard the
23 foreclosure action. He set forth in the order of sale,
24 which is before the Court, the property that was being
25 sold to 1776 as the credit bid at the foreclosure sale

1 nowhere is there a mention of this easement whatsoever
2 because it doesn't exist. It didn't then and it does not
3 now. If, if Mr. Laplante believed, legitimately believed
4 he had some right to an easement the time to mention that
5 easement would have been prior to or at the foreclosure
6 sale of this property because once that went through
7 there was no subornation to Wells Fargo as the mortgage
8 holder on this property.

9 So even if he thought it existed it would have been
10 gone at that point. It does not exist at this day, it
11 did not exist then. And that's why Your Honor we are so
12 adamant to try to get this to the Master in Equity. As
13 Your Honor pointed out last week it could be years before
14 we get a jury trial on this issue.

15 My client is sitting on a piece of property it owns
16 that it intends to develop and it's being held up by a
17 frivolous claim, Your Honor. It's not there and we want
18 resolution to this.

19 And we, and even if Your Honor sends it to Judge
20 Scarborough for disposition of pretrial motions Judge
21 Scarborough knows the parties, he knows the property.
22 He's dealt with this same property before and Mr.
23 Laplante's failure to make any reference to any purported
24 easement across my client's property. This is simply,
25 it's a hijacking of my client's property is what it is,

1 Your Honor and that's why we want this referred. We --
2 he says I want an injunction, this is critical; I've got
3 to have a disposition. Yet on the other hand he says oh
4 no, no, no I'm willing to wait till 2024 to have my jury
5 trial. Those positions simply cannot be reconciled.

6 My client wants a disposition of this, Your Honor
7 and that's why we've moved for it to be referred to Judge
8 Scarborough for further disposition. But if Your Honor
9 wants to hear the Motion to Dismiss I'm glad to go into
10 that.

11 MR. TAROKH: Your Honor, if I can briefly respond
12 to the objections that were of reference. I was given
13 some time briefly to respond to Mr. Young's Motion for
14 Order of Reference, I'd like to respond to this motion if
15 Your Honor will allow.

16 They are placing great emphasis on this final
17 judgment of foreclosure that was entered. And it's
18 important to remember who the parties were to that
19 foreclosure. And it's important to remember that Mitch
20 Laplante as I pointed out last time was severed from the
21 foreclosure claim.

22 On the base of the judgment itself on page 2 it says
23 defendant Michel F. Laplante parenthesis severed from the
24 foreclosure plan end parenthesis. In addition, Your
25 Honor I filed the order of severance in the foreclosure

1 claim, which severed my client from the foreclosure,
2 Mitch Laplante from the foreclosure claim and stated that
3 the foreclosure shall proceed as it gives defendant Penny
4 Creek Associates, LLC and defendant Property Owners
5 Association.

6 So what we have here Your Honor is just twisted
7 imputation of knowledge to overcome, the theory of
8 imputed knowledge to overcome a due process. My -- if
9 they wanted to foreclose out the easement, which everyone
10 knew about, they should have named Maybank, they should
11 have not only named Mitch but they should have also named
12 John Laplante, Peter Laplante, and Marianne Laplante and
13 they didn't do it.

14 And fundamentally, Your Honor, a judgment to which a
15 person is not bound by virtue of not being a party and
16 not having service of process is void. We don't contest
17 that the Master in Equity has jurisdiction over the
18 property, but only as to those parties that remain.

19 Mr. Laplante did not remain. And to say Mr.
20 Laplante because you had an interest in this other
21 entity, which was not named, therefore your other entity
22 is subject to the jurisdiction, what about John? What
23 about Peter? What about Marianne? They were not named
24 on the face of the document that clearly shows that they
25 had an easement interest at one point in time. So the

1 fact that they're saying well, let's send this down to
2 the Master my client requests a jury trial. That impacts
3 the mode of disposition. That's an important right and
4 we've requested it from the very beginning.

5 And my client Maybank wasn't a party to the
6 foreclosure. Mitch was but Mitch Laplante was severed
7 out and John, Peter, and Marianne were never parties. So
8 it's a jurisdictional issue. But Judge they can't haul
9 these individuals, they can't try -- they're trying to
10 haul these individuals before the Master without the
11 Master having jurisdiction.

12 And you get jurisdiction as I put in my filings and
13 my case law through service of a summons. And before
14 that the predicate, Your Honor, the logical fundamental
15 predicate you've got to be named as a party. And ---

16 MR. YOUNG: --- may it please the Court ---

17 MR. TAROKH: --- in addition, Your Honor ---

18 THE COURT: --- hold on, hold on, hold on. You've
19 had enough time, Mr. Tarokh ---

20 MR. TAROKH: --- Yes, Your Honor ---

21 THE COURT: --- you've had enough for today. Mr.
22 Young, I'll be happy to hear from you.

23 MR. YOUNG: Yes, sir. Two things; I'd like to
24 reserve my right to cross-examine Mr. Laplante on the
25 question of whether or not there in fact was any kind of

1 easement on the TRO part of this case. I've already
2 expressed verbally and in several filings a reason why
3 this should go to the Master in Equity. But let me
4 correct Mr. Tarokh on one thing. Mr. Laplante appeared,
5 and I have filed a transcript of the hearing on June 16th
6 before Judge Scarborough.

7 He appeared and not only did he appear he spoke.
8 And he said basically among other things I understand
9 that Wells Fargo is getting ready to foreclose on all of
10 this property. It's not something that I really wanted
11 to happen but I'm a big boy; I know what's happened and
12 I'm bound by what takes place.

13 And then Judge Scarborough said okay. Once the
14 foreclosure is over with if anything arises concerning
15 this property I retain jurisdiction to decide that. I
16 spoke a little bit out of turn. Mr. Hellman on 1776
17 filed his Motion to Refer a little bit before me so I
18 apologize to Mr. Hellman.

19 THE COURT: Does everybody -- do all defendants
20 join in the motion to have it referred to the Master?

21 MS. SHOUN: Yes, sir.

22 MR. HELLMAN: Your Honor, Brian Hellman here on
23 behalf of 1776. We do join in that. We filed a motion
24 as well. If I may I believe that Mr. Laplante as Mr.
25 Young pointed out was present at that hearing. Whether

1 severed or not he was present and he was actually severed
2 on the day of the final hearing so he was there all the
3 way through the very end. But what he's attempting to do
4 is rewrite the terms of the sale that my client bought
5 the property at the foreclosure sale from.

6 He's trying to rewrite those terms subsequent to the
7 sale. His easement came after the mortgage. It would
8 have been foreclosed on either way, either way.

9 So we would ask Your Honor that this matter be sent to
10 the Master if only just for the pretrial matters.

11 THE COURT: That's a good point, Mr. Hellman. I
12 mean if I refer it to handle these 16 motions that I
13 haven't gotten to today and still reserve their right to
14 come back to the Circuit Court for a trial is that
15 something that you all would be amenable to, Mr. Tarokh?

16 MR. TAROKH: Your Honor, respectfully we would
17 object. The claims are so intertwined. And one thing
18 that everyone forgets is this judgment that severed my
19 client that actually references the severance of my
20 client if the hearing was on -- I think the date they
21 said was sometime June 16th.

22 This judgment was signed after and entered after.
23 So, because to answer your question Your Honor because
24 the claims are so intertwined because the determination
25 of whether we have an easement is a legal question for

1 which a jury should be -- which a jury should decide. It
2 makes all the other issues too interconnected. It will
3 fundamentally impact the mode of trial especially as it
4 relates to the Motion for Temporary Injunction.

5 THE COURT: If it's a legal question I make the
6 determination. If it's a question of fact, that goes to
7 the jury.

8 MR. TAROKH: That's correct. That's what I meant,
9 Your Honor. That's correct.

10 THE COURT: Okay.

11 MR. YOUNG: Your Honor, under Rule 53 you've got
12 the clear authority, and I'm just quoting the rule, in
13 all other actions the Circuit Court may upon application
14 of any party or upon its own motion to reference of some
15 or all of the causes of action in a case. Any party may
16 request a jury pursuant to Rule 38 on any of the issues
17 triable of right by a jury. And upon the filing of a
18 jury demand in the Master in Equity court the Master
19 shall be -- the matter shall be returned to the Circuit
20 Court.

21 So, I mean the rule is pretty clear. You've got the
22 authority to do it. If it's a jury issue Judge
23 Scarborough's got to send it back that issue to you.

24 THE COURT: All right.

25 MR. TAROKH: Judge, I filed Supreme Court cases

1 which indicate that the Master in Equity does not have
2 authority hold a jury trial. We requested one. It
3 doesn't make any sense to send it down ---

4 THE COURT: --- what he's saying is that if it
5 can't get resolved by the Master and there is a question
6 of fact that needs to be determined by the jury he would
7 send it back up after he has either made a determination
8 on some of the motions or anything along those lines.
9 That's what he's indicating the rule says; not that he
10 can hold a jury trial because a Master can't hold them.
11 I can.

12 MR. YOUNG: He's required to send it back to you,
13 Your Honor. The rule says he's required to send it back.

14 THE COURT: That's correct. All right ---

15 MS. SHOUN: --- Your Honor, if I might add one
16 thing. The other action out there is the conspiracy
17 claim. If the Master in Equity hears all these 16
18 motions and probably some that will follow very shortly
19 after this hearing if the Court, if Judge Scarborough
20 were to determine there has, there is indeed no easement
21 as we propound is the case then there is no civil
22 conspiracy claim. Parties can't conspire ---

23 MR. TAROKH: --- Judge ---

24 MS. SHOUN: --- parties can't conspire to deprive
25 one of a right one does not have. And as I -- I'll hush.

1 Thank you, Your Honor.

2 THE COURT: All right. Here's what I'm going to
3 do. Just for the record I'm going to take the Motion for
4 Temporary Injunction under advisement. I'm going to take
5 the -- I'm not going to rule on the Motion to Dismiss.
6 And I'm going to take all parties Motions to Refer to the
7 Master under advisement.

8 And at this point in time I think I just need to
9 mull over those two and take a look at these exhibits and
10 what has been filed. Like I indicated I've had the
11 opportunity to do it this morning but I want to take a
12 closer look. So let's do that and if I'm not going to
13 refer it to the Master then I have another Common Pleas
14 non-jury week of July 13th and I will schedule y'all
15 another hearing at that time.

16 MR. TAROKH: Yes, Your Honor ---

17 MS. SHOUN: --- and Your Honor just as Mr. Young
18 did if I might reserve my right to cross-examine Mr.
19 Laplante. And of course if the Court entertains that I
20 have my ability to show the hardship that would be
21 affected on my clients as well for purposes of a bond.

22 THE COURT: Everyone's right to cross-examine will
23 be preserved.

24 MS. SHOUN: Thank you, Your Honor.

25 MR. TAROKH: Yes, Your Honor. And Your Honor, just

1 for the record we want to make sure we move in all the
2 exhibits; plaintiff's 1, 2, 3, and 4 into evidence. And
3 I believe I already did it but just to clear the record
4 we're doing that now ---

5 THE COURT: --- all right ---

6 MS. TEICH: --- we object to the admission of
7 exhibit, 3 Your Honor. He's not a party to the email
8 that corresponded that he referred to.

9 THE COURT: All right. The Court ruled over any
10 and all objections so they will be coming in, all right.
11 And you'll have my ruling by the end of the day.

12 MS. SHOUN: Thank you, Your Honor.

13 MR. TAROKH: Thank you, Your Honor.

14 THE COURT: Y'all are more than welcome. Have a
15 great day.

16 MR. HELLMAN: Thank you, Your Honor.

17 MR. YOUNG: Thank you.

18 *****END OF TRANSCRIPT OF RECORD*****
19
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C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is, to the best of my ability, a complete
Transcript of Record of the proceedings had, using Zoom
videoconferencing, and evidence introduced in the trial
of the captioned case, relative to appeal, in the Court
of General Sessions for Charleston County, South Carolina
on the 25th day of May, 2020.

I do further certify that I am neither of kin,
counsel, nor interest to any party hereto.

July 1, 2020

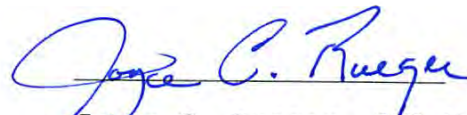
Joyce C. Rueger, CVR-M
Court Reporter

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July 1, 2020



Joyce C. Rueger, CVR-M

Court Reporter



COPY

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

Maybank 2754, LLC,

Plaintiff,

vs. CASE NO. 2020-CP-10-0209

Eugene J. Zurlo, Individually and
as Co-Trustee of the Eugene J. Zurlo
Living Trust Dated December 11, 1997;
1776, LLC; Beach Fenwick, LLC; The
Beach Company; Seamon, Whiteside &
Associates, Inc.; Penny Creek
Associates, LLC; John Doe and Mary Roe,

Defendants.

Hearing before the Honorable Mikell R.
Scarborough, reported by Christine A. Smith, Court
Reporter and Notary Public, at 10:07 a.m. on
August 17, 2020 100 Broad Street, Courtroom 2A,
Charleston, South Carolina.

Christine A. Smith, Court Reporter

Master-in-Equity

P.O. Box 30276

Charleston, South Carolina, 29417

(843) 958-5071

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P R O C E E D I N G S

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3 THE COURT: The case is Maybank 2754, LLC
4 versus Zurlo and the Zurlo Living Trust and a number
5 of other people. Mr. Jason Tarokh is present for the
6 Plaintiff, correct, Mr. Tarokh?

7 MR. TAROKH: Yes, Your Honor. Jason Tarokh on
8 behalf of the Plaintiff.

9 THE COURT: Tarokh. All right, Mr. Tarokh.
10 Thank you.

11 Next I have Rutledge Young. Mr. Young, you're
12 representing whom?

13 MR. YOUNG: I represent Eugene J. Zurlo
14 individually and as the cotrustee of his living
15 trust, December 11, 1997.

16 THE COURT: And Ms. Shoun's on, and Cheryl,
17 you represent whom?

18 MS. SHOUN: I represent Beach Fenwick, Your
19 Honor, and the Beach Company.

20 THE COURT: Beach Fenwick and Beach Company.
21 All right. Mr. Hellman?

22 MR. HELLMAN: Your Honor, I'm here with Jason
23 Smith and we represent 1776, LLC. Jason is on by
24 telephone.

25 THE COURT: I've got it. And Mr. Pritchard?

1 MR. PRITCHARD: Yes, sir. I represent Penny
2 Creek Associates.

3 THE COURT: Penny Creek Associates. Okay.
4 Who have I skipped over?

5 MS. TEICH: Me, Your Honor, Jordan Teich. I'm
6 here on behalf of Seamon Whiteside.

7 THE COURT: Very good.

8 MR. YOUNG: And Your Honor, Rutledge Young.
9 I've got Blake McKie who works with me also on the
10 telephone.

11 MR. McKIE: Good morning, Your Honor.

12 THE COURT: Very good. Good morning. The
13 case presented to me -- it came over by order and
14 then I noticed that Mr. Tarokh had filed an appeal of
15 the order of reference. I took a look at it.

16 I had gotten an e-mail requesting that we have
17 this status, and so I wanted to explore that with
18 you-all and figure out where we are. I don't know
19 that I even have jurisdiction, but I figured it
20 wouldn't hurt to have a status conference and figure
21 out where we are.

22 I wanted to verify what is on appeal and then
23 figure out where this case ought to be so we can
24 start moving that. It either needs to go back to
25 Circuit Court, go up to the Court of Appeals, or

1 wherever it needs to be. Mr. Tarokh, let me hear
2 from you, sir, if you would.

3 MR. TAROKH: Yes, Your Honor. The status
4 conference should not be happening. We filed an
5 objection to status conference because of the pending
6 appeal. I sent that to your law clerk. The entire
7 matter is pending before the Master, or it was until
8 we filed the Notice of Appeal, therefore, our
9 position is, Your Honor, this Court respectfully does
10 not have jurisdiction to entertain any matters
11 including the status conference. All matters are
12 impacted by the appeal.

13 THE COURT: All right. So the Notice of
14 Appeal as to all issues; is that what you're telling
15 me?

16 MR. TAROKH: Yes, Your Honor. We attached two
17 orders: The original Form 4 order and then the order
18 on the Motion for Reconsideration which transferred
19 the entire case to this Court, and it's those two
20 orders that we are appealing.

21 THE COURT: Okay.

22 MR. YOUNG: May it please the Court? I think
23 I'm next in line.

24 THE COURT: All right, Mr. Young.

25 MR. YOUNG: I represent, as you know, the

1 Zurlo parties, and actual Notice of Appeal states
2 that the matter on appeal is the mode of trial. It
3 basically is that Mr. Tarokh takes the position that
4 he's entitled to a jury trial on the issue of whether
5 or not this supposed springing easement is, in fact,
6 an easement that somebody has a right to enforce, so
7 our position is that when it was referred to you by
8 Judge Price, he gave you jurisdiction to hear all
9 matters not affected by the appeal, and I say that
10 based on Appellate Rule 205 and Rule 241 which
11 basically say the same thing, that once a matter is
12 referred to you as the Master-in-Equity and an appeal
13 is taken, you have the jurisdiction and authority
14 just like a Circuit Judge to hear nonjury matters.

15 If it comes to you -- Rule 53 really deals
16 with that and 53 says basically -- I think the word
17 is must refer any jury matters back to the Circuit
18 Court.

19 So Zurlo Trust's position pretty simply is
20 that there are matters of law that are nonjury
21 matters that can be heard by you for two separate
22 reasons. The first is the Rules that I mentioned and
23 Judge Price's order referring it to you. Because he
24 referred it to you pursuant to Rule 53, and if you
25 look at all of the appeals concerning whether or not

1 a jury trial is something that is a substantial right
2 that can be appealed -- as long as you have either
3 the authority to send it back or the Rule requires
4 you to send it back, that's something that is not
5 affected by the appeal.

6 So the second thing is, you'll recall -- and
7 I've been involved in this case since December of
8 2013, and Mr. Hellman has since about June of 2014,
9 there was a foreclosure case brought by Wells Fargo
10 in which you issued an order, and that's attached,
11 but it was 2014-CP-10-04946. So you have double
12 jurisdiction. Not only did Judge Price send this
13 case over to you, but -- I'm looking at Page 15 of
14 that order, Paragraph 10, after it says the Master
15 shall proceed with the sale, and then it says, and
16 it's a direct quote, that the other side,
17 Master-in-Equity -- that's you, Your Honor -- you
18 signed the order -- will retain jurisdiction to do
19 all necessary acts incident to this foreclosure. And
20 here's the key words, to hear any post judgment
21 matters including but not limited to the issuance of
22 a writ of assistance.

23 So you've got jurisdiction because Judge Price
24 sent it over to you. You've got jurisdiction that
25 you retained under this earlier foreclosure order,

1 and we believe that there are threshold, legal,
2 nonjury issues that you can decide even though the
3 appeal is pending.

4 Those quite simply are the Beach Company's
5 Motion to Dismiss, Seamon Whiteside's Motions to
6 Dismiss, 1776's Motions to Dismiss -- Thomas, did you
7 file one? Do you recall?

8 MR. PRITCHARD: I did not file one.

9 MR. YOUNG: You did or not?

10 MR. PRITCHARD: I did not.

11 MR. YOUNG: You did not. Okay. And then on
12 Friday I filed a Motion for Summary Judgment with a
13 group of documents attached. All of those are
14 threshold issues, Your Honor, that you can decide as
15 a matter of law as to whether or not there is even a
16 legal right for the Plaintiff to proceed. If you
17 decide there is, then I think probably what happens
18 is that you get to hear all of the underlying
19 discovery motions and other motions that may be
20 filed.

21 If you decide there's not a legal right to
22 proceed then the Plaintiff has got a right to appeal
23 that directly to the Court of Appeals under the Rule
24 or the orders by Judge Price. So we think those
25 matters are not affected by the appeal, and that you

1 have jurisdiction to schedule a hearing on those and
2 anything else that might come up between now and the
3 time that the appeal may be kept going or may be
4 dismissed.

5 Obviously, we're going to file a Motion to
6 Dismiss the Appeal. That's going to be coming fairly
7 soon. In the meanwhile you're got the jurisdiction
8 to hear these legal issues. Thank you very much.

9 THE COURT: All right, Mr. Young. Mr. Tarokh,
10 before I come back to you, let me go down my list.
11 Ms. Shoun or Mr. Hellman, whoever wants to be next?

12 MS. SHOUN: Your Honor, I'm glad to follow up.
13 Never mind following up on Rutledge. Rutledge
14 actually -- he set forth the argument very succinctly
15 and accurately. The only -- well, let me go back
16 just a minute, Your Honor.

17 I know Your Honor's looked at that, but under
18 the conclusion and order of Judge Price's order, it
19 includes the statement that all pretrial matters,
20 including the party motions, shall be and are hereby
21 referred to the Master-in-Equity with finality.

22 So there are pending motions. There will be
23 other motions that are being referred to Your Honor.
24 Nobody is asking the Plaintiff to waive any right to
25 a trial by jury to any matters on which Plaintiff may

1 be entitled to that. In fact, as Rutledge so
2 accurately pointed out, the order specifically
3 provides that the matters are being referred to
4 Your Honor pursuant to Rule 53. Rule 53 says, If
5 you're entitled to a jury trial it bounces back to
6 the Circuit Court.

7 Nobody has made the determination that there
8 is a right to trial by jury, but let's assume for a
9 moment that Plaintiff may be entitled to a right by
10 jury on some matters, then Your Honor has the matter
11 pursuant to 53, which means Your Honor is going to
12 take it back to Circuit Court for such a disposition.
13 In the interim, there are other matters pending over
14 which Your Honor certainly has jurisdiction.

15 THE COURT: All right.

16 MS. SHOUN: Thank you.

17 THE COURT: Very good. Okay. Next I have
18 Mr. Hellman.

19 MR. HELLMAN: Thank you, Your Honor. So as to
20 not repeat what Ms. Shoun and what Mr. Young had
21 said, I would completely incorporate everything
22 they've said. I think this is all controlled by
23 Rule 53, and Rule 53(b) is pretty clear.

24 THE COURT: Very good. Okay. And then
25 Ms. Teich?

1 MS. TEICH: Your Honor, I really have nothing
2 else further to add other than what my esteemed
3 colleagues have provided. We've had a Motion to
4 Dismiss filed on behalf of Seamon Whiteside since
5 February. It just keeps getting kicked along here,
6 and it's truly a matter of law that should just be
7 considered by Your Honor. So nothing further to add.

8 THE COURT: Very good. Okay. And
9 Mr. Pritchard, I have you muted. Hold on a second.

10 MR. PRITCHARD: Your Honor, I know better than
11 to speak after -- Mr. Young and Ms. Shoun have both
12 spoken so eloquently.

13 THE COURT: Very good. Mr. Tarokh, let me
14 come back to you then. Their position is that the
15 Court's got jurisdiction to at least entertain the
16 pending motions that -- your appeal addresses the
17 mode of trial, and we have not gotten to the mode of
18 trial yet. Let me hear from you on that one.

19 MR. TAROKH: Yes, Your Honor. Again,
20 respectfully, we have to, on behalf of my client, I
21 have to assert my objection to this proceeding as
22 this Court lacks jurisdiction, and my concern,
23 Your Honor, with going any further than that is that
24 it has been held that participation in a proceeding
25 before the Master-in-Equity has been deemed wavered

1 to the objection of the Master's authority and I
2 cited a case in my written objection.

3 So again, Your Honor, we object to this
4 proceeding and this Court's jurisdiction to hear this
5 matter and matters during the pendency of the appeal.

6 THE COURT: Very good. I've got it. Here's
7 where we are -- here's where I think that we are.
8 The matter before the Court -- there are Motions to
9 Dismiss which would be dispositive of the entire
10 case. I do think that the filing of the Notice of
11 Appeal would stay the jurisdiction of this Court to
12 entertain those motions.

13 I'm going to go one step further because this
14 appears to be -- the genesis of the case appears to
15 be a question of whether or not there is an easement.
16 As Mr. Young stated -- the argument is it was a
17 springing easement apparently based on the record
18 that I reviewed, there's no written easement. There
19 may be some oral agreement out there, which presents
20 its own Statute of Frauds problems, which I don't
21 need to address at this point in time, but what I'm
22 going to do is I'm going to refer the case back to
23 the Circuit Court.

24 The reason I'm going to do that is because
25 while the case has been referred under Rule 53 and it

1 can be done -- under Rule 53(b) any party may request
2 a jury pursuant to Rule 38 on any issues triable of
3 right by a jury, and upon the filing of a jury
4 demand, the matter shall be returned back to the
5 Circuit Court.

6 So I'm citing you to Rule 53. Then the other
7 thing that I'm going to cite you to is this issue,
8 and that is the existence of an easement is a
9 question of fact in a legal case. That does not mean
10 that it necessarily gets past either 12(b)(6) or
11 summary judgment, but it is -- this Court's tried a
12 lot of easement cases.

13 So the existence -- that's what really is at
14 stake here is the existence, whether or not there is
15 an easement, but I can tell you there's ample
16 authority on the existence of an easement, question
17 of fact, and a matter of law. So it's on that basis
18 that I'm going to refer it over.

19 In the event the Plaintiff gets to jury trial
20 and a jury determines that there is, in fact, an
21 easement, then it may be ripe for this Court's
22 determination as to the scope of the easement.
23 Generally that's where the Court is trying a lot of
24 cases. Is there an easement and if so, what are the
25 parameters of the easement.

1 That later issue is a question of fact in an
2 equitable matter. Again, there's ample authority for
3 that. So it's on that basis that I'm going to refer
4 the matter back to the Circuit Court for entertaining
5 the motions.

6 Frankly, I think that moots the appeal. The
7 Plaintiff can either agree to that or not agree to
8 that, but that certainly would allow Defendants to
9 file a Motion to Dismiss the Appeal. If that's the
10 basis for the appeal, then that would take care of
11 that issue.

12 I do know that because of the pandemic and all
13 the number of WebEx hearings we're having and the
14 inability to move cases along on the jury trial
15 docket, I know that the nonjury trial docket is
16 moving a lot faster over at the Circuit Court.

17 I put some thought into this before we came
18 out here. I think those are good arguments both
19 ways. It goes back to -- this issue was raised a lot
20 during the time of the Great Recession when people
21 were raising defenses to the foreclosure action. The
22 foreclosure action, clearly covered in Rule 53,
23 states that those can be referred over here pretty
24 much as a matter of right, but when there's a legal
25 issue involved, our Supreme Court has said that that

1 needs to be addressed first, the legal questions have
2 to be addressed first and then the equitable issues
3 can be addressed later.

4 So it's on that basis that I'm going to return
5 jurisdiction to the Circuit Court to get that issue
6 resolved. If it gets back to the point that it needs
7 to come here, I'm happy to hear the case. I don't
8 think that -- and I wanted to ask that question -- I
9 don't think that the Court retaining jurisdiction for
10 post-trial matters would apply. That foreclosure
11 case has got to be over, isn't it? Did this somehow
12 spin out of that? I'm assuming it's some of the same
13 parties. I can't imagine that that case is still
14 going on.

15 Mr. Young, I have you muted, so hold on. Go
16 ahead. I didn't hear you. I'm sorry.

17 MR. YOUNG: I said that that's probably pretty
18 smart to have me muted, but in any rate, here's what
19 happened in the foreclosure case. You ordered the
20 foreclosure and sale to take place on June 21, 2017.
21 It took place on August 3rd and Brian Hellman's
22 client, 1776, bought all of the PCA property out of
23 foreclosure. 1776 then began to sell large parcels
24 of the PCA property which obviously were subject to
25 the foreclosure. This 22-acre parcel was sold in

1 December of 2019 to Cheryl's client, the Beach
2 Company, who have a development agreement with the
3 City of Charleston to put a few apartments down
4 there. So the lawsuit basically has stopped a
5 \$15 million or \$20 million development because
6 Maybank 2754 claims it has a right to this springing
7 easement somewhere across the former PCA property.

8 So that's why we think you still have
9 jurisdiction because it all arises from the
10 foreclosure case and no mention was ever made of this
11 easement and the land that was foreclosed upon, the
12 plat attached to the land that was foreclosed upon or
13 any of the pleadings or any of the hearings before
14 Your Honor.

15 MR. HELLMAN: Your Honor --

16 THE COURT: They don't have -- go ahead.

17 MR. HELLMAN: Your Honor, if I may, this
18 really is just an attempt to reopen that foreclosure.
19 It's sort of a way to go back and try to rewrite your
20 foreclosure order to then provide for an easement
21 when the foreclosure order itself basically said it
22 was subject to certain matters of record and that's
23 it. Now we've got something that proceeded the
24 foreclosure that, Mr. Tarokh's client is claiming
25 he's got some right to.

1 THE COURT: Well, I've been down this road as
2 well. I remember I had a case with Mr. Wheeler one
3 time, David Wheeler, and I foreclosed on an easement
4 that existed post the mortgage, and he about had a
5 conniption fit. We ended up foreclosing on the
6 easement so the easement went away as well.

7 I don't know where they're coming from on this
8 argument, but they'll have to have some writing
9 somewhere that's going to survive that foreclosure
10 action, I believe. I think it's the better course at
11 this point in time to go ahead and send it back and
12 you-all try and educate the Circuit Court on this
13 one.

14 Again, if it needs to come back I'm happy to
15 hear it. I think at this point in time it just needs
16 to go back that way. Okay? I know that this has
17 been some long-time litigation.

18 I'm just going to do a Form 4 unless you-all
19 want something more than that. Mr. Tarokh's position
20 is that I don't even have jurisdiction to do it, but
21 I'm going to enter this order just so it's clear, and
22 we'll go from there. Okay?

23 MR. YOUNG: Your Honor, one final question.

24 THE COURT: Yes, sir.

25 MR. YOUNG: The court reporter, who is the

1 court reporter? I'm going to order a copy of this
2 transcript.

3 THE COURT: Sure. Ms. Christine Smith is my
4 court reporter here at the Master's Court. She will
5 be glad to get it to you.

6 MR. YOUNG: Thank you very much, Your Honor.

7 THE COURT: You-all take care.

8 (The proceedings were concluded at 10:27 a.m.)
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1 State of South Carolina)
2 County of Charleston) C E R T I F I C A T E
3

4 I, Christine A. Smith, Court Reporter and
5 Notary Public for the State of South Carolina at
6 Large, do hereby certify that the foregoing
7 transcript is a true, accurate, and complete record.

8 I further certify that I am neither related to
9 nor counsel for any party to the cause pending or
10 interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 20th day of August, 2020 at
13 Charleston, Charleston County, South Carolina.
14
15
16

17 _____
18 Christine A. Smith
19 Notary Public
20 My Commission Expires
21 May 12, 2021
22
23
24
25

1 STATE OF SOUTH CAROLINA) COMMON PLEAS COURT
)
 2 MAYBANK 2754) CASE NO.
) 2020-CP-10-0209
 3)
)
 4)
)
 5) Transcript of Record
 Plaintiff,)
 6)
 vs.) Date: August 24, 2020
 7)
 EUGENE J. ZURLO, ET AL.)
 8)
 Defendant.)

10 * * * * *

11

12 B E F O R E:

13 The Honorable Bentley Price

14 * * * * *

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16 Krista Nicole Carney, Stenographic

17 Court Reporter, transcribed by a

18 Stenographic Court Reporter

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22

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24

25

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1 (These proceedings were had August 24,
2 2020, Charleston County Common Pleas Court.)

3 THE COURT: We have a myriad of
4 motions; correct?

5 MS. YOUNG: Yes, Your Honor.

6 MR. TAROKH: Yes, Your Honor.

7 THE COURT: All right. Who would like
8 to go first?

9 MR. SHOUN: Your Honor, Cheryl Shoun
10 here on behalf of The Beach Company. If my
11 colleagues will indulge, I'm happy to start this
12 off.

13 MR. TAROKH: Your Honor, Jason Tarokh,
14 on behalf of the Plaintiff. We have some
15 preliminary issues that I think the Court should
16 consider before we dive into the motions for
17 summary judgement, if the Court prefers.

18 THE COURT: All right. And what are
19 they?

20 MR. TAROKH: Yes, Your Honor. There's
21 currently a pending appeal. I bring that up, in
22 all candor, to this Court. If you recall, a couple
23 of weeks ago we were before Your Honor via Zoom on
24 my motion for temporary injunction and their
25 motions for order of referral to the

1 Master-in-Equity.

2 The Court ordered that this case and
3 all pending motions, et cetera, be transferred to
4 the Master-in-Equity. We appealed that order.

5 The Defendant sought a status
6 conference with a master-in-equity to obtain one.
7 And the Master-in-Equity issued an order
8 transferring this case back to the Circuit Court.

9 THE COURT: Perfect.

10 MR. TAROKH: The only issue I have with
11 it, Your Honor, is the Master-in-Equity, without
12 jurisdiction even issued that order. Now, they
13 subsequently filed a motion to dismiss. I think it
14 was last week in part that the appeal was moot.

15 My only concern with that, Your
16 Honor -- I guess a concern with that, Your Honor,
17 is the time to appeal the Master-in-Equity order
18 didn't run until about three days -- it was
19 entered, I believe, on August 18th. That didn't
20 run until September 17th or September 18th, 30 days
21 later.

22 I believe the Defendants -- and I don't
23 have the exact date in my memory right now -- filed
24 that motion right before the expiration of
25 deadline.

1 My concern with the appeal in this
2 matter, Your Honor -- and I'm prepared to proceed
3 on the merits of their motions and my other
4 motions, as well. I only bring this up because,
5 you know, we don't want the Defendants to again
6 attempt to have this case transferred back down to
7 the Master-in-Equity prematurely. And that was the
8 substance of our argument, before Your Honor, at
9 that prior hearing.

10 So I bring that up before the Court.
11 We're ready to proceed. We have a pending motion
12 to amend the complaint. And we're ready to proceed
13 on that. And we're also ready to dive into the
14 substance of the Defendants' motions for summary
15 judgment, as well.

16 THE COURT: Well, I'm confused.
17 Because you just now said that they're just going
18 to try to attempt to have it referred back down to
19 the Master.

20 MR. TAROKH: Yes, Your Honor. The
21 appellate attorney for my client, who a
22 cocounsel for the appellate -- my cocounsel on the
23 appellate level filed a return a return on the
24 motion to dismiss. We're willing to enter into a
25 consent order of dismissal for that appeal, so long

1 as they agree that this matter proceeds in the
2 Circuit Court and not sent down back to the
3 Master-in-Equity prematurely.

4 THE COURT: I don't think it can be
5 sent back down to the Master-in-Equity, if it's
6 referred back to the Circuit.

7 MR. TAROKH: Well, that's sort of the
8 conundrum, Your Honor. We alleged, and we argued
9 all along that this case should not have been sent
10 down to the Master-in-Equity, to begin with.

11 THE COURT: But the Master agreed with
12 you and sent it back up.

13 MR. TAROKH: Right. But the Master
14 also did not have jurisdiction. So it's
15 questionable whether or not the order is even
16 valid, to begin with we. We contend that the
17 appeal is void. I believe it was returned that it
18 was void because the Master-in-Equity never had
19 jurisdiction to render the order because of the
20 pending appeal.

21 THE COURT: What was the pending
22 appeal?

23 MR. TAROKH: The Defendants' appeal was
24 that that the motive at trial, Your Honor, was
25 impacted by Your Honor's order sending the entire

1 case down to the Master-in-Equity.

2 THE COURT: And you're saying that you
3 appealed that and he sent it back up while it was
4 on appeal?

5 MR. TAROKH: Yes, Your Honor.

6 THE COURT: Okay. Well, then --

7 MR. TAROKH: Because we're all here
8 today, Your Honor -- because the appellate time for
9 the Defendants to appeal the Master-In-Equity has
10 run. And because, I believe, they all signed on
11 with a motion to dismiss, I believe we can still
12 proceed forward today.

13 But I think likely that resolves from
14 the waiver of any type of any future argument, that
15 this Court should send the case back down to the
16 Master-In-Equity when it's not appropriate.

17 And if you'll recall, we argued at
18 first the Court should determine whether an
19 easement exists, and then is when it should be sent
20 down to the Master-In-Equity to determine the scope
21 of the easement.

22 And, ironically, to my client's
23 prospective, that's basically what the
24 Master-In-Equity said, among other things, at that
25 status conference hearing.

1 THE COURT: All right. Give me one
2 second.

3 MR. YOUNG: May it please the Court.

4 THE COURT: Just give me one second.
5 All right. Yes, sir.

6 MR. YOUNG: May it please the Court.
7 My name is Rutledge Young with Duffy and Young. I
8 represent the Defendant, Eugene J. Zurlo
9 individually, and as cotrustee of the Eugene J.
10 Zurlo living trust.

11 For the record, let me introduce
12 everybody else, because I don't think anybody else
13 has done that yet. Cheryl Shoun with Nexsen Pruet.
14 She represents Beach Fenwick, LLC and The Beach
15 Company. Seamon Whitside & Associates is
16 represented by Patrick Norris with Copeland, Stair.
17 And Penny Creek & Associates is represented by
18 Thomas Pritchard. And 1776 is represented by Brian
19 Hellman of the firm of Hellman & Yates.

20 And I understand that Mr. Tarokh is
21 ready to proceed, as we are. But, just for the
22 record, I'd like to hand up, Your Honor,
23 Defendants' Exhibit Number 1 and 2. And I gave
24 those to Mr. Tarokh earlier. And maybe that's what
25 you were looking at.

1 But Number 1 is the notice of appeal
2 where Mr. Tarokh appeals your order referring this
3 matter to the Master-In-Equity claiming that it
4 affects the mood of trial, i.e. a jury trial.

5 Judge Scarborough, when we got over to
6 the status conference, said basically, well, you
7 might be right about that. I'm going to send it
8 back to the Circuit Court because he wants a jury
9 trial on that issue.

10 And Exhibit Number 2 you will see is
11 Judge Scarborough's Form 4 order sending it back,
12 in which he gratuitously says -- and I think this
13 is not a bad thing for him to have said, and I
14 believe it's true -- that this ruling would moot
15 the Plaintiff's appeal.

16 Now, what I hear from the Plaintiff is
17 that he's not willing to dismiss that appeal and
18 we'll all ready to proceed. But I just wanted to
19 put that on the record.

20 MR. TAROKH: Your Honor, I'm not
21 willing to dismiss the appeal. I just want the
22 Court to know that it's still pending.

23 But regardless of the fact that it's
24 pending, we're ready to proceed and address the
25 issues related to their summary judgment and my

1 motion to amend the complaint.

2 So under these circumstances, if the
3 Court is ready to proceed, we're here and ready to
4 proceed on all those other motions.

5 THE COURT: Well --

6 MR. YOUNG: May I add one more thing,
7 Your Honor?

8 THE COURT: Sure.

9 MR. YOUNG: South Carolina Rules of
10 Appellant Practice, Rule 205 and 241(a), allow you
11 to hear this. 205 is labeled effective appeal.
12 And it says, nothing in these rules shall prohibit
13 the lower court, commission, or tribunal from
14 proceeding with matters not affected by the appeal.

15 The issue on appeal is whether or not
16 Plaintiff is entitled to a jury trial. It's back
17 to you. And that issue has been decide.

18 And then 241(a), Your Honor, says
19 basically, stay and supersede us in civil actions
20 once an appeal has been filed, the lower court or
21 administrative tribunal will retain its
22 jurisdiction over matters not affected by the
23 appeal, including the authority to enforce any
24 matters not stayed by the appeal.

25 So the rules of practice also you give

1 the authority to hear this, because the matter on
2 appeal is not affected by the motions.

3 THE COURT: All right. I agree.

4 Happy to hear from you.

5 MS. SHOUN: May it please this Court,
6 Your Honor. Would the Court mind if I stepped up
7 to the podium?

8 THE COURT: Absolutely not a problem.

9 MS. SHOUN: Thank you.

10 MR. NORRIS: Judge, if I might -- just
11 for the record, my name is Patrick Norris and I
12 represent Seamon Whiteside & Associates.

13 We had filed a motion to dismiss, based
14 on 12(b)(6) back in February. That motion has not
15 yet been heard. But independently of all of what's
16 going on back and forth between the Master and the
17 Court, facts have been developed. I also filed a
18 motion for summary judgment, along with these
19 folks.

20 I think that the summary judgment
21 argument might be dispositive of the whole thing. And
22 if we go there it's probably going to take up the
23 bulk of the time today.

24 I'm happy to see, you know, where I
25 would fall in line ordinarily from a February

1 motion to dismiss, Ms. Shoun, and go over that
2 stuff, and then argue my motion to dismiss at the
3 end, if I need to.

4 THE COURT: Fair enough.

5 MR. NORRIS: Thank you.

6 THE COURT: Ms. Shoun.

7 MS. SHOUN: Thank you, Your Honor.

8 Just a few arguments, if I may.

9 Obviously, the Court understands all this already.
10 And I would just respectfully request that the
11 Court hear consideration all matters of records
12 thus far.

13 And I only bring that to the Court's
14 attention because as Your Honor is familiar from
15 having heard us earlier in June and then on
16 June 25th, there are a number of things that have
17 been filed with the Court. And Mr. Norris just
18 addressed some of them, a number of motions,
19 exhibits to those motions, and other exhibits that
20 were extraneously filed with the Court.

21 And I think all of those are proper for
22 consideration by the Court in a motion for summary
23 judgment. And just urge the Court to do so.

24 In addition to that, there are -- or,
25 in particular, there are exhibits filed with my

1 client's motion to dismiss. My client being Beach
2 Fenwick and The Beach Company, as well as the
3 exhibits to all these other Defendants' motion.

4 And we'd submit to Your Honor that
5 while these arguments are going to focus primarily
6 on the easement issue, the arguments being made are
7 going to be equally applicable to other issues in
8 the case. In particular, it's saying basic law
9 would be applicable to the Plaintiff's arguments of
10 restrictive covenant. And if this Court finds
11 there is in deed no easement, then the civil
12 conspiracy case, likewise, goes away, ergo there
13 can be nothing that Defendants were conspiring to
14 keep from the Plaintiff.

15 And then also, as Mr. Norris stated to
16 the Court, that should the Court rule in
17 Defendants' favor on these motions for summary
18 judgment, it would also take care of any action
19 against Seamon Whiteside.

20 Your Honor, I'll dispel with trying to
21 educate the Court on the standard review for
22 summary judgment. Of course, I'm aware that the
23 Court knows that. And the Court also has some
24 background. But if the Court would indulge just
25 briefly -- and this is also in our memorandum,

1 which I'm going to ask the Court to adopt.

2 In 1999 Penny Creek Associates, which
3 I'll refer to PCA, was formed. And it included
4 primarily the Eugene J. Zurlo living trust dated
5 December 11th, 1997, which I may refer to as Zurlo,
6 and certain members of the LaPlante family,
7 including Mitch LaPlante, who is the manger and
8 principle of the Plaintiff in this action, Maybank
9 2754.

10 The trust, the Zurlo Trust, and
11 Mr. LaPlante were the voting members of PCA. PCA
12 bought property on Maybank Highway, in order to
13 develop that property. And I'll, for ease of
14 reference, refer to that as the original track as
15 we do in our memorandum.

16 That original track was mortgaged to
17 Wells Fargo. There were a couple of mortgages.
18 And as indicated in our memorandum, those mortgages
19 over time were modified. Some of the property was
20 disposed of, otherwise, and ultimately all came
21 under one lien held by Wells Fargo.

22 Then chronologically Maybank 2754 was
23 formed to acquire a small parcel next to the
24 original track, that being the property owned by
25 Maybank 2754, as we're before the Court today.

1 PCA, Penny Creek Associates, was the
2 only member of Maybank 2754 until October of 2013.
3 And that's when this resolution, about which Your
4 Honor has heard so much already, was reportedly
5 entered into by the members of the PCA. Keeping in
6 mind, however, that the Zurlo Trust was actually
7 the voting member of PCA, and not Mr. Zurlo
8 individually, which is the reported signature on
9 the resolution.

10 It's on that document that Plaintiff
11 seeks its quest for some interest in the property
12 that now belongs to my client, Beach Fenwick.

13 That property at issue, Beach Fenwick's
14 property, is a smaller part of that original track,
15 all of which was -- all on which Wells Fargo held a
16 lien. And I'll get to another lien on that
17 property in just a moment. I'm just following it
18 chronologically.

19 As we go through this, Your Honor, I
20 would ask the Court to keep in mind that Mitch
21 LaPlante and various family members of the LaPlante
22 family were the alleged recipients of this
23 easement, as it were, in the resolution.

24 And also to keep in mind that until
25 2016, if my memory is correct, Mr. LaPlante was

1 also the manager of PCA.

2 So as things went on, then
3 chronologically, PCA or the Zurlo Trust initiated
4 an action for the dissolution of PCA. That action
5 included, of course, Mr. LaPlante.

6 Subsequently -- or kind of going on at
7 the same time, Wells Fargo negotiated a foreclosure
8 action to foreclose its lien on the property. As
9 the case of Zurlo went forward for the dissolution
10 of PCA. Part of what happened in that case was a
11 settlement of it. And the settlement provided that
12 PCA would execute and deliver to the Zurlo Trust a
13 note and a mortgage. This mortgage on the same
14 original track we talked about, that big track of
15 land. That track followed the followed the Wells
16 Fargo mortgage on that track of land. Wells Fargo
17 then reinitiated its mortgage foreclosure after
18 some forgiveness period of time.

19 As that foreclosure went forward, the
20 Zurlo Trust assigned the note and mortgage to 1776,
21 represented by Mr. Hellman. The property was
22 successfully foreclosed upon by Wells Fargo.
23 1776's credit bid its lien at the foreclosure sale,
24 and became the owner of the entire original track.

25 It subsequently then -- I think about

1 two years later -- sold a portion of that original
2 track to my client, Beach Fenwick. And it's over
3 that property that Plaintiff claims it has some
4 sort of easement right.

5 And, Your Honor, again, this has all
6 been briefed by the Defendants. And I give my
7 esteemed colleagues much credit for doing such a
8 good job.

9 So what I will do, Your Honor, because
10 we have so many people and so many arguments to be
11 made, I will sort of briefly address each of them.
12 But, again, there are more fully set out in our
13 memorandum and in the memorandum filed on behalf of
14 these other Defendants.

15 First of all, is the resolution. The
16 resolution simply and succinctly, Your Honor,
17 fails. And it fails in various ways. The Court
18 is, I think by now, probably familiar with what the
19 resolution says. But, in summary, in that
20 resolution, if we were to accept it for the
21 purposes of argument, that it's valid, PCA agreed
22 to grant, transfer, sell, and convey to purchasers.
23 That's members of the LaPlante family and access
24 easement for pedestrian and vehicular
25 ingress/egress, and access from an over-the-subject

1 track. The track now belonging to my client, Beach
2 Fenwick.

3 The location and condition of which
4 shall be mutually agreed upon at the completion of
5 a pitchfork road. Upon that completion, the
6 parties to the resolution, with an execute and
7 record in the easement agreement.

8 None of that happened. Nothing in that
9 language happened. At its most elementary level,
10 nothing. PCA never did grant, sell, transfer, or
11 convey anything to the LaPlantes. It just simply
12 did not occur. There's nothing more here than an
13 agreement to agree in that resolution.

14 Again, if we construe it in a favor --
15 in a light most favorable to the Plaintiff. The
16 parties to the resolution never agreed upon any
17 condition or location of the easement, rather
18 keeping in mind Mr. LaPlante was the manager at PCA
19 the whole time. He allowed PCA, as an entity, to
20 go through an action for dissolution without
21 reserving any right, about asserting any right to
22 an easement on behalf of himself and his family
23 members.

24 He, likewise, allowed the property to
25 go through a foreclosure by Wells Fargo. Again, no

1 mention, no reservation, no attempt to say, wait, I
2 and my family have an easement across that
3 property. And the Court will hear more about that
4 later.

5 Then, and now, the Plaintiff wants to
6 say, well, it wasn't Plaintiff itself, but Maybank
7 2754 was not a party to that foreclosure. And,
8 again, the Court will hear more about that. And,
9 of course, it was not a party to the foreclosure.
10 Mr. LaPlante was a party to the foreclosure until
11 the day of the hearing.

12 At the day of the hearing the Court set
13 him aside, because Wells Fargo did not want to
14 leave the foreclosure open for the bid. A simple
15 process followed frequently.

16 So then suddenly, 12 years later, and
17 after all those imaginations concerning the
18 property, Maybank 2754 says, wait a minute, I have
19 an easement interest in it, even though it never
20 received an easement interest, it's made
21 allegations that the easement belonging to the
22 plants that's assigned to it, there's nothing of
23 record indicating that. I've never seen an
24 assignment of anything from the LaPlantes to
25 Maybank 2754 that purports to be an easement. And

1 certainly nothing from my client who is now the
2 owner of the property.

3 So what essentially happened is,
4 Mr. LaPlante made Maybank, as the manager -- in
5 whatever role he had, individually, manager of PCA,
6 and now the principle of Maybank 2754 simply left
7 this property go through all these changes, all
8 these conveyances. And now, some 12 years later,
9 wants to say that somehow my client, as the
10 good-faith purchaser of the property, is obligated
11 to allow some easement that doesn't exist.

12 This is, Your Honor, as I mentioned,
13 simply an agreement to agree, which South Carolina
14 does not recognize as a contractual right.

15 THE COURT: But they always rest on the
16 fact that this was -- they're evidenced as to the
17 easement that they allege that they were awarded is
18 often the resolution that you're referencing there;
19 correct?

20 MS. SHOUN: Yes, sir. Yes, sir.

21 There is nothing of record. And
22 Plaintiff admits that.

23 THE COURT: Where did they find this
24 resolution?

25 MS. SHOUN: I frankly have no idea.

1 THE COURT: Okay. Fair enough.

2 MS. SHOUN: I'm sorry.

3 MR. TAROKH: Your Honor, just to
4 clarify -- I don't mean to interrupt Counsel. We
5 are asking the Court to find an easement on three
6 dockets, not just a resolution. There is a
7 resolution. There's a contract which is
8 specifically referenced in the resolution. And
9 there is an addendum, an agreement, and an
10 assignment to that contract. And those documents
11 are of record.

12 The Beach entities, I refer to them as
13 The Beach entities, propounded requests for
14 admissions upon my client back in April. I believe
15 it was April 30th, around May 15th or so. The
16 docket will show we filed our responses to that
17 response. They specifically asked -- I think it
18 was request for admission, number one, why the
19 resolution is the only document upon which we are
20 claiming an easement. And we say, it was the
21 resolution, the contract's first assignment and the
22 assignment and the three documents, not just the
23 resolution. Those documents are all record.
24 They're also attached to my client's -- excuse me
25 Mitchel LaPlante's affidavit in opposition of

1 summary judgement.

2 THE COURT: All right.

3 MS. SHOUN: I would take the position
4 that should be stricken. But nonetheless we can
5 address that, if the Court wishes to. And that's
6 fine. We can consider are all those documents.
7 Because if you take those documents individually,
8 you take them as a whole, however the Court wishes
9 to look at those documents, none of them, either
10 individually or collectively, represent anything
11 more than an agreement to agree. None of them.
12 Because none of the actions that would have
13 precipitated something memorializing an easement or
14 anything else that crossed property was ever
15 executed, was ever done. It's not recorded.

16 I mean, Mr. Tarokh says they're of
17 record, when they're of record of this part of this
18 action. They are a record in this RMC office.
19 They don't represent a valid interest in property.

20 THE COURT: So what he's talking about
21 they're of record, he means in the filings in the
22 case, not actual filings with any RMC or clerk's
23 office?

24 MS. SHOUN: That's right, Your Honor.

25 And I think Mr. Tarokh will admit that.

1 MR. TAROKH: That's correct, Your
2 Honor. We've also alleged that if party has actual
3 knowledge of the easement, the fact is it's not
4 recorded does not compact -- the fact that it's
5 valid. And we cite -- I'll get to that. I don't
6 want to take Counsel off of her argument. But we
7 have a defense of that issue that we've alleged in
8 our response to the motions for summary judgement.

9 So the fact that it's not recorded
10 doesn't matter if the party has actual knowledge.
11 From the beginning they have been claiming bonafied
12 purchaser status. And we can establish an
13 affidavit in evidence --

14 THE COURT: Hold on. I'll give you
15 your turn.

16 Go ahead, Ms. Shoun.

17 MS. SHOUN: Thank you. And, you know,
18 Your Honor, I'll be taken off of the argument. I'm
19 fine with that.

20 What Mr. Tarokh has just represented to
21 the Court is if my client purchased with knowledge
22 of an easement, it may be bound to it. I'm not in
23 a position to disagree with that. However, there
24 is no easement here. This is smoke and mirrors.
25 There is no easement.

1 The most that this Plaintiff could
2 possibly declare with any legitimacy is an
3 agreement to agree. And South Carolina law does
4 not recognize that. The essential terms of the
5 contract has to be set forth in order to establish
6 a contract. Simply agreeing to do something in the
7 future is not binding.

8 And if Maybank 2754 wants takes the
9 position it was binding, it should have frankly
10 enforced that against PCA, when PCA owned the
11 property and when PCA were managed by Mitch
12 LaPlante, the same individual who's the principle
13 of Maybank 2754.

14 Again, this is smoke and mirrors, Your
15 Honor. And that's what why the Defendants are here
16 in front of this Court with these arguments,
17 because this is nothing more than a very thinly
18 failed attempt to hold up my client's development
19 of this property.

20 This is nothing more than an agreement
21 to agree. It says PCA will convey. It did not.
22 It says the resolution of the parties will agree as
23 to location and condition. They did not. And the
24 resolution says when this fork road is completed,
25 which it is not. So there is nothing there that

1 has been agreed upon.

2 Mr. LaPlante in his testimony before
3 this Court on June 25th admitted there was no
4 agreement on essential terms, as is required. Your
5 Honor, there is nothing with the Register of Deeds
6 Office. Because it doesn't exist. And that's
7 exactly why Maybank 2754 wasn't a party to the
8 foreclosure, because it has -- and to this day has
9 no property right. It's just not there.

10 If I may just change a little bit, Your
11 Honor, and talk about the easement that 2754
12 alleges it has. And we address easement somewhat
13 in our memorandum.

14 An easement, impossible that it can be
15 that. It simply cannot be that under South
16 Carolina law. Number one, an easement requires a
17 terminus on the property. The dominant estate,
18 which would be the Maybank 2754 property. There is
19 not terminus on the Maybank 2754 property. Because
20 overall there's no terminus at all.

21 There's no easement. There's not even
22 a description of what an easement might look like
23 in the future, should the parties have ever agreed
24 to that. It's not there.

25 And, significantly, Your Honor, an

1 easement of pertinence, in order to establish that,
2 the dominant estate must essentially rely on that
3 easement for the enjoyment of the property.

4 Maybank 2754 has owned and enjoyed this
5 property for a number of years. Maybank 2754
6 indicates to this Court, in its various filings,
7 there's an office building on this property. It's
8 rented. That's before the Court. I'm not sure
9 why, but it is.

10 So, obviously, the property is being
11 enjoined. No easement is necessary for the
12 enjoyment of the property. If there were an
13 easement, which there is not, it would be an
14 easement in growth, because it was given to
15 individuals. It was given to members of the
16 LaPlante family.

17 Now, Mr. Tarokh now wants to say, well,
18 it's an easement in gross of a commercial nature.
19 There's nothing to establish that. Again, it was
20 given to individuals. And an easement in gross is
21 not transferable. It is not assignable. Even if
22 Mr. LaPlante came up with some assignment, it can't
23 be done. It's not possible. South Carolina law
24 does not allow that.

25 If I might go on, the Plaintiff has

1 further admitted there is no easements. You need
2 to look -- the Court needs to look no more than the
3 Plaintiff's own admissions, including those set
4 forth in its action against its formal legal
5 counsel, Buist, Byars & Taylor. In that, Maybank
6 2754 said, Buist, Byars & Taylor, and particularly
7 you, failed to memorialize an easement, which
8 needed to be memorialized. And, you, as legal
9 counsel have failed to make it of record, which has
10 to be done in order to make it a valid interest or
11 right across the property.

12 So aside from the incorrigibles that
13 arises in addressing the fact that no one, nobody,
14 was more in control of what could or would happen
15 with any alleged easement than Mitch LaPlante, the
16 principle of Maybank 2754, I would ask the Court to
17 stop this, stop allowing them to continue down this
18 path.

19 The most favorable result they can ever
20 reach, which includes holding up my client's
21 development, bringing these remaining Defendants
22 into this Court repeatedly, at a substantial cost
23 and inconvenience, and disparaging the reputation
24 of well-known and respected individual -- a law
25 firm and an individual, it's going to met with some

1 judicial estoppel, Your Honor.

2 They cannot take completely different
3 positions. On the one hand saying, we have this
4 easement against Beach Fenwick, The Beach Company
5 and my colleagues on my side of the room. But on
6 the other hand saying, you're responsible for
7 preventable negligence because you never
8 memorialized this easement and you never recorded
9 it. Completely inconsistent positions that qualify
10 to be estopped under this doctrine of judicial
11 estoppel.

12 There are other estoppel arguments
13 equally applicable, Your Honor. That would be
14 collateral estoppel. And that would also be
15 estoppel by silence, which South Carolina
16 recognizes.

17 And, again, that goes back to the
18 argument in our memo, and the argument that I made
19 today, is that Mitch LaPlante, the principle of
20 Maybank 2754, whose knowledge, by statute, is
21 imputed to that entity. Simply let all these
22 changes go on with this property. And not until
23 December of 2019, when he saw that my client was
24 getting ready to develop the property, did he say,
25 you know what, you need to stop. Because Maybank

1 2754 has an easement. Not recorded. Not reserved.
2 Nowhere.

3 And lastly, Your Honor, but by no means
4 least significant, is the foreclosure itself. And
5 aside from the estoppel that it creates by
6 Plaintiff's failure to have it memorialized in the
7 agreement, or recorded in any agreement, and thus
8 Maybank 2754 being made a party to the foreclosure
9 action, even if an easement had existed, the
10 Plaintiff makes these unfounded, unsupported
11 allegations so the easement is it sees is out
12 there.

13 Nonetheless, even if we were to assume
14 that it was, Your Honor, the Wells Fargo mortgages
15 far in advance of the October 2013 resolution by
16 which plaintiff alleges this easement was created.
17 There was no subordination, unless we happen to see
18 one of those pop up.

19 Thus, even if we take everything the
20 Plaintiff says to be true, even if we assume for
21 purposes of this motion there was an easement,
22 there was never a subordination at Wells Fargo
23 Mortgage. That easement would have been, gone,
24 dismissed, obliterated by the foreclosure action.

25 If the Court will allow me, however, I

1 would ask Mr. Hellman to address that even further,
2 since he definitely represented a 1776 and has the
3 familiarity with the foreclosure.

4 THE COURT: All right. Let me ask
5 Mr. Hellman, who his clients now retain that
6 property, to the foreclosure action.

7 MR. HELLMAN: Yes, Your Honor.

8 THE COURT: And you sold a portion of
9 that off to The Beach Company; is that correct?

10 MR. HELLMAN: Yes, Your Honor.

11 THE COURT: Tell me what we're talking
12 about, just to educate me a little bit. How large
13 is this property?

14 MR. HELLMAN: Judge, it's a pretty
15 significant piece of property. It's over 80 acres
16 that comprises of this property.

17 THE COURT: And some of it is
18 developed?

19 MR. HELLMAN: Most of it is undeveloped
20 when my client purchased it in the foreclosure
21 sale.

22 THE COURT: But there is some
23 development on it currently, or no?

24 MR. HELLMAN: Really no development.

25 THE COURT: Okay. Perfect.

1 Beach Company carved out a piece?

2 MS. SHOUN: About 12 acres, I think.

3 THE COURT: How much did you purchase?

4 MR. HELLMAN: About 22.

5 THE COURT: So you have 22 acres?

6 MS. SHOUN: Yes, sir, apparently.

7 THE COURT: So the remaining, what I
8 assume is 66 acres, is yours?

9 MR. HELLMAN: Yes, Your Honor.

10 THE COURT: And Maybank alleges that
11 they have an easement. Now, what is this easement?
12 Everybody keeps talking about it. What is it? I
13 heard when she said ingress/egress of motor vehicle
14 or pedestrian. But is it through the entire
15 property?

16 MR. HELLMAN: Your Honor, we don't know
17 what the easement is. It's whatever that -- it's
18 propertied to be whatever to that resolution. It
19 would connect to a road that has yet to be built
20 through the middle of that property.

21 MS. SHOUN: Well, if I might, Your
22 Honor, actually -- and I don't mean to correct my
23 colleague -- there's nothing indicating it connects
24 to any road.

25 THE COURT: It just says when the road

1 is build?

2 MS. SHOUN: Yes, sir.

3 THE COURT: So that would be some
4 trigger that would initiate, I guess, some of the
5 easement?

6 MR. HELLMAN: Perhaps, Your Honor.

7 But if I may, if it pleases the Court,
8 so I think there's really one dispositive issue
9 that addresses this entire matter. And it's really
10 an indisputable one. It is the subordination
11 agreement. So in -- my client, 1776, you heard,
12 purchased this property from the Wells Fargo
13 foreclosure sale. And it did that in 2017.

14 And then in 2013 is the date this
15 alleged resolution that would create this reported
16 easement came to be. And in 2006 and 2000, the
17 mortgages that were foreclosed on were granted to
18 Wells Fargo's predecessor, First Union.

19 So basically we've got a 2000 and a
20 2006 mortgage. Even in a light most favorable to
21 the Plaintiff, if you assume, which they don't.
22 But if you assume they have whatever this easement
23 is, okay, in 2013, in 2014 the Wells Fargo
24 foreclosure begins. And there is no subordination
25 agreements. So we have this first and fine right

1 mortgage, we have this subsequent easement in a
2 light most favorable to Mr. Tarokh's client. Let's
3 assume for now that it exists, even though it does
4 not. Then we have a foreclosure.

5 Any recorded document, any unrecorded
6 document, if it is not subordinated to a first and
7 right mortgage gets wiped out at foreclosure. At
8 the foreclosure there were a numbers of covenants
9 and restrictions for the entire neighborhood that
10 exists over there. They were never subordinated to
11 Wells Fargo's mortgage. And they all got wiped
12 out. Literally, everything post-mortgages got
13 wiped out. It didn't have a subordination
14 agreement.

15 So now we have this situation where
16 there is no subordination agreement. There is no
17 recorded subordination agreement. There is no
18 allegation in Plaintiff's complaint and Plaintiff's
19 amended complaint about any subordination
20 agreement. We have a superior right to Wells
21 Fargo. It's purchased at the foreclosure sale.

22 And as a result of that, whatever right
23 they had, even if it was a recorded document that
24 we all had knowledge and notice of, it wasn't
25 subordinated to that mortgage. It gets wiped out

1 at foreclosure.

2 So now here they are with an unreported
3 documents years later saying, wait a second, we
4 have this right. That right got wiped out.

5 So, as a result, just to walk through
6 it again; 2000 and 2006 mortgages; purported
7 easement, 2013; foreclosure, 2014. Not recorded.
8 No existence of subordination agreement. Section
9 30-7-20 requires subordination agreements to be
10 reported. And so now we have a reported easement
11 that they say they have. It's inferior to the
12 mortgages, as a matter of law. And, ultimately,
13 extinguished by the foreclosure. And we address
14 all of that in our memorandum, Your Honor. I can
15 answer any questions.

16 THE COURT: All right. Who's next?

17 MR. YOUNG: Very briefly.

18 THE COURT: You represent Mr. Zurlo,
19 individually, and the trust?

20 MR. YOUNG: Yes, sir. And in all of
21 our papers we've gone through very, very
22 specifically how all this came about.

23 But I have represented Mr. Zurlo and
24 the Zurlo Trust since 2013, when all this started
25 out, through the judicial dissolution lawsuit and

1 through the Wells Fargo foreclosure.

2 And, Your Honor, I appreciate the fact
3 that judges don't like this stage in the game to
4 grant summary judgment. And I know the Supreme
5 Court has an appeal on summary judgment at this
6 stage of the game.

7 But if, in fact -- and I state this in
8 our brief. Summary judgment is a drastic remedy.
9 And if, in fact, it should be causally invoked
10 where a verdict is not reasonably possible, under
11 the facts presented, summary judgment is proper.

12 So without going into a lot of
13 repetitive arguments, what I've done is
14 incorporated the arguments of all of the Defendants
15 in a proposed order. And, basically, I think the
16 Court, as Mr. Hellman and Mrs. Shoun both said, has
17 an absolute right to grant summary judgement on the
18 grounds of the foreclosure action, wiped out any
19 easement, assuming there was an easement.

20 But there are additional sustaining
21 grounds. So one time I was making argument, the
22 Court said to me, well, Mr. Young, that's
23 interesting. Is that on page 10 on your brief?
24 And I said, yes, sir. And I tried another one.
25 And he said, isn't that on page 12. And I said,

1 yes, sir. And I said, I'll just shut up. I'm
2 going to hand you this order.

3 And I'll send that to you in Word form.
4 That's my proposal.

5 MR. TAROKH: Just for the record, I
6 haven't seen this proposed order granting all the
7 Defendants' summary judgement. It's rather
8 presumptuous, when I haven't had an opportunity to
9 respond.

10 MR. YOUNG: And I'll include you on the
11 email in Word form.

12 THE COURT: All right. Mr. Tarokh,
13 happy to hear from you.

14 MR. TAROKH: Yes, Your Honor. To
15 start, we have some pending motions, as well. And
16 I'll address those motions at the end of my
17 argument to respond to what you just heard from the
18 opposing side.

19 Mainly, there's Plaintiff's motion to
20 amend the complaint. And we also have an issue
21 with the Court. If the Court is granting summary
22 judgment, we object on that, on the basis of
23 discovery. And I'll get to that issue after I
24 address the substance of what they're arguing.

25 Your Honor, you've heard a lot about

1 how The Beach Company -- and when I say The Beach
2 Company I'm referencing The Beach Company, Beach
3 Fenwick. How they're being held up.

4 They're not innocent parties, Your
5 Honor. They knew about this claim of easement
6 before they decided to purchase the property from
7 1776. And that's stated in clients -- my
8 Plaintiff's affidavit in opposition of the summary
9 judgement. We go into great detail to explain how
10 they were at a design review board meeting. It was
11 December 2nd, December 3rd. The property wasn't
12 transferred until, I believe, a week later. So
13 they knew about this from the very beginning. And
14 had decided to proceed forward with the purchase.

15 So they're not innocent. They're
16 trying to get you to believe that they're bonafied
17 purchaser. They had actual notice of this.

18 And case law is clear that when a
19 purchaser of actual knowledge of an easement, the
20 fact that it's not recorded, is irrelevant. The
21 fact that it's not recorded does not impact whether
22 or not it's valid.

23 There's also an issue with 1776. Well,
24 first, you know, we have to -- we're not piercing
25 the vail. But if you lift the vail just a little

1 bit, you see who 1776 is. And the records that --
2 the documents that I filed, namely my request for
3 judicial notice, it's a development agreement
4 between the City of Charleston and 1776. It's the
5 signature page. The sole member is Zurlo Trust.

6 And what's important is 1776 is not an
7 innocent party. 1776 is not a bonafied purchaser.
8 1776, its sole member is the same trust that's
9 named in this lawsuit.

10 Zurlo, who is a member of this trust,
11 signed the resolution. Now, they're placing --
12 this is on the fact, well, Zurlo didn't sign. It
13 doesn't show that he signed as capacity as
14 cotrustee or whatever. But that argument is
15 rebutted by my affidavit in opposition, which
16 clearly shows that my client relied on Zurlo
17 signing that matter. Because there was a prior
18 certificate -- and this is from memory --
19 certificate or resolution to borrow money, at which
20 he signed on behalf of Penny Creek without putting
21 his trust information.

22 And so I think that's very important.
23 It's principle of equitable estoppel, things of
24 that, which should prevent the Court from granting
25 summary judgement because he doesn't sign with his

1 cotrustee title on the document.

2 In addition, Your Honor, what everybody
3 is not telling you about is this membership
4 transfer that arose from a resolution was
5 contingent on -- specifically contingent on the
6 grant of an easement. And I say that because we
7 have a principle of equitable estoppel where they
8 should be estopped in equity from disavowing or
9 denying the validity of the easement.

10 And there's three documents upon which
11 we base our claim. The first document is
12 resolution that we attach to the complaint. We
13 also subsequently filed, in response to admissions
14 propounded upon us, the contract for assignment,
15 and also the amendment.

16 And those documents establish it. It
17 was specific -- that it was -- the grant of an
18 easement was a specific condition for the transfer,
19 or the membership transfer.

20 And that important. It so important
21 because it's an equitable estoppel argument. How
22 can they now disavow Zurlo through vis-a-vis 1776
23 and other defendants, who we named, who had
24 knowledge of this thing before the purchase. How
25 can they now say, well, it's not valid, when the

1 membership transfer closed to a specific condition
2 of the transfer.

3 In addition, Your Honor, you raised
4 some questions, which I think are important. I
5 think they're completely irrelevant. You're asking
6 where is this easement, where it's going, things of
7 that nature.

8 I think that's crucial because the
9 cases I cited show, the Court should entertain
10 control. We should look outside of the
11 four-corners of this document, because it's
12 ambiguous.

13 And there's case laws to support the
14 fact that just because -- and I cite this in my
15 motion and my document, just because the easement
16 is not specifically located, it doesn't mean that
17 it doesn't exist. The Court should undertake
18 its -- it should first determine the intent of the
19 parties, based upon the documents themselves.

20 And when you read the document, what
21 were the parties intending. The parties intending
22 a membership transfer contingent on the specific
23 grant of an easement. It actually says the word
24 grant.

25 So we have and we cited the Smith case.

1 And I won't take up time to go through that case,
2 but it's cited in my response in opposition, where
3 even that situation, like this situation, the fact
4 it's unrecorded, the fact that it's not located is
5 irrelevant. It's relevant for the Court to
6 determine whether there exists an easement. And
7 then when you get to the issues of, well, what type
8 of easement, that goes to the scope and character
9 of the easement. Like, is the easement pertinent.
10 Is it a commercial engrossed. Things of that
11 nature.

12 So the first step in determining
13 whether this document -- what were the intention of
14 the parties. And the case law that I cited, Your
15 Honor -- I cite the Smith case. I guess I'll cite
16 it for the record, 441 S.E.2d 331, 335. They cite
17 a case where they state a quote, if the language is
18 uncertain or ambiguous in all -- excuse me. In any
19 respect, all surrounding circumstances, including
20 the construction which the parties have placed on
21 the language may be inquired into and taken into
22 consideration by the Court.

23 That's very important because the Court
24 should undergo determination of what were the
25 parties intending. And the memorandum filed by the

1 Zurlo entities, their motion and/or memorandum,
2 they go into great detail about how this pitchfork
3 road is not created.

4 Well, that's irrelevant. They're
5 complaining construction -- or to the existence
6 with location. In fact, it's not -- it's not
7 located physically is irrelevant. However, we
8 filed documents to demonstrate to the Court that
9 it's now a plan.

10 And I bring that up because when you
11 take yourself back between to '13, what were the
12 parties intending to this agreement. There's an
13 inference there.

14 There's an inference that the parties
15 intended an easement. There's an inference that
16 pitchfork road, even though it was not constructed
17 at the time, existed. And there's also inference
18 the parties knew the whereabouts, generally, of
19 where this roadway was going to go.

20 And my clients -- and I ask Your Honor
21 to -- it's a lengthy affidavit -- review my
22 client's affidavit. Because it goes into the
23 history of how the -- and Zuro became partners, the
24 District of Penny Creek, how the Maybank 2754 was
25 purchased by Penny Creek with the sole purpose of

1 having it increase in value. It was commercial
2 property. And my client's affidavit explains how
3 the entire intent of Penny Creek purchasing Maybank
4 was to have a second means of ingress and egress
5 for commercial purposes. They wanted to increase
6 its commercial value. And my client's affidavit
7 goes into those facts.

8 And I mention this because at this
9 stage there's facts that we've allege that create
10 material issues of fact. There's inferences in
11 that affidavit that should be resolved at this
12 stage in my client's favor. And this is not a
13 situation of, oh, my client is just holding up this
14 development. My client has no other option.

15 And the misstatement from the part of
16 opposing counsel saying, well, they admit they
17 don't have an easement. That's not true. That's
18 not true at all. The entire purpose of this case
19 is for the Court to establish an easement. That's
20 our position and we maintain that.

21 My client is also suing for
22 malpractice, a law firm and a lawyer who was part
23 of the transaction. And we're doing that because
24 we have an affidavit from another member of the
25 South Carolina Bar who states it's malpractice for

1 the attorney in a law firm to not have not recorded
2 a document to put the world on notice. And had
3 that happened, we probably wouldn't have been here.
4 Had that lawyer recorded the document, put the
5 world on notice of, hey, this piece of property is
6 subject to an easement, it would have probably been
7 picked up by a title search when they were doing
8 their due diligence of the purchase and we wouldn't
9 be here.

10 And, you know, in terms of this
11 judicial estoppel, they're on the edge of that
12 doctrine. And that's important because there's
13 five separate elements that should be met for that
14 doctrine to apply. One of which is a finding
15 evidence that there's an intention to mislead the
16 Court. That's not there.

17 And I get a little angry about that,
18 because within that malpractice case we
19 specifically cite this case. We cite it and we
20 actually in our pleadings state what we're trying
21 to do, have the Court declare an easement, having
22 the Court have this alternative argument, declare
23 it a restrictive covenant, civil conspiracy.

24 And the civil conspiracy stems from
25 Zurlo, how Zurlo -- it's not referencing innocent

1 parties here. Zurlo is behind 1776. Zurlo's
2 acknowledgement of the easement, because he signed
3 a resolution as to 1796. That knowledge was
4 imputed to all of the other Defendants because they
5 were involved in the development of the property.

6 Just because -- they were told, well,
7 you know, this hasn't been developed. Well, it's
8 planned to be developed. And our records -- our
9 records filed with the Court upon which we're
10 asking the Court to take judicial notice, there's a
11 development agreement with the City of Charleston.

12 So the fact that, you know, we've said,
13 we've lost the value of the easement, that's true
14 until and unless the Court declares that we have an
15 easement. And we have maintained consistently we
16 have an easement. So the principal of judicial
17 estoppel and collateral estoppel, they don't even
18 apply.

19 THE COURT: What do you want the
20 easement for?

21 MR. TAROKH: Ingress and egress. It
22 will increase the commercial value of the property.

23 THE COURT: But you don't own it.

24 MR. TAROKH: I'm sorry?

25 THE COURT: But you don't own it.

1 MR. TAROKH: My client owns the
2 adjacent lot. And we state that in our pleading.
3 The adjacent lot is the property that my client
4 owns upon which we're seeking -- excuse me.
5 They're the dominate state upon which we're seeking
6 easement in favor.

7 THE COURT: Mr. Hellman, so your
8 argument that when the foreclosure action took
9 place, it wiped everything out? I mean, didn't
10 Mr. LaPlante own that property? How did the
11 foreclosure come about, is my question?

12 MR. HELLMAN: So as Ms. Shoun said,
13 there were Mr. LaPlante and Mr. Zurlo were, through
14 various entities, partners in this Penny Creek
15 entity. Penny Creek owned the property. Penny
16 Creek ran the mortgages of Wells Fargo.

17 Those mortgages were -- they received
18 this easement. So even if you take everything he
19 says is true and even if you take his position
20 that, hey, in 2013 everything was done right, there
21 was a recorded easement. Without the subordination
22 agreement none of that survived. It doesn't matter
23 if you have notice and knowledge of a document.

24 There were actually reported covenants
25 and restrictions that didn't get subordination

1 agreements that got wiped out, too. We've spent
2 two years trying to put Humpty Dumpty back together
3 again because they didn't get subordinations
4 agreements for a lot of things. So no
5 subordination agreement. It's all wiped out. It
6 doesn't matter if we had knowledge or notice. We
7 have record notice of documents.

8 THE COURT: So Penny Creek and Zurlo,
9 did they just not make the payments on the
10 property; that's how they lost it?

11 MR. YOUNG: I can answer that question.
12 What happened basically was in -- they put this
13 deal together in 1999. They began to sell some
14 lots over on Penny Creek Associates, and a little
15 subdivision over there. They finance everything,
16 the infrastructure and all of that with Wells
17 Fargo.

18 In 2008, 2009 the world went to the
19 devil and the property was worth much less than the
20 note and the mortgage on the property. So Wells
21 Fargo forbore for a while to see whether or not the
22 real estate market would come back. And then in
23 2014 they decided to foreclose.

24 In 2014 Penny Creek Associates still
25 owned all of this property and Mr. LaPlante was the

1 manager of all of this property, because he was the
2 manager of Penny Creek Associates.

3 So when that foreclosure took place, it
4 was running basically simultaneously with the
5 judicial dissolution lawsuit. And as a part of the
6 settlement, before Judge Dennis in the judicial
7 dissolution lawsuit, Penny Creek Associates, the
8 owner of the land, gave to Mr. Zurlo's Trust, \$3.2
9 thousand million mortgage, which was the amount
10 that Mr. Zurlo's Trust claimed Mr. LaPlante had
11 used for personal, rather than corporate purposes
12 from 1999 up until '07.

13 So Wells Fargo had the first mortgage,
14 2000; another mortgage in 2006; in 2013, this
15 resolution that nobody knows about until apparently
16 December of 2019 somehow gets signed. But,
17 meanwhile, the property has been foreclosed upon.
18 And at the foreclosure Wells Fargo's bid was \$5.6
19 million for its combined note and mortgage. And
20 Mr. Zurlo then started credit bidding the \$3.25
21 million amount that his trust had the mortgage for.

22 And we got it for, what, \$6 million,
23 somewhere in that neighborhood?

24 MR. HELLMAN: Yes, sir.

25 THE COURT: So there was a dissolution

1 of Penny Creek, right, which removed Mr. LaPlante;
2 correct?

3 MR. YOUNG: Yes. And in March of 2016
4 Chris Lanning was substituted by Judge Dennis for
5 Mr. LaPlante, 2016, two years after supposedly this
6 resolution and the property wasn't developed.

7 THE COURT: Right. So then Mr. Zurlo
8 moves forward with the project, apparently, you
9 know, starts up another company and wants to have
10 the property himself. And so he bids, purchases
11 it, pays for it, whatever he ended up doing, and
12 now -- and that would have been in when; 2013?

13 MR. HELLMAN: 2017 it was bought in the
14 foreclosure.

15 THE COURT: '17. And then in December
16 of 2019 the dissolved party comes back and says, oh
17 by the way, I want change the property, I have a
18 lien on this property to make my property more
19 valuable?

20 MS. YOUNG: No. It wasn't a dissolved
21 party. This Maybank 2754, which had transferred
22 from PCA to the LaPlante family in October of 2013.
23 PCA no longer has any ownership interest in Maybank
24 2754, and has not since October 2013.

25 THE COURT: Well, that's what I was

1 insinuated. To dissolve meaning he had been
2 removed from -- he was no longer involved?

3 MS. YOUNG: Right. That's correct.

4 MR. TAROKH: Mitch LaPlante was
5 removed. He resigned. And then Chris Lanning was
6 appointed by, I believe, Judge Dennis to be the
7 manager of Penny Creek. And this was after the
8 membership, the subject membership that was
9 transferred as evidenced by resolution, and those
10 three documents that I referenced earlier.

11 THE COURT: All right. Go ahead.

12 MR. HELLMAN: If I may, Your Honor.
13 Mr. Tarokh has said nothing about the subordination
14 argument we've made. Because that subordination is
15 the only way that any agreement that's reported or
16 entered into after a mortgage can survive a
17 foreclosure. It's the foundation of the house of
18 cards, his whole complaint is built on.

19 And without a subordination agreement,
20 he can't produce one. There's nothing. It yanks
21 that card right out of the bottom of that house of
22 cards. He has to show that in order for any
23 agreement, post a mortgage, to survive a
24 foreclosure, even if you have knowledge, even if
25 you have notice, it doesn't survive.

1 THE COURT: Address just that one
2 issue.

3 MR. TAROKH: Yes, sir. That was my
4 intent. I was letting opposing counsel finish.

5 Judge, the subordination agreement is a
6 red herring. We have to look at who were the
7 parties before foreclosure. And it's fundamental.
8 A persons -- and I say persons, an individual or a
9 person such as an entity, their interests aren't
10 impacted by a judgement unless there's due process.
11 And due process usually requires service of a
12 summons, notice, and opportunity to be heard.

13 Maybank was not served in the
14 foreclosure. And Mitch LaPlante was served, but as
15 I argued -- I think I argued this same point to
16 Your Honor -- I think this is my third time from
17 the two prior hearings. Mitch LaPlante was
18 separate from the foreclosure action. And that's
19 stated in our affidavit.

20 And, in addition, we have the final
21 judgment of foreclosure attached as an exhibit
22 where clearly on page two, next to his name,
23 Defendant, Michel F. LaPlante severed from the
24 foreclosure action. The whole point is, there's no
25 necessity for a subordination agreement. My

1 client, Mitch LaPlante, was not named. If Mitch
2 LaPlante was named he was severed, which means he's
3 not impacted by the foreclosure. And other members
4 of the LaPlante family were -- may have been
5 through the foreclosure.

6 So the fact that they're saying, well,
7 there's no subordination risk, we didn't have to
8 have a subordination agreement. Because my client
9 was never named in the foreclosure. Their interest
10 in the property was never foreclosed. That's
11 fundamental. And it's like that's what I don't
12 understand about their argument. That's
13 fundamental. The Court has to have jurisdiction to
14 issue an order and that renders this order void as
15 against Maybank. Because they weren't named -- so
16 they're trying to enforce this order. They're
17 trying to say, we didn't have to have one. They
18 weren't named as a party. And that's fundamental.
19 And we explain that in our affidavit and in my
20 response. A red herring issue.

21 THE COURT: All right. I'll take it
22 under advisement.

23 MR. TAROKH: Yes, Your Honor. I had
24 another motion. We've asked the Court to -- if you
25 recall at the last hearing, Zoom hearing, motion

1 for temporary injunction in the very beginning --
2 in the very beginning I entered an ore tenus motion
3 to amend the complaint, the Court basically said
4 file your motion.

5 After Your Honor ordered the sending
6 this case to the Master-In-Equity, the case went on
7 to appeal.

8 The whole point being, everyone knew
9 that I was going to move to file an amended
10 complaint. That was filed recently. And we're
11 asking the Court to amend the complaint so that I
12 can remove the temporary injunction count, which
13 Your Honor denied, and also add a party, the City
14 of Charleston, and in addition add another count
15 for declaratory judgment. And also because of
16 discovery documents I received from The Beach
17 Company, I can better state the allegations
18 surrounding civil conspiracy. If Your Honor takes
19 a look at the amended complaint, I think we make
20 that very clear with exhibits and we can better
21 state our claim for an easement, namely attacking
22 the contract for as an assignment as part of our
23 claim for an easement.

24 And it's not prejudicial. There's a
25 brief liberality. There's a brief liberality

1 policy in ordering misleading the State.

2 So this is not a situation where, based
3 off of summary judgement -- and I bring it up to
4 file a motion to avoid summary judgement. Because
5 everyone was on notice before motions for summary
6 got here was that intervening to the Maters-In
7 Equity's Court, that can explain that gap period.
8 And it's a relatively short gap period.

9 In addition, Your Honor -- and I don't
10 like discovery disputes or issues, or things of
11 that nature. And it's my understanding, and I've
12 learned from, experience, most judges don't.

13 I bring the discovery issue up, because
14 if you recall in March 2020 I had propounded
15 discovery on 1776. There was a Covid excuse. And
16 I'm not using the word excuse flagrantly. If there
17 as a Covid excuse -- and I put this -- and the
18 whole point is, I never got the documents. The
19 issue of they're giving me documents that are
20 proper before the Court, we believe Mr. Hellman
21 telling you, or you telling Mr. Hellman -- and I
22 have a copy of that transcript for my motion to
23 compel, attached to the motion to compel, how
24 they're supposed to work with me.

25 Well, they don't give me any documents.

1 I don't hear from them. They file their motion for
2 summary judgment. And then I believe it was that
3 very same day I filed my motion to compel.

4 They give me the documents this week,
5 September 21st. And there are a lot of documents.
6 And my last count, I think, they were like almost
7 close to over 2,500 documents that were given to
8 me, either part of Monday and Tuesday.

9 In addition, Your Honor, I propounded
10 discovery on Seamon Whiteside, same -- you know,
11 excuse more or less, Covid. And I don't mean the
12 world excuse or anything of that nature.

13 They responded to the discovery. They
14 said that they'll produce the documents at a
15 mutually convenient time. So back in May I
16 e-mailed them, hey, you know, please send me these
17 via e-mail? Yes, you know, we'll do that as soon
18 as we compile or whatever.

19 And then, you know, it wasn't until
20 September 15th that I shoot them an e-mail and I
21 say, where are these documents; we're going to get
22 them Bate stamped for you, we'll get them to you in
23 a couple days. I don't get those documents until
24 yesterday after 5.

25 And I believe those documents --

1 they're probably still downloading. I believe
2 they're approximately 1,800 documents. I have a
3 link to the document's download.

4 So the whole point is -- and I put this
5 in my memorandum, summary judgment should now be
6 entered when there's pending discovery. The facts
7 should be developed. I cite a case in the second
8 to last paragraph about that issue.

9 So that's another reason. It's
10 prejudicial. I was diligent in seeking the
11 documents back in March. And they don't get them
12 to me until last week.

13 THE COURT: All right. Mr. Norris, I
14 will give your five minutes to argue. I mean, we
15 have to take break because she has to -- we have a
16 1:00 hearing. Nobody has eaten obviously. We have
17 to take a break.

18 So I'll be happy to hear from each of
19 you for five minutes.

20 MR. NORRIS: Very briefly. Your Honor,
21 my name is Patrick Norris. I represent Seamon
22 Whiteside Associates, which is a civil engineering
23 firm. It's local. They're the only entity in this
24 whole group of folks who has no ownership interest
25 in these properties. I guess, because they were

1 hired to do some claim unit development commissions
2 for the City.

3 But in any event, I'll short circuit
4 everything by saying a total conspiracy, as the
5 Court knows, it's a big deal. It's more than just
6 alleging what you allege. That was sort of in the
7 complaint. And saying, oh, by the way, that act or
8 omission is also a conspiracy.

9 The whole point is you have to allege
10 additional acts and furtherance of the conspiracy
11 to support it. The Plaintiff failed to do that.
12 And another pin that sort fails completely side the
13 Plaintiff hasn't alleged act with special damages.
14 So the conspiracy cannot seek damages. That the
15 damages they're seeking must go beyond the damages
16 of the alleged and other causes of actions.

17 Plaintiffs haven't done either. The
18 damages they seek are for the conspiracy claim is
19 the value of the easement. Well, I just submit
20 that, A, that same damages is being sought against
21 the attorneys and the legal malpractice action.
22 And, B, they're trying to get the easement wide
23 enough so just they can have it then look at it.
24 So it makes the property more valuable. Counsel
25 just told you that. It's the same two sides of the

1 same coin.

2 But in terms of Seamon Whiteside, back
3 to my original point, the only allegations in the
4 complaint, that I have. And this was filed six
5 months ago before the motion to amend. So this
6 goes to the original complaint.

7 Seamon Whiteside inquired Penny Creek
8 to do a plan unit development a for the City. The
9 allegation is they did that. The documents they
10 submitted on behalf of Penny Creek did not contain
11 reference to this easement that we're talking about
12 here today.

13 And then that's the last part of Seamon
14 Whiteside. So they hired to do a job. They do a
15 job. The documents don't contain an easement that
16 they're talking about. And then we go over to the
17 civil conspiracy cause of action, which then a lump
18 single Whiteside entity to all the Defendants at
19 the direction, guidance, and/or persuasion of Zurlo
20 didn't include an easement in their submission to
21 the City.

22 So the whole point -- step back a
23 moment, it's not whether the Plaintiff was injured
24 by something that Seamon Whiteside did. It's
25 whether a joint plan primary intent to injure the

1 Plaintiff. And that's not even alleged that way.

2 Stated in case law of South Carolina
3 supports, if a business transaction, on one hand,
4 incidentally harms someone else, that's not a
5 conspiracy. That's why you have to plea additional
6 facts. Additional overacts that support the
7 conspiracy, because it goes beyond the other
8 claims, any other allegations asserted in the
9 complaint.

10 So I don't think that there is the
11 original complaint was sufficiently pled. I think
12 Counsel wants to now to amend his complaint. And I
13 think the proper thing to do -- I think the Court
14 is certainly within its discretion to dismiss the
15 original complaint, as to my client total
16 conspiracy is the only thing that we're involved
17 in. Get my client out of this mess.

18 And then if the Court is inclined to
19 grant the motion to amend, if they bring us back
20 in, I can't really do anything about that. But I
21 think as the original complaint, I think on the
22 12(b)(6) I think it stands.

23 THE COURT: All right. Thank you.

24 MR. TAROKH: Just briefly, Your Honor.
25 If the Court grants my motion to amend and moots

1 out my motion to dismiss, and we also -- our
2 position is we do state the cause of action
3 properly for civil conspiracy, and that conspiracy
4 is better spelled out in the motion in the amended
5 complaint.

6 MS. SHOUN: Your Honor, I promise I'll
7 be extremely brief. Your Honor has been patient.

8 If I might just draw the Court's
9 attention to our footnote six in our memorandum,
10 which goes to many of the arguments that Your Honor
11 has just heard, and that is, the non-moving party
12 in a motion for summary judgment must demonstrate
13 the likes of events that further discovery will
14 uncover additional relevant evidence, and if the
15 party is not nearly engaged in a fishing
16 expedition.

17 Your Honor, every Defendant here has
18 made their arguments before day, saying assuming
19 everything is true, assuming everything that the
20 Plaintiff says is true. There is no further
21 information that can change this matter as a matter
22 of law.

23 THE COURT: All right.

24 MR. TAROKH: My response to that is we
25 should not be in a position to take their word for

1 it. We allege and go into great detail, and all of
2 the documents to demonstrate how everyone had
3 knowledge of it. This was a creation of Zuro. If
4 when you pull back the vail of 1776, something's
5 going on. They all had knowledge of this.

6 THE COURT: All right. Thank you so
7 very much. Have a wonderful day.

8 (The proceedings concluded.)
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CERTIFICATE OF REPORTER

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State of South Carolina)
)
County of Charleston)

I, Krista Nicole Carney, Official Court
Reporter for the Ninth Judicial Circuit of the
State of South Carolina do hereby certify that the
foregoing is a true, accurate and complete
Transcript of Record in the Court of Common Pleas
for Berkeley County, South Carolina, on the 24th of
September, 2020.

I do further certify that I am neither of
kin, counsel, nor interest to any party hereto.

October 27, 2020

Krista Nicole Carney,
Stenographic Court Reporter

PROCEEDINGS

THE COURT: All right. This is Maybank 2754, LLC's Motion to Reconsider. All right Mr. Tarokh, I'll be happy to hear from you.

MR. TAROKH: Thank you very much, Judge.

THE COURT: Yes, sir.

MR. TAROKH: Jason Tarokh on behalf of the plaintiff. I also have present a representative of my client, Mitch LaPlante. He is the current manager of the plaintiff.

Your Honor, I want to first thank you for allowing this hearing and having this hearing. I understand that the Courts have the discretion to grant or deny motions for reconsideration without a hearing. And I appreciate the Court's time and opportunity to present the motion here today.

Your Honor, in sum we adopt today every argument we make in our motion, and it's a lengthy motion. In part it's lengthy because the order was so lengthy. And it includes a lot of facts and conclusions of law which I believe are incorrect or not based upon the evidence of record.

Your Honor, my first issue is that we raised certain issues that were not specifically ruled upon I believe. In order to preserve those issues for appellate review I

1 have brought them forth in this motion. It appears from
2 the responses of the opposing counsel all the issues were
3 decided and all the issues I've raised were ruled upon.
4 But to preserve issues for appeal I have brought this
5 motion in part for that reason.

6 The first, Your Honor, is whether the resolution
7 that is at issue and the Contract for Assignment and the
8 assignment when construed together create an easement.
9 Now, you've heard a lot of argument about the resolution
10 just merely being an agreement to agree. That's
11 incorrect and that's not supported by the evidence.

12 The Contract for Assignment, which is of record and
13 which is attached to my client's affidavit, specifically
14 states that Penny Creek shall grant an easement to my
15 client. And when construed together all the language of
16 those documents show that there was an obligation that
17 created an easement and which did create an easement.
18 The only thing that is left remaining is the specific and
19 precise location of the route of the easement.

20 And pursuant to the case law I cite in my motion the
21 fact that there is no understanding at this point of
22 precisely where that easement is does not make the
23 Agreement, does not make the easement fail. The Court
24 should undertake as I state in those as I -- the Court
25 should undertake review of all the extrinsic evidence

1 that are relevant to the intent of the parties as to the
2 creation of the easement and also as to where the
3 easement was to go. That was the first issue. So it's
4 not just a resolution; there are three documents.

5 The second issue is Your Honor whether those three
6 documents, whether the Resolution, Contract for
7 Assignment and Assignment were ambiguous. We contend
8 they are ambiguous. They are ambiguous inherently
9 because of the term, the reference to Pitchfork Road.

10 Clearly the parties had a reference point in mind
11 when they put that phrase in those documents. And the
12 Court should undertake parol and extrinsic evidence to
13 determine what the intent of the parties were with the
14 inclusion of that.

15 The third, Your Honor, is whether the equitable
16 doctrines of equitable estoppel or unclean hands apply to
17 the defendants, namely Mr. Zurlo, as to the sufficiency
18 in which he signed the Agreement and also their ability
19 to disavow or dishonor the easement.

20 And I say that Your Honor because the grant of an
21 easement was a specific condition of the membership
22 interest transfer which did occur. But membership
23 interest transfer is not in dispute. That occurred;
24 there isn't a dispute as to that. But a specific
25 condition of that to have happened was a grant of an

1 easement. And when construed together those documents
2 support an equitable estoppel and unclean hands defense
3 for their ability to sit here in court and say there is
4 no easement.

5 And another thing, Your Honor, to point out with all
6 this because it's a complicated fact pattern is who are
7 these parties. You know namely its Zurlo. Zurlo, Zurlo,
8 Zurlo and I say that because it's Zurlo's signature on
9 the Resolution. It's also Mr. Laplante's signature on
10 the Resolution.

11 At the time the Resolution was signed Mr. Laplante
12 was the manager of Penny Creek Associates. Zurlo was a
13 partner by and through his Trust. And it was Zurlo that
14 purchased the property by and through 1776 at the
15 foreclosure sale.

16 So, at no point did the property fall into the hands
17 of an innocent third party or a bonafide purchaser.
18 Everyone had knowledge of the easement. And that
19 knowledge even extends to Beach Fenwick, LLC the current
20 owner by and through the Beach Company.

21 We have an affidavit, a lengthy affidavit that we
22 filed as well in opposition to their summary judgment
23 which establishes that Mitch Laplante his intent in
24 creating the easement in which also establishes that 1776
25 created -- I'm sorry, it's not just in the affidavit.

1 There are documents that we filed of record which
2 indicate that 1776 purchased the property at the
3 foreclosure sale. And when you look behind 1776 it's the
4 Eugene J. Zurlo Trust; the same party that we name here
5 today.

6 And I mention that because he had knowledge of this
7 easement. And if you look at the timeline which we make
8 great reference to and I did that intentionally in the
9 original complaint so we can put all the cards on the
10 table, there is nothing to hide here, as to how we got to
11 this point.

12 You had the Resolution occurred in October 2013. A
13 couple months later you have a dissolution action filed
14 by Mr. Zurlo to dissolve, judicially dissolve Penny
15 Creek. About eight months later you have the foreclosure
16 of the property. And then it's Zurlo who by and through
17 1776 who bought the property at the foreclosure sale.
18 And that knowledge of this easement is imputed to 1776.
19 And I think that's a very important fact.

20 And then the way that extends to the Beach entities
21 is because on December 2nd there was a City of Charleston
22 or -- there was a City of Charleston design review board
23 meeting for the development that we're -- that this
24 property is subject to. And present at that hearing, and
25 this is in the affidavit, were members of the Beach

1 Company and Seamon Whitesides. And the Beach Fenwick
2 entity isn't created until a day later. And I also have
3 filed requests for judicial notice which shows that
4 timeline which shows the creation of Beach Fenwick, LLC
5 and which shows the Beach Company as the manager. So
6 there is no bonafide innocent purchaser in this case.

7 If a bonafide purchaser was in this case I believe
8 the situation would be much different. But you have the
9 common thread throughout all this it's the knowledge of
10 the easement by Zurlo which is imputed to 1776. And the
11 knowledge of the easement was made known to the Beach
12 Company which was imputed to Beach Fenwick which was
13 formed the day after that meeting and the purchase of it
14 doesn't happen until about 10 days later. So there is no
15 bonafide innocent purchaser.

16 And I mention that Your Honor just because, and
17 that's relevant because they are hammering on the fact
18 this thing wasn't recorded. And I mention this thing,
19 this easement wasn't recorded. And as a matter of law,
20 and I cite a case to this, so long as the party upon
21 which receiving forfeit has knowledge or actual knowledge
22 recording isn't necessary for the validity of that
23 easement.

24 So we overcome the non-recording. It's not an
25 enforcement argument by the fact they had actual

1 knowledge of this easement. And they had knowledge by
2 virtue of that December 2nd, 2019 meeting that we
3 reference in our affidavit. And also, Your Honor, we
4 believe there are general issues of material fact which
5 exist as to support plaintiff's claim for declaratory
6 judgment for a restrictive covenant for the reasons we
7 state in the motion. Namely, it affects property; it
8 restricts property.

9 There is an intent to affect the property. And for
10 the same reasons that the Court should find there is an
11 easement, and we reference the Smith case as to that
12 which is referenced in our opposition. We also reference
13 the case West v Newberry in support of that as well.

14 There are also issues of material fact to support
15 plaintiff's claim for civil conspiracy. And one thing
16 that is really relevant here, Your Honor, is we asked the
17 Court, we filed a Motion to Amend the complaint. And
18 within that amended complaint we used documents, some
19 documents that were gathered through discovery, the
20 minimal discovery we've had an opportunity to engage in
21 up to this point to better state both the claim for an
22 easement and the conspiracy.

23 Namely, there is an email; there are some emails
24 from 1776 which we believe is relevant which shows the
25 semblance, relevant as to whether or not there is a

1 conspiracy. We believe it was. And there is also an
2 email and I can go into detail with that from Russ Seamon
3 with Seamon and Whitesides indicating that and I don't
4 want to misstate, I want to make the specific reference
5 for the record, but the email I'm referencing in the
6 amended complaint -- Court's indulgence, please.

7 [Whereupon, Mr. Tarokh reviews documents]

8 MR. TAROKH: Like for example exhibit J of our
9 proposed amended complaint there is an email sent on
10 behalf of 1776. It was an email sent on November 18th,
11 2019, 1776 submitted an email to Seamon Whitesides, Beach
12 Company, and Zurlo that stated quote:

13 You are correct. We have no interest whatsoever in
14 doing anything for Mitch Laplante including assisting in
15 the development of his or his kids' lot bearing tax map
16 number 3460000260. So long as we own the property please
17 do not release, share any information with Laplante or
18 anyone else regarding and 1776, LLC property without our
19 permission. I have copied Allen and Eddie as the request
20 concerns property currently owned by 1776, LLC but as you
21 know being purchased for development by the Beach
22 Company.

23 And we believe that tax map number I read Your Honor
24 is the adjacent lot that my client claims is the dominant
25 estate to which the easement across the subject property

1 should benefit. So, I mention that, Your Honor, because
2 there is a lot of evidence here that should have caused
3 the Court not to enter summary judgment.

4 There is another email, Your Honor attached as
5 plaintiff's exhibit L to the amended complaint where in
6 response to an email from the city Russ Seamon from
7 Seamon Whitesides on December 3rd, 2019 that stated
8 quote:

9 It seems this was included in the amended PUD that
10 Hellman and Yates handled.

11 And that's relevant because that shows you knowledge
12 of this easement as of November 2019. So now we have
13 evidence that shows Seamon Whitesides who was the
14 engineer for this development seemed to recall that he
15 thought that this easement was supposed to have been
16 included in the amended PUD. That's the inference there.
17 The whole point is there are a ton of inferences in the
18 evidence that I submitted that should create material
19 issues of fact which should prevent summary judgment.

20 Your Honor, the Court also, respectfully the Court
21 should have granted my Motion to Amend the complaint at
22 this stage. And we specifically ask that the Court find
23 that justice requires the plaintiff be permitted to amend
24 his complaint. And there is no prejudice to any
25 defendants if the complaint is permitted. We also raised

1 the issue at the hearing last time Your Honor about these
2 discovery documents. I was document bombed by thousands
3 of documents the week of the hearing; I believe it was
4 the week of the hearing. But also lots of documents,
5 hundreds of documents I want to say close to 1,800
6 documents if I'm not mistaken the evening before the
7 hearing.

8 And that's relevant because I was able to use
9 discovery documents to support my conspiracy claim. And
10 with the proposed amended complaint then who knows what
11 else is in there and I just haven't had, my client hasn't
12 had the full opportunity to engage in discovery. And
13 that's prejudicial at this point considering the stakes
14 in this case.

15 Your Honor, I'd like just for the sake of time we
16 also allege in our motion that there are genuine issues
17 of material fact as to approximately 15 different issues.
18 Whether or not those documents, the Resolution, Contract
19 for Assignment and Assignment create an easement or
20 whether it was just merely an agreement to agree.

21 The second, the nature or character, extent and
22 location of the easement, and that's something that the
23 Court should undertake parol and extrinsic evidence for.
24 Three) the manner in which Zurlo signed the Resolution
25 and its sufficiency to bind Penny Creek; Four) the

1 parties' intent as to my client's membership interest
2 which occurred being specifically conditioned on the
3 grant of an easement; five) the parties' intent relative
4 to the reference in the Resolution, Contract for
5 Assignment and Assignment to Pitch Ford Road.

6 Six) the defendant's actual and imputed knowledge of
7 the easement; seven) the innocent purchaser and bonafide
8 purchaser for value status of 1776 and Beach Fenwick,
9 LLC; eight) Zurlo and all the defendants being part of
10 the deceit -- and/or all of the defendants being part of
11 the deceitful scheme and conspiracy to develop the
12 property without affording any provision or reservations
13 for the easement with the specific harm -- with the
14 specific intent to harm the plaintiff my client which
15 causes damages, including special damages.

16 Nine) and I think this is a very important one, the
17 application of equitable estoppel and/or unclean hands as
18 to both the sufficiency in which Zurlo signed the
19 Resolution and their ability to disavow, dishonor and
20 deny the existence of the easement when the grant of the
21 easement was made a specific condition of the membership
22 interest of Maybank 2754, LLC which occurred; ten) and
23 this is a big one too, is whether the June 23, 2017
24 foreclosure judgment in the foreclosure case had any
25 application as to impact the rights of Maybank or whether

1 it impacted the rights of Mr. Laplante or any other
2 members of the Laplante family.

3 And I say that because there was no personal
4 jurisdiction against Maybank. And they're going to come
5 back and say well, there is no personal jurisdiction
6 because there is never a reason to name that they have an
7 easement.

8 Well, that's an improper circular argument because
9 in order to effectuate a judgment against anybody you
10 have to at least have due process. They're going to come
11 back and say no non-subornation agreement. And they
12 reference a statute and that's their big rebuttal to that
13 argument. There is not a non-subornation agreement.

14 Well, the point is the non-subornation agreement is
15 a red herring. There is no requirement -- if you adopt
16 their argument it's almost as if you don't have to name,
17 if I'm a foreclosing plaintiff I don't have to name
18 junior interest for which -- who don't have a subornation
19 agreement. In other words attorneys, a subornation --
20 the fact there is not a non-subornation agreement as a
21 substitute if you will for service of process.

22 And the statute, the non-subornation agreement
23 statute that they reference you know that deals with the
24 modification, subornation, or extension of a loan. The
25 three documents have nothing to do with that. So that

1 statute doesn't apply. And for them to contort and
2 pervert the application of that statute to say well
3 because you didn't have a non-subornation agreement they
4 didn't have to serve you with process. That is error I
5 believe; that's fundamentally an error. And I cite cases
6 to that effect too.

7 So I'll go on number 11) whether the foreclosure
8 judgment entered in the foreclosure case is the law of
9 the case. Your Honor's order states that order is the
10 law of the case and we believe that is in error for the
11 same reasons I just stated; lack of due process because
12 there is no service of process and the non-subornation
13 agreement is a red herring.

14 And in addition Your Honor, if it's true that that
15 foreclosure judgment is the law of the case well the
16 foreclosure judgment itself says and this is my summary
17 of it that the foreclosure sale, that easements of record
18 and recorded easements will be subject to the foreclosure
19 sale.

20 So there is an inference there and it's almost as if
21 okay if that is the law of the case and this is an
22 existing easement how in the world does it foreclose out
23 my client's interest? How in the world does my client's
24 easement interest not survive the foreclosure when it's
25 on the very face of the judgment? And I think that's a

1 material issue as well. Another issue, Your Honor, is
2 whether the document of judicial estoppel applies against
3 my client because of claims against his prior law firm in
4 preparing the resolution of the other documents. As I
5 argued previously and I have it in this motion that the
6 document of judicial estoppel does not apply and there
7 are five specific requirements one of which, a very
8 important one is that the Court has to specifically find
9 there is evidence to show there is an intent to mislead
10 the Court, which is not the case here.

11 And number two you have to show that among other
12 five elements another one is whether we had any benefit,
13 whether we received any benefit for the taking of the
14 certain position. And obviously we haven't received any
15 benefit in either case at this point. So the document of
16 judicial estoppel doesn't apply.

17 Another issue Your Honor is whether the document
18 collateral estoppel applies to the plaintiff. They are
19 going to say well because Mitch Laplante was named in the
20 foreclosure he had an opportunity to raise that issue but
21 he didn't raise it therefore collateral estoppel applies
22 him from raising it now. That doesn't apply either for
23 the reason I stated in my motion; namely Mitch Laplante
24 was severed from the foreclosure claim so the severance
25 effectuates -- what does severance mean, the application

1 of severance in this point? It means he's no longer
2 impacted by the foreclosure judgment. That's the whole
3 point of the severance. The final judgment specifically
4 severs Mitch Laplante from the foreclosure claim. Not
5 only that as set forth in his affidavit the easement was
6 never an issue in the case. The easement was never an
7 easement in the case. It was a foreclosure by Wells
8 Fargo; no mention of the easement as stated in my
9 client's affidavit. So it doesn't even -- it was not a
10 subject matter of the previous litigation.

11 Fourteen) whether the doctrine of estoppel by
12 silence applies against the plaintiff. For the same
13 reasons estoppel, and I state this in my motion, estoppel
14 by silence is when there is a duty on the part of someone
15 to speak up. There is never a duty on my client to speak
16 up about the easement especially when Gene Zurlo was also
17 a party in that case. He had knowledge of the easement
18 too.

19 And number one you know there is no duty for my
20 client to, he's being sued for foreclosure to say hey,
21 I've got an easement here, do you want to foreclose that
22 as well. But that's not the case especially when the
23 claim never dealt with the easement to begin with. It
24 doesn't make any sense for that argument; it's
25 unreasonable. And fifteen) whether the doctrine of

1 laches applies against the plaintiff. Laches is an
2 unreasonable delay in asserting rights. There is no
3 laches argument that they have. And to the extent Your
4 Honor thinks there is the evidence should be construed
5 most favorably at this stage in my client's favor.

6 The summary judgment standard as Your Honor is very
7 familiar with is very clear. There has to be all -- any
8 ambiguities, conclusions and things of that nature should
9 be construed in favor of my client at this stage. And
10 the only thing we're required to do at a summary judgment
11 hearing in a case like this where the burden of proof is
12 preponderance of the evidence is merely show a scintilla
13 of evidence. And we've shown overwhelming evidence as to
14 all the elements to establish our claim and to defeat
15 their affirmative defenses that they've alleged.

16 In addition, Your Honor, I just want to point out a
17 lot of this case you hear about smoke and mirrors. Well,
18 it's not smoke and mirrors when one has the parties in
19 mind. Who are the parties? Once upon a time there was
20 Mitch Laplante and Gene Zurlo who signed the Resolution,
21 created an easement, the transfer interest occurred.

22 A couple of months go by, you know months go by and
23 then Gene Zurlo initiates the dissolution action. In his
24 mind he knew about the easement because he signed it. He
25 benefitted from the transfer because Penny Creek

1 benefitted from the transfer. My client paid the funds
2 for the membership interest. That's not in dispute.
3 Eight or nine, ten months go by from that point and the
4 foreclosure begins. After towards the end of the
5 foreclosure Zurlo creates 1776 and they buy the property
6 at foreclosure. But at no point was there an innocent
7 party, at no point can they say well, you didn't have an
8 easement.

9 THE COURT: All right. Who would like to respond?

10 MS. SHOUN: May it please the Court, Your Honor?

11 THE COURT: Yes, ma'am.

12 MS. SHOUN: Cheryl Shoun. I'm here on behalf of
13 Beach Fenwick and the Beach Company. Your Honor
14 succinctly Mr. Tarokh was correct when he said there is
15 nothing to hide. Your Honor has now heard the facts of
16 this case and examined the law of this case.

17 I think this might be Your Honor's fourth time
18 maybe. Two hearings prior to the hearing on the Motion
19 for Summary Judgment you entertained a great deal of
20 argument from counsel, reviewed the briefs in preparation
21 for the hearing and in disposing of the hearing on the
22 Motion for Summary Judgment.

23 This Court well considered the order before
24 entering it. Having said that Your Honor the defendants,
25 my clients; I don't want to speak on behalf of other

1 counsel except to the extent they wish me to do that.

2 But I think all the defendants safely say Your Honor we
3 adopt the Court's findings.

4 We adopt the arguments that were made at the hearing
5 on the Motion for Summary Judgment, the briefs and
6 memoranda that were submitted to the Court in support of
7 the defendants Motions for Summary Judgment as well as
8 those briefs that were presented to the Court in
9 opposition to the plaintiff's Motion for Reconsideration.

10 Having said that Your Honor I will be happy to go
11 through whatever the Court wishes for me to go through,
12 but at this point I think Your Honor has the facts and
13 has drawn the correct conclusions.

14 THE COURT: All right.

15 MS. SHOUN: Thank you, Your Honor.

16 THE COURT: Yes, ma'am. Thank you. All right.
17 Y'all want to go specifically like as to 1776 or to the
18 Zurlo Trust or all y'all just going to...

19 MR. HELLMAN: Your Honor, I can speak on behalf of
20 1776. In any event Your Honor, may it please the Court?
21 Brian Hellman on behalf of 1776 and incorporating what my
22 colleague at the bar Ms. Shoun had to say we're happy to
23 say as much or as little on behalf of 1776 as the Court
24 would like. We certainly believe that the matters that
25 were before the Court were correctly handled with the

1 order that was granted. And certainly as it relates to
2 all the claims that were made but there's really very
3 little of anything that we need to add.

4 THE COURT: All right. Thank you very much.

5 MR. HELLMAN: Thank you.

6 MR. YOUNG: Your Honor, Rutledge Young on behalf of
7 Eugene Zurlo individually and the Zurlo Trust. We
8 believe the Court was correct in issuing its order on
9 October 16th. And basically what you held there was the
10 threshold legal issue is whether there is a legally
11 enforceable easement. If there is one it was foreclosed.

12 But our position is and the Court has found assuming
13 for the sake of argument the October 2013 Resolution
14 created some form of an easement it never was
15 subordinated to the Wells Fargo lawyers and it was
16 therefore foreclosed upon in 2017 see S.C. Code 3720
17 which is the subordination has to be recorded per the
18 Code.

19 So we believe the Court was correct in its initial
20 order. And if there is no easement as the Court found
21 there is no reason to amend the complaint because the
22 only reason sought was to bring in the City of Charleston
23 and he can sue the City of Charleston today, tomorrow, or
24 any other time; no problem.

25 THE COURT: All right.

1 MR. YOUNG: Thank you.

2 THE COURT: Yes, sir. Anyone else?

3 MS. TEICH: Good morning, Your Honor. Jordan Teich
4 here on behalf of Seamon Whiteside. We second what our
5 esteemed co-counsel has brought forth before you. We do
6 not believe that there are any facts or law that has been
7 presented by Mr. Tarokh here today which would beg the
8 Court's reconsideration of its order --

9 THE COURT: All right. Thank you, ma'am.

10 MR. PRITCHARD: Your Honor?

11 THE COURT: Yes, sir.

12 MR. PRITCHARD: Thomas Pritchard here on behalf of
13 Penny Creek Associates. And judging by your last hearing
14 you've probably heard more than you want already from a
15 Pritchard this morning. So, I don't have anything else.

16 THE COURT: All right. That's everybody. Unless
17 you want to respond but they didn't add anything other
18 than...

19 MR. TAROKH: If I may just Your Honor just for the
20 record? We adopt every single argument we made in our
21 motion. I can go through these one by one but for the
22 sake of time we adopt every you know item that we believe
23 was in error. The big one I think is there is a
24 statement under the final judgment that Mitch Laplante
25 was the manager of Maybank at the relevant time and

1 that's not correct. He became manager of Maybank last
2 October. And I think that's important with the whole
3 imputed knowledge theory that they are asking the Court
4 to, well, which the Court adopted. And I think that's a
5 reason in and of itself for the Court to vacate the
6 summary judgment.

7 We've also specifically asked the Court to take
8 judicial notice of the documents we asked the Court to
9 take -- we ask the Court to take judicial notice of we
10 filed two requests for judicial notice; one on September
11 14th, 2020 and another one on August 24th, 2020.

12 And as I stated in my motion I state the relevance
13 of the documents in my motion. A lot of those documents,
14 Your Honor, show the property, my client's adjacent lot,
15 the subject property, the fact that Pitchfork Road is
16 planned, the development agreement between 1776 and the
17 city of Charleston, the fact there is evidence of a
18 connection point for my client's easement that we point
19 out. And we also go into great detail about that aspect
20 of that in my proposed amended complaint which we're
21 asking the Court to allow.

22 In addition, Your Honor, that development agreement
23 was assigned to the Beach Company. And we have documents
24 supporting that as well. And basically all the documents
25 paint the picture relevant to who the parties are, where

1 the property is located, the current state of Pitchfork
2 Road and evidence of my client's easement.

3 And because of all that there is more than a
4 scintilla of evidence to defeat a summary judgment motion
5 at this stage.

6 THE COURT: All right. If there is nothing
7 further I'll take it under advisement and you'll have my
8 decision by the end of the day.

9 MS. SHOUN: Your Honor, may I have one just very
10 brief in furtherance of the issues before the Court.
11 Technically there is still a lis pendens on my client's
12 property. Should the Court affirm its earlier order,
13 which we would encourage the Court to do, we would just
14 respectfully ask that the Court include in the order a
15 dissolution of that lis pendens to clear the title on
16 that property.

17 THE COURT: All right. I'll take it under
18 advisement. All right, thank you ---

19 MR. TAROKH: --- Your Honor, if I could just ask
20 you one last thing. And I thank you for the indulgence
21 here. If the Court can make a decision either way as
22 soon as possible, the reason for my request is the 30
23 days runs to appeal the October 7th Form 4. Tomorrow I'd
24 like if I need to appeal I'd like to do it today. So the
25 Court -- I just want to make sure I can make it to the

1 post office in time to serve the notice of appeal. So if
2 Your Honor can please do the order either way, get us an
3 order in a couple of hours if you will so please, sir.

4 THE COURT: All right. Y'all have a wonderful rest
5 of your day. Be safe.

6 MR. TAROKH: Thank you.

7 MS. SHOUN: Thank you, Your Honor.

8 MR. PRITCHARD: Thank you, sir.

9 MR. HELLMAN: Thank you.

10 *****END OF TRANSCRIPT OF RECORD*****
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C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of Common Pleas for Charleston County, South
Carolina on the 5th day of November, 2020.

I do further certify that I am neither of kin,
counsel, nor interest to any party hereto.

November 8, 2020

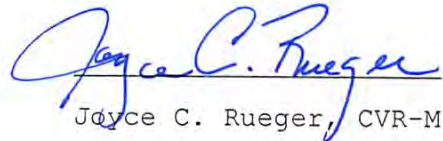
Joyce C. Rueger, CVR-M
Court Reporter

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November 8, 2020



Joyce C. Rueger, CVR-M
Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as
Co-Trustee of the Eugene J. Zurlo Living
Trust Dated December 11, 1997; 1776, LLC;
BEACH FENWICK, LLC; THE BEACH
COMPANY; SEAMON, WHITESIDE &
ASSOCIATES, INC.; PENNY CREEK
ASSOCIATES, LLC; JOHN DOE AND
MARY ROE,

Defendants.

NOTICE OF FILING OF EXHIBITS FOR
JUNE 16, 2020, HEARING by EUGENE J.
ZURLO, Individually and as Co-Trustee of the
Eugene J. Zurlo Living Trust Dated December
11, 1997

In addition to the Exhibits attached to previous pleadings filed by all parties, **Attached please find** Exhibits to be presented and moved into evidence by the Defendant EUGENE J. ZURLO, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997 (The Zurlo Trust) at the hearing scheduled before The Honorable Bentley Price on June 16, 2020, in connection with the Zurlo Trust's Motion Seeking Referral to the Master-in-Equity.

Respectfully submitted to the Court this 15th day of June 2020 at Charleston, South Carolina.

/s J. Rutledge Young, Jr.

J. Rutledge Young, Jr. (SC Bar No. 5737)

Blake McKie (SC Bar No. 80198)

DUFFY & YOUNG, LLC

96 Broad Street

Charleston, South Carolina 29401

(843) 720-2044 (phone)

(843) 720-2047 (fax)

jry@duffyandyoung.com

bmckie@duffyandyoung.com

*Attorneys for Defendant Eugene J. Zurlo,
Individually and as Co-Trustee of the Eugene J.
Zurlo Living Trust Dated December 11, 1997*

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

Jan 17 2020
REFERENCE ID: 458737

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA
SECRETARY OF STATE
JIM MILES
ARTICLES OF ORGANIZATION
LIMITED LIABILITY COMPANY



The undersigned deliver the following articles of organization to form a South Carolina limited liability company pursuant to § 33-44-202 and § 33-44-203 of the 1976 South Carolina Code, as amended.

1. The name of the limited liability company which complies with § 33-44-105 of the South Carolina Code of 1976, as amended is Penny Creek Associates, L.L.C.
2. The office of the initial designated office of the limited liability company in South Carolina is:
4 Nicklaus Lane
Street address
Kiawah Island, South Carolina 29455
City Zip Code
3. The initial agent for service of process of the limited liability company is
Michel LaPlante
Name
and the street address in South Carolina for this initial agent for service of process is:
4 Nicklaus Lane
Street address
Kiawah Island, South Carolina 29455
City Zip Code
4. The name and address of each organizer is:
 - (a) Scott Y. Barnes
Name
171 Church Street
Street address
Charleston South Carolina 29401
City State Zip Code
 - (b) _____
Name

Street address

City State Zip Code
(Add additional lines if necessary)

99-002789CC



CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

5. Jan 1, 2020 ☒ Check this box only if the company is to be term company. If so, provide the
REFERENCE ID: 48717 specified:

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

January 1, 2020

6. ☒ Check this box only if management of the limited liability company is vested in a
manager or managers. If this company is to be managed by managers, specify the
name and address of each initial manager:

(a) Michel LaPlante

Name

4 Nicklaus Lane

Street address

Kiawah Island

South Carolina

29455

City

State

Zip Code

(b)

Name

Street address

City

State

Zip Code

(c)

Name

Street address

City

State

Zip Code

(d)

Name

Street address

City

State

Zip Code

(Add additional lines if necessary)

7. ☐ Check this box only if one or more of the members of the company are to be
liable for its debts and obligations under Section 33-44-303(c). If one or more
members are so liable, specify which members, and for which debts, obligations
or liabilities such members are liable in their capacity as members.

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

Jan 17 2020

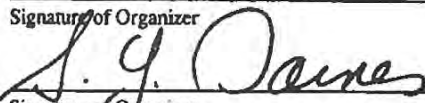
REFERENCE ID: A38737

8. Unless a delayed effective date is specified, these articles will be effective when endorsed for filing by the Secretary of State. Specify any delayed effective date and time:


SECRETARY OF STATE OF SOUTH CAROLINA

9. Set forth any other provisions not inconsistent with law which the organizers determine to include, including any provisions that are required or are permitted to be set forth in the limited liability company operating agreement.
10. Signature of each organizer:

Signature of Organizer


Signature of Organizer

Date: January 15, 1999

FILING INSTRUCTIONS

1. File two copies of this form, the original and either a duplicate original or a conformed copy.
2. If space on this form is not sufficient, please attach additional sheets containing a reference to the appropriate paragraph in this form, or prepare this using a computer disk which will allow for expansion of the space on the form.
3. This form must be accompanied by the filing fee of \$110.00 payable to the Secretary of State.

Form Approved by South Carolina
Secretary of State Jim Miles, June 1996

PLANNED UNIT DEVELOPMENT GUIDELINES

The Village at Fenwick Plantation

Charleston, South Carolina

ID# 150928-RiverRd-1

October 15, 2015



Applicant:

Mitch Laplante

Owners:

Penny Creek Associates, LLC

Fenwick Allee, LLC

2754 Maybank, LLC

Prepared By:

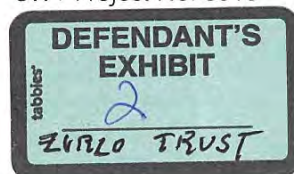
Seamon, Whiteside & Associates, Inc.

501 Wando Park Boulevard, Suite 200

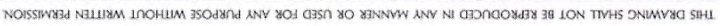
Mt. Pleasant, SC 29464

(843) 884-1667

SW+ Project No. 6518



APPENDIX A





Village at Fenwick Plantation

Parcel ID: 3460000008
Owner1: MAYBANK 2754 LLC
Prop St Number: 2754
Prop St Name: MAYBANK
Prop Type: HWY
Acreage: 0.55
Class Code: 650 - SPCLTY-OFC

Plat Book Page: T-139
Deed Book Page: F583-757
Jurisdiction: CITY OF CHARLESTON

0 30 60 120 Feet
 1 inch = 52 feet



Note: The Charleston County makes every effort possible to produce the most accurate information. The layers contained in the map service are for information purposes only. The Charleston County makes no warranty, express or implied, nor any guaranty as to the content, sequence, accuracy, timeliness or completeness of any of the information provided. The County explicitly disclaims all representations and warranties. The reader agrees to hold harmless the Charleston County for any cause of action and costs associated with any causes of action which may arise as a consequence of the County providing this information.

Author: Charleston County SC
 Date: 9/15/2015



Village at Fenwick Plantation

Parcel ID: 3460000004

Owner1: PENNY CREEK ASSOCIATES LLC

Prop St Number: 0

Prop St Name: RIVER

Prop Type: RD

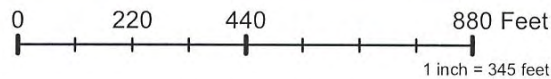
Acreage: 12.64

Class Code: 800 - AGRICULTURAL

Plat Book Page: AO-74

Deed Book Page: O352-691

Jurisdiction: CITY OF CHARLESTON



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Author: Charleston County SC

Date: 8/25/2015

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE CIRCUIT COURT

Case No. 2014-CP-10-04946

Wells Fargo Bank, N.A., as Successor by
Merger to Wachovia Bank, National
Association, as Successor by Merger to First
Union National Bank,

Plaintiff,

vs.

MASTER-IN-EQUITY'S ORDER AND
JUDGMENT OF FORECLOSURE AND
SALE

(Deficiency Not Waived;
not HAMP eligible)

Penny Creek Associates, L.L.C. a/k/a Penny
Creek Associates, LLC; Michel F. LaPlante
a/k/a Michel Laplante a/k/a Mitch Laplante;
Charlotte R. Zurlo; Eugene J. Zurlo; Charlotte
R. Zurlo and Eugene J. Zurlo, as Co-Trustees
of The Nicklaus Lane Realty Trust No. 1 under
Declaration of Trust dated May 22, 1998, and
The Zurlo Investment Trust No. 1 pursuant to
trust agreement dated August 10, 1998;
Fenwick Hall Plantation Property Owners
Assn., Inc. a/k/a Fenwick Hall Plantation
Property Owners' Association, Inc.; Preserve
at Fenwick Hall Property Owners Association,
Inc. a/k/a The Preserve at Fenwick Hall
Property Owners' Association, Inc.; and The
Grove At Fenwick Plantation Condominium
Association, Inc.,

Defendants.

Michel Laplante,

Third-Party Plaintiff,

vs.

The Eugene J. Zurlo Living Trust, Dated
December 11, 1997,

Third-Party Defendant.

FILED
2017 JUN 23 PM 2:52
JULIE J. ARMSTRONG
CLERK OF COURT

PPAB 3738113v2



Pursuant to Rules 53 and 71, SCRCP, the above-entitled matter was referred to the undersigned to make appropriate findings of fact and conclusions of law with authority to enter a final judgment in the cause.

Pursuant to the said reference, a hearing was held on June 19, 2017, and attended by the following persons:

Robert C. Byrd – Attorney for the Plaintiff
 Thomas B. Pritchard – Attorney for Defendant Penny Creek Associates, LLC
 J. Rutledge Young, Jr. – Attorney for Defendants Charlotte R. Zurlo and Eugene J. Zurlo, individually and as Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998, and The Zurlo Investment Trust No 1 pursuant to trust agreement dated August 10, 1998 (severed from the foreclosure claim)
 Defendant Michel F. Laplante (severed from the foreclosure claim)
 Brian Hellman – Attorney for Intervenor 1776, LLC
 J. Christopher Lanning – Manager of Penny Creek Associates, LLC

Based on the evidence presented at the hearing, I hereby find, conclude and order as follows:

FINDINGS OF FACT

1. The Lis Pendens, Summons, Complaint and Notice of Intent to Refer were filed August 14, 2014.
2. Service was made upon the defendants in this action, as is shown by the proofs of service filed herein.
3. Defendant Michel F. LaPlante a/k/a Michel Laplante a/k/a Mitch Laplante (“LaPlante”) filed a Motion for Injunction on August 29, 2014.
4. Defendant LaPlante filed a Motion for Temporary Restraining Order on September 9, 2014, and the Order denying said motion was entered on September 19, 2014.



5. Defendants Fenwick Hall Plantation Property Owners Assn., Inc. a/k/a Fenwick Hall Plantation Property Owners' Association, Inc.; Preserve at Fenwick Hall Property Owners Association, Inc. a/k/a The Preserve at Fenwick Hall Property Owners' Association, Inc.; and The Grove At Fenwick Plantation Condominium Association, Inc. (collectively, the "POA Defendants") filed an Answer and Counterclaim on September 29, 2014.

6. Defendants Charlotte R. Zurlo and Eugene J. Zurlo filed a Memorandum in Opposition to defendant LaPlante's Motion for Injunction on September 29, 2014.

7. Defendants Charlotte R. Zurlo, Eugene J. Zurlo, and Charlotte R. Zurlo and Eugene J. Zurlo, as Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998, and The Zurlo Investment Trust No. 1 pursuant to trust agreement dated August 10, 1998 (collectively, the "Zurlo Defendants"), filed an Answer and Cross Claim on October 16, 2014.

8. Defendant LaPlante filed an Answer, Cross Claims, and Third-Party Claims on October 27, 2014.

9. Defendant Penny Creek Associates, L.L.C. a/k/a Penny Creek Associates, LLC ("Penny Creek") and The Grove at Fenwick Plantation, LLC filed an Answer on November 6, 2014.

10. Defendant LaPlante filed a Reply to the Zurlo Defendants' Cross-Claims on November 10, 2014.

11. Third-party defendant Paul Zurlo filed a Motion to Dismiss defendant LaPlante's Third-Party Complaint on November 25, 2014.

12. Third-party defendant Eugene J. Zurlo Living Trust filed an Answer to defendant LaPlante's Third-Party Complaint on November 26, 2014.

13. The Plaintiff's Reply to the POA Defendants' Answer and Counterclaim was filed on December 4, 2014.

14. Defendant LaPlante filed Memoranda on January 15, 2015, in opposition to the Plaintiff's Motion to Strike Jury Demand and to Refer and in opposition to third-party defendant Paul Zurlo's Motion to Dismiss.

15. The Plaintiff filed a Memorandum of Law in support of its Motion to Refer on January 16, 2015.

16. Third-party defendant Paul Zurlo filed an Answer to Third-Party Complaint on January 30, 2015.

17. The Order granting Plaintiff's Motion to Refer was entered on March 5, 2015.

18. Defendant LaPlante filed a Motion on March 23, 2015, seeking to alter or amend the Order granting the Plaintiff's Motion to Refer.

19. The Zurlo Defendants filed an Amended Answer and Cross Claim on April 15, 2015.

20. Defendant LaPlante filed a Reply to the Cross-Claims of the Zurlo Defendants on April 27, 2015.

21. The Order denying defendant LaPlante's Motion to Alter or Amend the Order granting Plaintiff's Motion to Refer was entered on June 3, 2015.

22. Defendant LaPlante filed a Notice of Appeal on July 6, 2015, appealing the Order granting Plaintiff's Motion to Refer.

23. The Stipulation dismissing the third-party complaint against Paul Zurlo with prejudice was filed on July 17, 2015.



24. The Plaintiff filed a Motion to Dismiss defendant LaPlante's appeal in the Court of Appeals on August 4, 2015.

25. The Order granting the Plaintiff's Motion to Dismiss Appeal was entered by the Court of Appeals on October 20, 2015.

26. The Plaintiff's Motion for Partial Summary Judgment and Supporting Affidavit were filed on February 2, 2016.

27. The Stipulation was filed on May 26, 2016, dismissing the claims relating to The Grove at Fenwick Plantation loan and dismissing defendant The Grove at Fenwick Plantation, LLC as a party defendant.

28. The case originally asserted four (4) causes of action, two of which related to a loan by the Plaintiff to The Grove at Fenwick Plantation, LLC (the "Fenwick Loan"). During the course of the action, the Fenwick Loan was paid off and the parties stipulated to the dismissal of the two claims relating to that loan. Only the claims relating to loan to defendant Penny Creek remain.

29. The Consent Order Striking Case from Trial Docket Pursuant to Rule 40(j), SCRPC was filed on September 30, 2016.

30. The Notice to Restore Case to Active Trial Docket was filed on April 12, 2017.

31. The Order Restoring Case to Active Trial Docket was entered on April 12, 2017.

32. The Stipulation to Entry of Order and Judgment of Foreclosure and Sale was filed on April 13, 2017; and

33. The Plaintiff's Motion to Sever and for Entry of Stipulated Final Order and Judgment of Foreclosure and Sale was filed on May 25, 2017, which this Court granted on June 19, 2017.

34. The Motion to Intervene was filed by 1776, LLC on June 19, 2017.
35. This Court granted the Plaintiff's Motion to Sever on June 19, 2007.
36. The Court also grants 1776, LLC's Motion to Intervene, as set forth more fully hereinafter.
37. All parties were notified of the date, time and place of the hearing in this matter.

The \$5,300,000.00 Loan

38. Defendant Penny Creek, for consideration, made, executed and delivered that certain Promissory Note dated August 7, 2000 ("Original Note 1"), payable to the order of First Union National Bank ("First Union"), in the original principal sum of \$5,300,000.00, together with interest as provided therein.

39. To secure payment of the indebtedness evidenced by Original Note 1, in accordance with the terms and conditions thereof, defendant Penny Creek, for consideration, made, executed and delivered to First Union a certain Mortgage and Absolute Assignment of Leases dated August 7, 2000 ("Mortgage 1"), covering certain real property located in Charleston County, South Carolina and described more fully therein. Mortgage 1 was recorded in the RMC Office for Charleston County on August 8, 2000, in Book P-352 at Page 613. Other terms and conditions are stated in the said Mortgage 1, which is of record herein.

40. Wells Fargo Bank, N.A. is the successor by merger to Wachovia Bank, National Association who is the successor by merger to First Union and is the sole owner and holder of Original Note 1, Mortgage 1, and all other related loan documents.

41. Certain terms of the Original Note 1 were amended, modified and/or renewed by, among other things, that certain renewal Promissory Note dated April 28, 2008, in the original



principal sum of \$3,142,781.92 ("Renewal Note 1"). (Original Note 1 and Renewal Note 1 are hereinafter referred to, collectively, as "Note 1.")

The \$2,200,000.00 Loan

42. Defendant Penny Creek, for consideration, made, executed and delivered that certain Promissory Note dated April 5, 2006 ("Original Note 2"), payable to the order of the Plaintiff, then known as Wachovia Bank, National Association, in the original principal sum of \$2,200,000.00, together with interest as provided therein. Other terms and conditions are stated in the said Original Note 2, which is of record herein.

43. To secure payment of the indebtedness evidenced by Original Note 2, in accordance with the terms and conditions thereof, defendant Penny Creek, for consideration, made, executed and delivered to the Plaintiff a certain Mortgage and Assignment of Rents dated April 5, 2006 ("Mortgage 2"), covering certain real property located in Charleston County, South Carolina and described more fully therein. Mortgage 2 was recorded in the RMC Office for Charleston County on April 7, 2006, in Book G-579 at Page 249. Other terms and conditions are stated in the said Mortgage 2, which is of record herein. (Mortgage 1 and Mortgage 2 are hereinafter referred to, collectively, as the "Mortgages.")

44. Certain terms of Original Note 2 were thereafter amended, modified and/or renewed by: (i) that certain renewal Promissory Note dated July 5, 2007, in the original principal sum of \$4,450,000.00; and (ii) that certain Modification Number One to Promissory Note dated April 28, 2008 (collectively, "Renewal Note 2"). Other terms and conditions are stated in the said Renewal Note 2, which is of record herein. (Original Note 2 and Renewal Note 2 are hereinafter referred to, collectively, as "Note 2.")



45. Thereafter, Mortgage 2 was amended and/or modified by that certain Modification of Mortgage and Notice of Future Advance dated July 5, 2007, and recorded in the RMC Office for Charleston County on July 27, 2007, in Book V-633 at Page 342. Other terms and conditions are stated in the said Modification of Mortgage and Notice of Future Advance, which is of record herein.

2009 Modification and Consolidation

46. Thereafter, certain terms of Note 1 and Note 2 were amended, modified and/or renewed by, among other things, that certain renewal Promissory Note dated July 28, 2009, in the original principal sum of \$7,592,781.92, which, among other things, consolidated Note 1 and Note 2 (collectively, the "Note"). Other terms and conditions are stated in the said Note, which is of record herein.

47. In order to induce the Plaintiff to modify or extend the aforesaid loan as evidenced by the Note, and to further secure the same, defendants LaPlante and the Zurlo Defendants, for consideration, executed separate, written Unconditional Guaranties dated July 28, 2009 (collectively, the "Guaranties"), whereby the said defendants absolutely, unconditionally and irrevocably guaranteed to the Plaintiff the full and prompt payment of the obligations of defendant Penny Creek to the Plaintiff under the Note, as consolidated. Other terms and conditions are stated in the said Guaranties, which are of record herein.

2012 and 2013 Modifications

48. Thereafter, certain terms of the Note were amended, modified and/or renewed by: (i) that certain First Modification to Promissory Note dated August 14, 2012; and (ii) that certain Second Modification to Promissory Note dated May 23, 2013 (collectively, the "Note



Modifications"). Other terms and conditions are stated in the said Note Modifications, which are of record herein.

49. In connection with the aforesaid modifications, Mortgage 1 and Mortgage 2 were amended and/or modified by that certain Modification of Mortgages dated October 1, 2012 (the "Mortgage Modification"), and recorded in the RMC Office for Charleston County on October 15, 2012, in Book 0284 at Page 614. Other terms and conditions are stated in the said Mortgage Modification, which is of record herein.

50. Under the express terms of the aforesaid Mortgage Modification, Mortgage 1 and Mortgage 2 (collectively, the "Mortgages") secure the Note in its entirety.

51. Certain portions of the subject mortgaged properties were thereafter released from the lien of the Mortgages, as amended and/or modified, which remains in full force and effect as to the remaining property described in the said Mortgages (the "Property").

**Loan Defaults, Forbearance Agreement and Stipulation
to Entry of Order and Judgment of Foreclosure and Sale**

52. The obligations under the terms and conditions of the Note are in default for, among other reasons, failing to repay the indebtedness in accordance with the terms thereof, including without limitation failing to repay the loan in full at maturity on April 18, 2014. The defendants have been duly notified, in writing, of the outstanding defaults.

53. In May 2016, the Plaintiff and defendants Penny Creek, LaPlante and the Zurlo Defendants entered into that certain Forbearance Agreement dated as of May 4, 2016 (the "Forbearance Agreement"), wherein the said defendants agreed and acknowledged, among other things, that the subject loan is in default and further agreed to execute the Stipulation to Entry of Order and Judgment of Foreclosure and Sale attached as Exhibit A to the Forbearance Agreement. Other terms and condition are stated in the said Forbearance Agreement, which is of record herein.

54. Pursuant to and in reliance upon the Forbearance Agreement and Stipulation, the case was removed from the active calendar pursuant to Rule 40(j), with leave to restore, by Consent Order entered on September 30, 2016.

55. The forbearance period set forth in the Forbearance Agreement expired on March 31, 2017, and the case was restored to active calendar on April 12, 2017.

56. The Plaintiff is entitled to proceed with foreclosure of its Mortgages, as amended and/or modified.

57. The Plaintiff's Mortgages constitute valid first priority liens on the Property.

58. Subsequent to the commencement of this action, the Eugene J. Zurlo Living Trust Dated December 11, 1997 (the "1997 Zurlo Trust") recorded a Second Mortgage on the subject Property in the Office of the RMC for Charleston County on May 25, 2016, in Book 0556 at Page 242 (the "Second Mortgage").

59. The Second Mortgage arose out of that certain Settlement Agreement between the 1997 Zurlo Trust and defendant Penny Creek Associates, LLC, the terms of which Settlement Agreement were entered on the record before The Honorable Markley Dennis, Jr. on February 29, 2016, in Case No. 2013-CP-10-07280. A copy of the transcript from the February 29, 2016 hearing before Judge Dennis in Case No. 2013-CP-10-07280, together with a copy of the Second Mortgage and the promissory note it secures, were presented to this Court and have been made a part of the record herein.

60. In accordance with the terms of the Settlement Agreement, the 1997 Zurlo Trust and its successor and assigns are only entitled to recover the principal sum of \$3,250,000.00, without any interest.

61. The Second Mortgage was assigned from the 1997 Zurlo Trust to 1776, LLC

pursuant to that certain Assignment of Note and Mortgage recorded in the Office of the RMC for Charleston County on April 7, 2017, in Book 629 at Page 45, a copy of which was presented to this Court and has been made a part of the record herein.

62. The parties to the foreclosure hereby consent to the joinder of 1776, LLC as a party defendant on the following express terms and conditions, which are hereby adopted and ordered by this Court:

a. That 1776, LLC expressly acknowledges and stipulates that the lien of its Second Mortgage is junior and subordinate to the lien of the Plaintiff's Mortgages;

b. That 1776, LLC further acknowledges and stipulates that it is bound by the terms of the Stipulation to Entry of Order and Judgment of Foreclosure and Sale filed on April 13, 2017; and

c. That all parties to the foreclosure, including 1776, LLC, consent to the immediate disposition of the foreclosure proceeding, expressly waiving the time limitations contained in Rule 40(b), SCRPC.

63. In the Plaintiff's loan documents, defendant Penny Creek agreed to pay all reasonable costs and expenses of collection including, but not limited to, reasonable attorneys' fees. I find and conclude that the sum of Thirty-Two Thousand Three Hundred Five and No/100 Dollars (\$32,305.00) is a reasonable amount to award as Plaintiff's unreimbursed attorneys' fees for services performed and anticipated to be performed until final adjudication of the within action, and that the sum of Two Thousand Six Hundred Sixty-Eight and 50/100 Dollars (\$2,668.50) is a reasonable amount to award as legal costs. In reaching this conclusion, I have carefully considered the nature, extent and difficulty of the legal services provided by Plaintiff's counsel in this commercial foreclosure action, the time and labor necessarily devoted by Plaintiff's

counsel to the case, the professional standing of Plaintiff's counsel and his firm, the fees customarily charged in Charleston County for similar legal services, and the beneficial results obtained by Plaintiff's counsel in this matter.

64. The amount due and owing on the loan evidenced by the Note, as of June 19, 2017, including attorneys' fees and costs of collection, is as follows:

(1)	Principal due	\$5,775,289.35
(2)	Interest on principal only 02/28/17 – 03/29/17 @ 5.75% (30 days @ \$922.44205 per day)	\$ 27,673.26*
(3)	Interest on principal only 03/30/17 – 03/31/17 @ 6.00% (2 days @ \$962.54823 per day)	\$ 1,925.09*
(4)	Interest on principal only 04/01/17 – 04/29/17 @ 8.00% (29 days @ \$1,283.39763 per day)	\$ 37,218.53**
(5)	Interest on principal only 04/30/17 – 05/29/17 @ 8.00% (30 days @ \$1,283.39763 per day)	\$ 38,501.93**
(6)	Interest on principal only 05/30/17 – 06/19/17 @ 8.00% (21 days @ \$1,283.39763 per day)	\$ 26,951.35**
(7)	Legal Fees	\$ 32,305.00
(8)	Legal Costs	\$ <u>2,668.50</u>
	Total Debt Secured by Mortgages:	\$5,942,533.01

* Interest accruing at forbearance period rate of Prime plus 2.00%. It is a variable rate that has been and is subject to change.

** Interest accruing at default rate of Prime + 1% + 3.00%. It is a variable rate that has been and is subject to change.

Interest for the period from June 19, 2017, through the date of this judgment at the rate of 8.00% per annum shall be added to the above stated Total Debt Secured by Mortgages to comprise the amount of the judgment debt entered herein, and interest after the date of judgment at the same rate shall be added to such judgment debt to comprise the amount of the debt through the date to which such interest is computed.

65. Inasmuch as the Plaintiff has not waived deficiency, the bidding will remain open for thirty (30) days after the sale, unless waived by the Plaintiff, in writing, prior to the sale.

CONCLUSIONS OF LAW

1. The Plaintiff should have judgment of foreclosure of its Mortgages, as amended and/or modified.

2. The subject Property should be ordered sold at public auction after due advertisement.

3. The Plaintiff has not waived its right to seek a personal judgment for any deficiency remaining after the sale, but expressly reserves the right to waive deficiency, in writing, prior to the sale.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That there is due to the Plaintiff on the loan secured by the Mortgages, as amended and/or modified, set forth in the Complaint the sum of **Five Million Nine Hundred Forty-Two Thousand Five Hundred Thirty-Three and 01/100 Dollars (\$5,942,533.01)** representing the "Total Debt Secured By Mortgages" due the Plaintiff as set out in paragraph 64 hereinabove, together with interest after the aforesaid date at the rate of 8.00% per annum and thereafter, in the event of a deficiency judgment, at the legal rate of interest for judgments.

2. That the party or parties liable for the aforesaid debt, shall, on or before the date of sale of the Property hereinafter described, pay to the Plaintiff or its attorneys the amount of the debt owed as aforesaid, together with the costs and disbursements of this action.

3. That on default of payment at or before the time herein indicated, the Property be sold by the undersigned Master-in-Equity or his designee, at public auction, at the Charleston County Courthouse, in the City of Charleston, County and State aforesaid; on some convenient Sales Day hereafter as set by the Court, on the following terms, that is to say:



a. FOR CASH: The Master-in-Equity will require a deposit of five (5%) percent on the amount of the bid, in cash or its equivalence, same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within thirty (30) days same to be forfeited and applied to the costs and Plaintiff's debt.

b. The sale shall be subject to taxes, assessments, existing easements, and easements and restrictions of record.

c. Purchaser to pay for deed stamps and cost of recording the deed.

d. That if the Plaintiff is the successful bidder at said sale for a sum not exceeding the amount of costs, expenses and the indebtedness of the Plaintiff in full, the Plaintiff may pay to the Master-in-Equity only the amount of the costs and expenses, crediting the balance of the bid on its indebtedness.

e. That if defendant 1776, LLC is the successful bidder at said sale for a sum not exceeding the amount of costs, expenses, the indebtedness of the Plaintiff in full, and the indebtedness owed on the Second Mortgage, the Plaintiff may pay to the Master-in-Equity only the amount of the costs, expenses, and the full amount of the Plaintiff's indebtedness, crediting the balance of the bid against its own indebtedness.

4. Inasmuch as the Plaintiff has not waived deficiency, the bidding will remain open for thirty (30) days after the sale, unless waived by the Plaintiff, in writing, prior to the sale.

5. That the Master-in-Equity will, by advertisement according to law, give notice of the time and place of such sale, and the terms thereof; and will execute to the purchaser or purchasers a deed to the Property sold. The Plaintiff or any other party to this action may become a purchaser at such sale, and if, upon such sale being made, the purchaser or purchasers should fail to comply with the terms thereof within thirty (30) days after date of sale, then the Master-in-

Equity may advertise the said Property for sale on the next or some other subsequent Sales Day, as set by the Court, at the risk of the former highest bidder, and so from time to time thereafter until a full compliance shall be secured.

6. That the Master-in-Equity shall apply the proceeds of the sale of the Property as follows:

FIRST: To payment of the amount of costs and expenses of this action;

NEXT: To the payment to Plaintiff or its attorney of the amount of debt owed to Plaintiff and interest, so much thereof as the purchase money will pay on the same; and

NEXT: Any surplus should be held pending further Order of this Court.

7. That the defendants named herein and all persons whosoever claiming under the defendants be forever barred and foreclosed of all right, title, interest and equity of redemption in the subject Property, or any part thereof.

8. That the deed(s) of conveyance made pursuant to said sale shall contain the names of only the Plaintiff, the defendant who was the titleholder of the Property at the time of the filing of the Lis Pendens, and the grantee; and the RMC is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deeds.

9. A description of the Property encumbered by the Mortgages and herein ordered to be sold is attached hereto as Exhibit "A" and Exhibit "A-1".

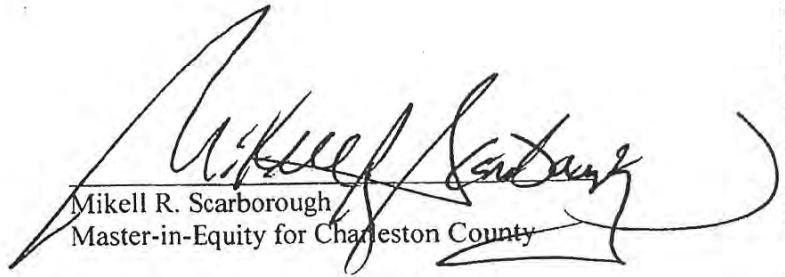
10. That the undersigned Master-in-Equity will retain jurisdiction to do all necessary acts incident to this foreclosure and to hear any post-judgment matters, including, but not limited to, the issuance of a Writ of Assistance.



AND IT IS SO ORDERED.

June 21, 2017

Charleston, South Carolina


Mikell R. Scarborough
Master-in-Equity for Charleston County

**RESOLUTION OF THE SOLE SHAREHOLDER
OF PENNY CREEK ASSOCIATES, L.L.C.**

At a meeting of the Members of Penny Creek Associates, L.L.C. (the "Company") held at the Company's offices in Charleston, South Carolina, the Members of the Company hereby adopt the following resolutions:

WHEREAS, the Company is the sole member of Maybank 2754, LLC, a South Carolina limited liability company (the "Maybank 2754, LLC"); and

WHEREAS, pursuant to the terms and conditions of that certain Contract for Assignment of Interest, dated October 9, 2013, by and between the Company, Inc. (as Seller thereunder) and John H. Laplante, Michel F. Laplante, Peter F. Laplante, Marianne Laplante-Scarlata, or their assigns (as Purchasers thereunder) (the "Agreement"), the Seller desire to sell, assign, transfer and convey certain Membership Interest in the Company to those certain Purchasers mentioned above and according to the provisions of the Agreement; and

WHEREAS, pursuant to the Agreement, the Company hereby certifies that the Company has complied with all provisions of the Company operating documents, with respect to the aforementioned sale, assignment and/or transfer of the Company Membership Interest in the Maybank 2754, LLC to the Purchaser, in consideration of Four Hundred Thousand and no/100 Dollars (\$400,000.00) and that the Members of the Company consent to the same; and

WHEREAS, as a condition of closing, the Company has agreed to grant, transfer, sell and convey to Purchasers, their successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of Seller known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES)," having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 ("30' Private R/W"), the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road ("Pitch Fork Road"). Upon the completion of Pitch Fork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30' Private R/W.

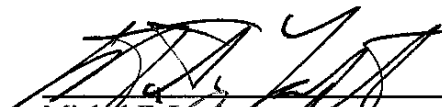
NOW THEREFORE IT IS RESOLVED, that the Company approves the Agreement; the sale, assignment, transfer and conveyance of Membership Interest in the Company thereunder; and any and all other documents necessary to facilitate the Company's execution of the Agreement and its compliance with the transactions contemplated thereunder.

BE IT FURTHER RESOLVED, that upon the completion of Pitch Fork Road, the Company shall grant to Purchasers, their successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of the Company known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES)," having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 ("30' Private R/W"), the location and condition of which shall be mutually agreed upon at a future date.

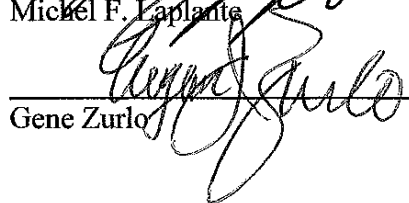
BE IT FURTHER RESOLVED, that Michel F. Laplante in his capacity as Manager of the Company is hereby authorized to execute and deliver on behalf of the Company any and all agreements, assignments, satisfactions, releases, discharges, papers, documents, lending and collateral documents, offers, applications, leases, affidavits, certificates, certifications, verifications, non-disturbance agreements, guaranties, bonds, notes, subordination agreements, security agreements, resolutions, settlement statements, and any and all other contracts, papers or documents required in the course of the execution of the Agreement and the assignment and transfer of Membership Interest in the Company.

The undersigned Members of the Company do hereby certify that as of this 4th day of October, 2013 the above to be a true and correct transcript of the Resolutions passed by the Company at the time and place above stated.

MEMBERS:



Michel F. Laplante (SEAL)



Gene Zurlo (SEAL)

CONTRACT FOR ASSIGNMENT OF INTEREST

THIS CONTRACT FOR ASSIGNMENT OF INTEREST (this "Agreement") is made and entered into this 1 day of October, 2013, by and between John H. Laplante, Michel F. Laplante, Peter F. Laplante, Marianne Laplante-Scarlata, or their assigns, (each a "Purchaser" and collectively the "Purchasers") and Penny Creek Associates, L.L.C., a South Carolina limited liability company (the "Seller").

WITNESSETH:

WHEREAS, the Seller is the sole member of Maybank 2754, LLC, a South Carolina limited liability company (the "Company"); and

WHEREAS, the Company is not governed by a written operating agreement;

WHEREAS, on the terms and subject to the conditions of this Agreement, Purchasers desire to purchase One Hundred and No/100 (100%) Percent of Seller's membership interest in the Company, and Seller desires to sell and assign such One Hundred and No/100 (100%) Percent of its membership interest in the Company to Purchasers (the "Assignment"); and

WHEREAS, Purchasers and Seller now desire to memorialize the terms and conditions and respective rights, duties and obligations of the Purchasers and Seller regarding the Assignment by the provisions hereof and executing this Agreement; and

WHEREAS, the Company is joining in this Agreement for the limited purpose of acknowledging its agreement to the Assignment.

NOW, THEREFORE, in consideration of the forgoing and the mutual promises and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by Purchasers and Seller, the undersigned, intending to be legally bound, hereby agree as follows:

ARTICLE I **Assignment of Interest**

Section 1.1. Assignment of Interest. On the terms and subject to the conditions set forth in this Agreement, Seller hereby agrees to sell, assign, transfer and deliver to Purchasers on the "Closing Date" (hereinafter defined), and Purchasers agree to purchase from Seller on the Closing Date, One Hundred and No/100 (100%) Percent of Seller's membership interest in the Company, including any and all associated financial and voting rights in the Company (such assets being hereinafter collectively referred to as the "Interest"). Said Interest being the entire outstanding membership interest of the Company.

Section 1.2. Assumption of Liabilities. It is hereby expressly understood and agreed that Purchasers do not assume or agree hereunder to pay, perform or discharge any debt, obligation or liability of Seller of any kind or nature whatsoever nor shall the Interest be subject to any such debt, obligation or liability.

Section 1.3. Purchase Price. On the terms and subject to the conditions set forth in this Agreement, Purchasers shall pay to Seller the purchase price of Four Hundred ~~Twenty Five~~ Thousand and No/100 (\$~~425,000.00~~) Dollars ("Purchase Price").

400,000.00

ARTICLE II

Closing

Section 2.1. Closing. The closing (the "Closing") of the sale, transfer, assignment and delivery of the Interest, the delivery of the Conveyance Documents pursuant to Section 2.2 of this Agreement, the payment of the Purchase Price, and the delivery of any and all other instruments and certificates required hereunder shall take place on or before 4:00 PM ET, October 4, 2013, at the offices of Buist, Byars & Taylor, LLC, or at such other date or at such other time or place as the parties hereto shall agree to in writing (the date and time of the closing hereunder being referred to herein as the "Closing Date").

Section 2.2. Transfer of Interest. On the Closing Date, Seller shall execute and deliver to Purchasers all such instruments and documents (the "Conveyance Documents") (including, but not limited to the "Assignment of Interest" attached hereto as Exhibit "A,") as shall be requested by Purchasers to effectuate the sale, assignment, transfer and delivery of the Interest from Seller to Purchasers.

ARTICLE III

Representations and Warranties

Seller and Purchasers hereby represent and warrant to each other as follows:

Section 3.1. Authorization, Etc. The execution and delivery of this Agreement, the Assignment of Interest and any Conveyance Documents by Seller and Purchasers and the due consummation of the transactions contemplated herein have been duly authorized by all necessary action on the part of Seller and Purchasers. This Agreement has been duly executed and delivered by Seller and Purchasers and constitutes the legal, valid and binding obligations of Seller and Purchasers, enforceable against Seller and Purchasers in accordance with its terms. When executed and delivered pursuant to this Agreement, the Conveyance Documents will be the legal, valid and binding obligations of Seller and Purchasers, enforceable against Seller and Purchasers in accordance with their terms.

Section 3.2. No Violation. Neither the execution and delivery of this Agreement nor the consummation by Seller or Purchasers of the transactions contemplated hereby will constitute a violation of: (a) any agreement(s) or commitment(s) to which they are a party or by which they are bound; (b) any judgment, decree, order, regulation or rule of any court or governmental authority; or (c) any statute or law.

Section 3.3. Consent to Transfer of Membership Interest. The Company has joined in this Agreement for the limited purpose of acknowledging its consent to the Assignment of Interest from Seller to Purchasers, and its agreement to accept the Purchasers as Members of the Company.

Section 3.4. No Other Consents. Except as set forth in Section 3.3 hereto, no consent, approval or authorization of any third party or any federal, state or local or other governmental regulatory agency or authority is required in connection with the execution, delivery and performance of Seller and Purchasers under this Agreement.

Section 3.5. Title to Assets; Encumbrances. Seller has good, valid and marketable title to the Interest, subject to no lien, security interest, encumbrance or other restriction and Seller hereby represents and warrants that the Company has good, valid and marketable title to the Property, subject only to the permitted exceptions” set forth in Exhibit “2” (the “Permitted Exceptions”).

ARTICLE IV Conditions to Purchasers’ Obligations

Each and every obligation of Purchasers under this Agreement to be performed at or before the Closing Date shall be subject to the fulfillment, at or before the Closing Date, of each of the following conditions:

Section 4.1. Representations and Warranties True; Obligations Performed. (i) The representations and warranties of Seller and Purchasers contained in this Agreement shall be true and correct in all material respects as of the Closing Date with the same force and effect as if made on and as of the Closing Date; (ii) Seller and Purchasers shall have performed and complied in all material respects with all agreements and covenants required by this Agreement to be performed by it prior to the Closing Date; and (iii) Seller shall have delivered the Interest to Purchasers at the Closing.

Section 4.2. No Material Adverse Change. There shall not have occurred any material adverse change since the date of this Agreement in the business, properties, results of operations or business or financial condition of the Company, or the Interest being conveyed by Seller.

Section 4.3. Litigation. No suit, investigation, action or other proceeding shall be threatened or pending against Seller or Company before any court or governmental agency that, in the opinion of counsel for Purchasers, could result in the restraint, prohibition or obtainment of damages or other relief against either Seller or Company in connection with this Agreement or the consummation of the transactions contemplated hereby.

Section 4.4. Conveyance Documents. Seller shall have executed and delivered the Conveyance Documents in form and substance customary and usual for their intended purpose and reasonably satisfactory to Purchasers and its counsel.

Section 4.5. 30' Access Easement. Seller shall grant, transfer, sell and convey to Purchaser, its successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of Seller known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES)," having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 ("30' Private R/W"), the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road ("Pitch Fork Road"). Upon the completion of Pitch Fork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30' Private R/W.

ARTICLE V Indemnification

Section 5.1. Indemnification. Seller and Purchasers each hereby indemnify and hold the other harmless and shall defend the other from any and all claims, demands, actions, causes of action, judgments, costs and expenses, including attorneys' fees and court costs arising out of the ownership of the Interest and the operation of the Company; prior to the Closing in the case of Seller's indemnification of Purchasers, and from and after the Closing in the case of the Purchasers' indemnification of Seller.

ARTICLE VI Miscellaneous

Section 6.1. Expenses. The Purchasers and Seller shall pay all expenses incurred in connection with the preparation and execution of the Agreement and in connection with the transactions contemplated hereby as purchasers and sellers customarily pay in Charleston County in similar transactions.

Section 6.2. Survival of Representations, Warranties and Covenants. Each of the representations, warranties, obligations, covenants and agreements of the undersigned included or provided for herein or in any schedule, certificate, or other document delivered pursuant to this Agreement shall survive the consummation of the transactions contemplated by this Agreement, notwithstanding any investigation heretofore or hereafter made by any of them or on behalf of any of them.

Section 6.3. Schedules and Exhibits. Any exhibits and schedules referred to herein and attached hereto are made a part of this Agreement.

Section 6.4. Assignment. This Agreement and all of the provisions hereof shall be binding upon, and inure to the benefit of Seller, Purchasers, and their respective successors, personal representatives, executors, heirs, beneficiaries, and permitted assigns. Purchasers, with the prior written consent of the Company, shall be permitted to assign his rights or delegate their duties pursuant to this Agreement, or any other right, obligation or duty contemplated by this Agreement, in whole or in part.

Section 6.6. Entire Agreement. This Agreement, including the other documents referred to herein which form a part hereof, constitutes the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings between the parties with respect to such subject matter.

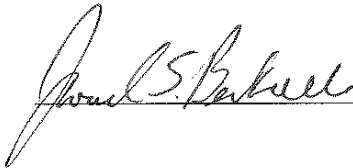
Section 6.7. Waiver; Amendment. No waiver in any instance by any party of any provision of this Agreement shall be deemed a waiver by such party of such provision in any other instance or a waiver of any other provision hereunder in any instance. This Agreement cannot be modified except in writing signed by the party to be charged.

Section 6.8. Counterparts This Agreement may be executed in more than one counterpart, each such counterpart shall be deemed an original, and all such counterparts shall constitute one and the same agreement. This Agreement shall be effective when executed by all parties, but all parties need not execute the original or the same counterpart.

[Signatures on following page]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date(s) written below.

WITNESS

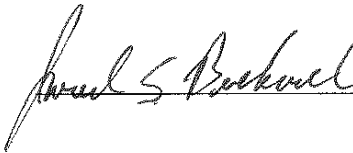
_____

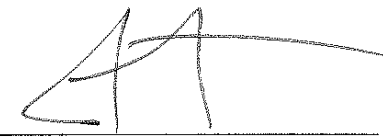
SELLER:

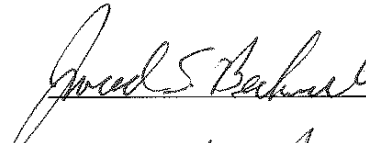
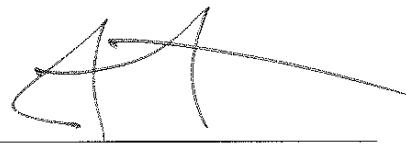
Penny Creek Associates, L.L.C.

_____
By: Michel F. Laplante
Its: Manager
Date: 10/7, 2013

PURCHASERS:

_____

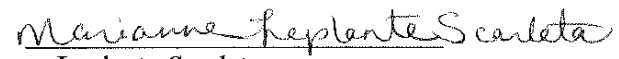
_____
John H. Laplante
Date: 10/7, 2013

_____
_____

Michel F. Laplante
Date: 10/7, 2013

_____
Peter F. LaPlante
Date: 10/4, 2013

_____

_____
Marianne Laplante-Scarlata
Date: 10/7, 2013

[Balance of page intentionally left blank. Signatures to follow.]



COMPANY:
Maybank 2754, LLC



By: Penny Creek Associates, LLC

Its: Sole Member

By: Michel F. Laplante

Its: Manager

Date: 10/7, 2013

[Balance of page intentionally left blank.]

EXHIBIT "A"

(Assignment of Membership Interest and Written Consent in Lieu of a Special Meeting of the
Sole Member of Maybank 2754, LLC)

**ASSIGNMENT OF MEMBERSHIP INTEREST AND
WRITTEN CONSENT IN LIEU OF A SPECIAL MEETING
OF THE SOLE MEMBER OF MAYBANK 2754, LLC**

DATE: October 4, 2013

PARTIES: Penny Creek Associates, L.L.C., a South Carolina limited liability company (the "Transferring Member") and, John H. Laplante, Michel F. Laplante, Peter F. Laplante, Marianne Laplante-Scarlata, or their assigns or its assigns, (each a "Transferee" or collectively the "Transferees").

RECITALS:

A. The Transferring Member is the sole member of Maybank 2754, LLC, a South Carolina limited liability company (the "Company").

B. The Transferring Member has a 100.0% ownership interest in the Company, and is entitled to that percentage of the profits and interim distributions of the Company, and must bear that percentage of the Company's losses.

AGREEMENTS:

1. ASSIGNMENT. By signing this assignment, the Transferring Member assigns and transfers all of its 100.0% interest in the Company to the Transferees, in equal shares. This assignment and transfer includes all of the right, title and interest of the Transferring Member in the profits, losses, and interim distribution of the Company.

2. ACCEPTANCE. By signing this assignment, the Transferees accept the assignment and transfer of the interest as a Member of the Company being transferred under this assignment.

3. CONSIDERATION. In consideration of the mutual promises and agreements contained in that certain Contract for Assignment of Interest, dated October 4, 2013, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged ("Consideration"), said Consideration to be paid in full and into escrow upon the execution of a certain Contract for Assignment of Interest, by and between the Transferring Member and Transferees, dated October 4, 2013.

4. TRANSFERRING MEMBER'S REPRESENTATIONS AND WARRANTIES. The Transferring Member represents and warrants to the Transferees that:

4.1. Ownership of Interest and Right to Transfer. The Transferring Member is the sole owner of the interest in the Company being transferred under this assignment, free and clear of any and all liens or encumbrances, and will defend the same against all claims and demands of all persons. The Transferring Member has a good right to transfer the interest as a member of the Company to each Transferee.

4.2. Status of Company. The Company is a limited liability company duly organized, validly existing, and in good standing under the laws of the State of South Carolina and has all powers required to own its assets and property and to carry on its business as now owned and conducted. The Company is not licensed or qualified as a foreign limited liability company in any other state, and the nature of its business does not make such license or qualification necessary.

4.3. Financial Statements. The financial records of the Company, to the extent available, have been furnished to the Transferees (collectively the “Financial Statements”) and are in accordance with the books and records of the Company, are based upon regularly accepted accounting principles that have been consistently applied, are complete and correct, and fairly present the financial position and results of operation of the Company as of the dates and for the periods indicated.

4.4. Adverse Changes. There has been no material adverse change in the financial condition of the Company or in the condition of its assets from that reflected in the Financial Statements.

4.5. Liabilities. the Company does not have any material liabilities or obligations of any kind whether accrued, absolute, contingent, or otherwise, and whether or not such liabilities or obligations would have been required to be disclosed on a balance sheet prepared in accordance with generally accepted accounting principles.

4.6. Tax Returns. The Company has filed all tax returns and reports that it is required to file with the appropriate federal, state, and local government agencies. Such returns and reports are accurate and complete, and the Company has paid in full or has made adequate provision for payment of all taxes, interest, penalties, assessments, or deficiencies shown to be due on such returns or reports, claimed to be due by any taxing authority, or otherwise due and owing. The Company has made all withholdings of tax required to be made under all applicable federal, state, and local tax regulations. To the best of the knowledge of the Transferring Member, the provisions for applicable property taxes and/or any applicable payroll taxes payable reflected in the Financial Statements are adequate.

4.7. Assets. The Company has good and marketable title to all of its assets, including but not limited to that certain real property known as “Lot B-3” located in City of Johns Island, Charleston County, South Carolina and as more particularly described in Exhibit “1,” attached hereto and incorporated herein by reference (the “Property”), free and clear of all claims and encumbrances, except any liens for taxes not yet due and payable or as disclosed in the financial statements.

4.8. Compliance with Law. To the best of the knowledge and belief of the Transferring Member, the Company is not in violation of any applicable law, ordinance, regulation, order, or requirement relating to its operations.

4.9. Actions and Suits. There are no actions, suits, or proceedings pending or threatened against or affecting the Company at law or in equity or before or by any federal, state, municipal, or other governmental or nongovernmental department, commission, board, bureau, agency, or instrumentality that can reasonably be expected to result in any adverse change in the business, properties, operations, prospects, or assets of the Company or in its condition, financial or otherwise.

4.10. Obligations and Contracts. The Company is not in default in the payment of any of its obligations and is not in breach of the performance of any contract to which it is a party.

4.11. Complete Disclosures. To the best of the knowledge and belief of the Transferring Member, neither this assignment nor any document that has been furnished by the Transferring Member to the Transferees in connection with this assignment contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements in this assignment or in such documents not misleading. There is no fact that materially adversely affects, or, to the best of the knowledge and belief of the Transferring Member, in the future may materially adversely affect, the business, operations, or condition (financial or otherwise) of the Company that has not been set forth in this assignment or in the Financial Statements.

5. TRANSFEREES' REPRESENTATIONS AND WARRANTIES. The Transferees represent and warrant to the Transferring Member, and to the Company, that:

5.1. Investment Intent. The Transferees are acquiring the interest as a member of the Company being transferred under this assignment for investment and not with a view to distribution.

5.2. Securities Law Registration. The Transferees understand that the interest as a member of the Company being transferred under this assignment has not been registered under the Securities and Exchange Act of 1933 or under applicable state securities statutes in reliance upon exemptions from registration. The Transferees also understand that the interest must be held indefinitely, unless it is later registered under the Securities and Exchange Act of 1933 and applicable state securities statutes unless exemptions from registration are otherwise available, and that the Company has no obligation to register the interest. The Transferees agree that the interest will not be offered, sold, transferred, pledged, or otherwise disposed of without registration under the Securities and Exchange Act of 1933 and applicable state securities laws or an opinion of counsel acceptable to the Company that such registration is not required.

6. **30' ACCESS EASEMENT.** As a condition of closing, Transferor agrees to grant, transfer, sell and convey to Transferee, its successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of Transferor known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895

ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES),” having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 (“30’ Private R/W”), the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road (“Pitch Fork Road”). Upon the completion of Pitch Fork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30’ Private R/W.

7. **SURVIVAL OF REPRESENTATIONS AND WARRANTIES.** All warranties and representations made in this assignment will survive the closing of the transfer of the interest as a member of the Company being transferred under this assignment.

8. **CONSENT.** By signing this assignment, the Transferring Member consents to the assignment and transfer to the Transferees of the interest as a member of the Company being transferred under this assignment and agrees to accept the Transferees as a members of the Company with respect to the transferred interest of the Transferring Member, with full rights and obligations of a member, and by signing this written Consent, waives notice of the time, place and purpose of a joint meeting of the Members, and agrees to the transaction of the business of this joint meeting by unanimous consent of the Members.

9. **OWNERSHIP INTEREST.** The Members of the Company, their initial capital contributions shall be deemed to have been made, and their voting percentage within the Company shall be as follows:

MEMBERS	VOTING PERCENTAGE
John H. Laplante	50.0%
Michel F. Laplante	25.0%
Peter F. Laplate	12.5%
Marianne Laplante-Scarlata	12.5%
TOTAL	100.0%

10. **MISCELLANEOUS PROVISIONS.**

10.1. **Binding Effect.** The provisions of this assignment are binding upon and will inure to the benefit of the heirs, personal representatives, successors, and assigns of the parties.

10.2. **Notice.** Any notice or other communication required or permitted to be given under this assignment must be in writing and must be mailed by certified mail, return receipt requested, postage prepaid, addressed to the parties at the addresses set forth herein. All notices and other communications will be deemed to be given at the expiration of three days after the

date of mailing. The address of a party to which notices or other communications must be mailed may be changed from time to time by giving notice to the other parties.

10.3. Litigation Expense. If any legal proceeding is commenced for the purpose of interpreting or enforcing any provision of this assignment, including any proceeding in the United States Bankruptcy Court, the prevailing party in such proceeding will be entitled to recover reasonable attorney's fees in such proceeding, or any appeal thereof, to be set by the court without the necessity of hearing testimony or receiving evidence, in addition to the costs and disbursements allowed by law.

10.4. Governing Law. This assignment will be governed by the law of the State of South Carolina.

10.5. Entire Agreement. This assignment constitutes the entire agreement between the parties pertaining to its subject matter, and it supersedes all prior and contemporaneous agreements, representations, and understandings of the parties. No supplement, modification, or amendment of this assignment will be binding unless executed in writing by all parties.

[Signatures on following page]

IT IS SO RESOLVED, APPROVED, AND AGREED THIS 4th DAY OF OCTOBER,
2013.

TRANSFERRING MEMBER:

Penny Creek Associates, L.L.C.

Paul S. Beckwith

Michel F. Laplante
By: Michel F. Laplante
Its: Manager

TRANSFERREE:

Paul S. Beckwith

John H. Laplante
John H. Laplante

Paul S. Beckwith
John H. Laplante

Michel F. Laplante
Michel F. Laplante

Paul S. Beckwith

Peter F. Laplante
Peter F. Laplante

Marianne Laplante-Scarlata
Marianne Laplante-Scarlata

Message

From: Alan McMahon [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=82F0AD4E8CA14C67906ABC7DEF925DD1-ALAN MCMAHO]
Sent: 12/3/2019 2:39:34 PM
To: Russ Seamon [RSeamon@SeamonWhiteside.com]; Patterson Farmer [PFarmer@SeamonWhiteside.com]; Rivers Cape [RCape@SeamonWhiteside.com]
CC: Eddie Hughes [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=915c5929756945718a155c7ee160a919-Eddie Hughe]
Subject: RE: Fenwick ALTA - Mitch LaPlante connection
Attachments: ExtractPage2.pdf

There's also this from Page 10 Letter F

From: Alan McMahon <amcmahon@thebeachcompany.com>
Sent: Tuesday, December 3, 2019 9:36 AM
To: Russ Seamon <RSeamon@SeamonWhiteside.com>; Patterson Farmer <PFarmer@SeamonWhiteside.com>; Rivers Cape <RCape@SeamonWhiteside.com>
Cc: Eddie Hughes <ehughes@thebeachcompany.com>
Subject: RE: Fenwick ALTA - Mitch LaPlante connection

Sorry, this is from the PUD Appendix E

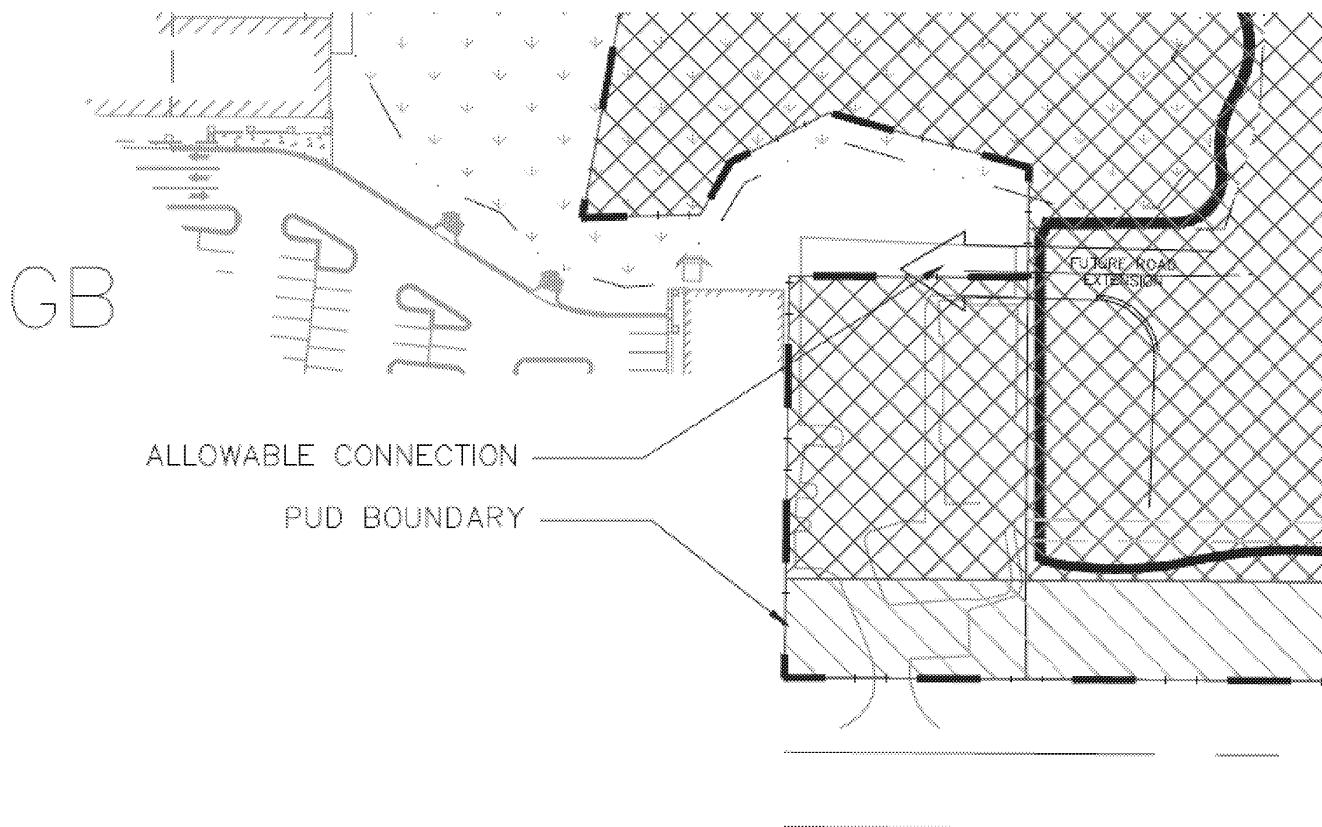
From: Alan McMahon
Sent: Tuesday, December 3, 2019 9:35 AM
To: Russ Seamon <RSeamon@SeamonWhiteside.com>; Patterson Farmer <PFarmer@SeamonWhiteside.com>; Rivers Cape <RCape@SeamonWhiteside.com>
Cc: Eddie Hughes <ehughes@thebeachcompany.com>
Subject: RE: Fenwick ALTA - Mitch LaPlante connection

Russ,

#4 on this page from the PUD says the owner "shall create an access road intersecting with Maybank Highway at a location east.....346-00-00-008." Does this impact our plan?

From: Russ Seamon <RSeamon@SeamonWhiteside.com>
Sent: Tuesday, December 3, 2019 8:49 AM
To: Alan McMahon <amcmahon@thebeachcompany.com>; Patterson Farmer <PFarmer@SeamonWhiteside.com>; Rivers Cape <RCape@SeamonWhiteside.com>
Cc: Eddie Hughes <ehughes@thebeachcompany.com>
Subject: RE: Fenwick ALTA - Mitch LaPlante connection

PLAINTIFF'S EXHIBIT # 3



This is what the PUD shows on the connection Mitch LaPlante was discussing. Says “allowable” not “required”, but TRC could potentially force the issue if they want... The only easements I show in that area is the “existing utility” easement that comes into the property (orange) then turns north and hits the Pitchfork Rd. I wonder if he is confused and thinking that is an access easement?

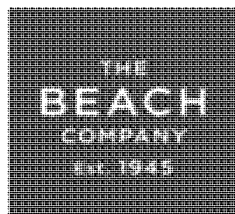
D. Russ Seamon, ASLA
 Director
 SeamonWhiteside
 M: 843.442.5342
 SeamonWhiteside.com

From: Alan McMahon <amcmahon@thebeachcompany.com>

Sent: Tuesday, November 26, 2019 2:34 PM

To: Patterson Farmer <PFarmer@SeamonWhiteside.com>; Rivers Cape <RCape@SeamonWhiteside.com>; Russ Seamon <RSeamon@SeamonWhiteside.com>

Subject: Fenwick ALTA



Alan McMahon
 Development Manager

m: 843.412.2739
 t: 843.277.3026
 e: amcmahon@thebeachcompany.com
www.TheBeachCompany.com



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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE #: _____

MAYBANK 2754, LLC,

Complaint

Plaintiff,

(Jury Trial Requested)

v.

EUGENE J. ZURLO, Individually and as Co-Trustee
of the Eugene J. Zurlo Living Trust Dated December
11, 1997; 1776, LLC; BEACH FENWICK, LLC;
THE BEACH COMPANY; SEAMON, WHITESIDE
& ASSOCIATES, INC.; PENNY CREEK ASSOCIATES,
LLC; JOHN DOE AND MARY ROE

Defendants,

VERIFIED COMPLAINT

COMES NOW THE PLAINTIFF, MAYBANK 2754, LLC, and sues the Defendants,
EUGENE J. ZURLO, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated
December 11, 1997; 1776, LLC; BEACH FENWICK, LLC; THE BEACH COMPANY;
SEAMON, WHITESIDE & ASSOCIATES, INC.; PENNY CREEK ASSOCIATES, LLC;
JOHN DOE AND MARY ROE; and alleges as follows:

General Allegations

1. Plaintiff, MAYBANK 2754, LLC (herein "Maybank"), is a limited liability company
organized and existing under the laws of the State of South Carolina, and transacted business in
Charleston County, South Carolina at all relevant times.

2. Defendant, EUGENE J. ZURLO, Individually and as Co-Trustee of the Eugene J.
Zurlo Living Trust Dated December 11, 1997 (herein "Zurlo"), is a resident of Charleston
County, South Carolina.

3. Defendant, 1776, LLC (herein "1776"), is a limited liability company organized and

PLAINTIFF'S EXHIBIT # 4

existing under the laws of the State of South Carolina, and transacted business in Charleston County, South Carolina at all relevant times. Upon information and belief, the sole member of 1776, LLC, is The Eugene Zurlo Living Trust Dated December 11, 1997, in which Zurlo and his wife are its Co-Trustees.

4. Defendant, BEACH FENWICK, LLC (herein "Beach Fenwick"), is a limited liability company organized and existing under the laws of the State of South Carolina, and transacted business in Charleston County, South Carolina at all relevant times. Upon information and belief, Beach Fenwick is an affiliate and/or subsidiary of Beach Company sharing some of the same officers, directors and/or employees.

5. Defendant, THE BEACH COMPANY (herein "Beach Company"), is a corporation organized and existing under the laws of the State of South Carolina, and transacted business in Charleston County, South Carolina at all relevant times.

6. Defendant, SEAMON, WHITESIDE & ASSOCIATES, INC. (herein "Seamon Whiteside"), is a corporation organized and existing under the laws of the State of South Carolina, and transacted business in Charleston County, South Carolina at all relevant times.

7. Defendant, PENNY CREEK ASSOCIATES, LLC (herein "Penny Creek"), is a limited liability corporation organized and existing under the laws of the State of South Carolina, and transacted business in Charleston County, South Carolina at all relevant times. Zurlo, individually, was a member of Penny Creek during all relevant times, and upon information and belief, is currently a member.

8. Upon information and belief Defendants, JOHN DOE and MARY ROE, are presently

unknown persons who are principals of one or more Defendants, and/or agents thereof, and each other, who conspired together and with one or more Defendants to defraud the Plaintiff of its easement rights as described herein.

9. This Court has jurisdiction over the parties and the subject of this lawsuit.

10. Venue is appropriate in Charleston County, South Carolina.

11. The real estate that is the subject of this case (herein "Property") is described as follows:

ALL that certain piece, parcel or tract of land situate, lying and being in the City of Charleston County, South Carolina, containing 19.322 acres, more or less, and being shown as "TRACT B-2-2 TMS 346-00-00-076 OWNER: 1776 LLC PREVIOUS ACREAGE 998,976 SF 22.933 AC NEW ACREAGE 841,688 SF 19.322 AC" on a plat entitled "A PLAT OF A PORTION OF TMS #346-00-00-004, and -076 OWNED BY 1776, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA FOR THE NORTHERN PITCHFORK ROAD" dated January 22, 2019, last revised December 4, 2019, prepared by Philip R. Bryan, Jr. S.C.P.L.S. No. 28597 of Southeastern Land Surveying LLC and recorded on December 4, 2019, in Plat Book L19, Page 0515, in the ROD Office for Charleston County, South Carolina. Said parcel having such size, shape, buttings and boundings as will more fully appear by reference to said plat.

BEING A PORTION of the property conveyed to Grantor by deed of Mikell R. Scarborough as Master-in-Equity dated August 29, 2017 and recorded August 29, 2017 at Book 0662, Page 915 in the ROD Office for Charleston County, South Carolina.

This being the same property conveyed to Beach Fenwick, LLC, by deed of 1776, LLC, recorded on December 12, 2019, in Book 0846, Page 268 in the ROD Office for Charleston County, South Carolina
Owner of the Property: Beach Fenwick, LLC

TMS# 346-00-00-076.

The Thirty (30) Foot Private Right of Way Easement on the Property

12. Maybank owns a lot adjacent to the Property. The lot has a building situated thereon with office spaces for lease. During all material times, office space on the lot has been leased and is currently leased.

13. Until on or about October 4, 2013, Penny Creek solely owned Maybank and was the sole member of Maybank.

14. On October 4, 2013, Zurlo executed that certain Resolution of the Sole Shareholder of Penny Creek Associates, LLC (herein "Resolution"). A true and correct copy of the Resolution is attached hereto and incorporated herein as an exhibit.

15. Pursuant to the Resolution, Penny Creek approved the transfer of its membership interest in Maybank to individuals set forth therein (herein "Laplante Family"), and also agreed to grant to them, and their assigns, a thirty (30) foot private right of way access easement for pedestrian and vehicular ingress, egress and access to, from and over the Property, the location and condition of which to be mutually agreed upon at the completion of that certain roadway known as Pitchfork Road (herein "thirty (30) foot private right of way easement").

16. Pursuant to the Resolution, upon completion Pitchfork Road, an easement agreement to memorialize the thirty (30) foot private right of way easement would follow.

17. Pitchfork Road has not been completed.

18. The resolution was not recorded.

19. At the time of the Resolution, members of the Laplante Family owned real estate, or had an interest in residential real estate, that was also adjacent to the Property.

20. Maybank was assigned rights to the thirty (30) foot private right of way easement.

The Derivative and Judicial Dissolution Against Penny Creek and the Foreclosure of the Property

21. Zurlo has a contentious history with certain members of the Laplante Family.

22. On December 16, 2013, a little over two (2) months after Zurlo executed the Resolution, Zurlo and others commenced a derivative and judicial dissolution action against Penny Creek and others in Charleston County Court of Common Pleas Case # 2013-CP-07280.

23. On August 14, 2014, approximately ten (10) months after the Zurlo executed the Resolution, a foreclosure action, the Property being a subject thereof, was commenced against Penny Creek and others by Wells Fargo Bank, N.A., in Charleston County Court of Common Pleas Case # 2014-CP-10-4946.

24. Thereafter, on or about February 29, 2016, the derivative and judicial dissolution action was settled on the record before the Court.

25. Upon information and belief, on May 19, 2016, as part of the settlement of the derivative and judicial dissolution action, Penny Creek executed and delivered a promissory note to The Eugene J. Zurlo Living Trust Dated December 11, 1997, and secured it with a second mortgage on the Property (herein "Zurlo Note and Mortgage").

26. On April 7, 2017, the articles of organization of 1776 were filed with the South Carolina Secretary of State.

27. On the same day 1776 was created, April 7, 2017, The Eugene J. Zurlo Living Trust Dated December 11, 1997 also assigned the Zurlo Note and Mortgage to 1776.

28. Upon information and belief, around the time of the creation of 1776, the Zurlo Note and Mortgage went into default.

29. Thereafter, 1776 intervened in the above-referenced foreclosure action and received a credit bid based on the indebtedness owned on the Zurlo Note and Mortgage.

30. Subsequently, 1776 was the winning bidder at the foreclosure sale and consequently received title to the Property by virtue of a master's deed.

The Development of the Property

31. During the pendency of the above-referenced derivative and judicial dissolution

and foreclosure action, the Property was in the process of being developed while it was still owned by Penny Creek.

32. During the pendency of the above-referenced derivative and judicial dissolution action and foreclosure action, Seamon Whiteside was hired by Penny Creek to prepare planned unit development guidelines for the Property that were submitted to the City of Charleston for approval.

33. Upon information and belief, as a direct result of its involvement with the development process and in working with Penny Creek, and later also with 1776 and Zurlo, for the development of the Property, Seamon Whiteside acquired actual knowledge of the thirty (30) foot private right of way easement.

34. Upon information and belief, sometime after 1776's acquisition of the Property, Beach Company became involved with, and assisted with, the development of the Property.

35. Upon information and belief, as a direct result of its involvement with the development process and working with 1776 and Zurlo for the development of the Property, Beach Company acquired actual knowledge of the thirty (30) foot private right of way easement.

36. Subsequently, on November 27, 2019, 1776 entered into a certain development agreement with the City of Charleston to develop the Property, which was recorded in Book 0843, Page 506, in the ROD Office of Charleston County, South Carolina.

37. Then, on December 12, 2019, 1776 transferred the Property to Beach Fenwick by virtue of a deed recorded in Book 0846, Page 268, in the ROD Office of Charleston County, South Carolina.

38. Beach Fenwick is the current owner of the Property, and upon information and

belief, is an affiliate and/or subsidiary of Beach Company, sharing some of the same officers, directors and/or employees who had actual knowledge of the thirty (30) foot private right of way easement, and otherwise had actual knowledge of the thirty (30) foot private right of way easement before it acquired title to the Property.

39. Also, on December 12, 2019, 1776 partially assigned its rights and obligations of the above-referenced development agreement to Beach Fenwick except for its obligations “with respect to the contribution of land for Northern Pitchfork Road...” pursuant to that certain partial assignment and assumption of rights and obligations under development agreement recorded in Book 0846, Page 269 in the ROD Office of Charleston County, South Carolina.

40. Upon information and belief, the development plans for the Property do not have any specific provisions or reservations for the thirty (30) foot private right of way easement upon the completion of Pitchfork Road.

The Conspiracy

41. At all relevant times, Zurlo had actual knowledge of the thirty (30) foot private right of way easement.

42. Upon information and belief, Zurlo’s actual knowledge of the thirty (30) foot private right of way easement is imputed to each Defendant with whom he possessed any ownership or held any other interest therein.

43. Upon information and belief, during all relevant times, the Defendants had actual knowledge of the thirty (30) foot private right of way easement.

44. Upon information and belief, after 1776 acquired the Property and despite all Defendants having actual knowledge of the thirty (30) foot private right of way easement, Defendants, at the direction, guidance, and/or persuasion of Zurlo, surreptitiously concealed the

thirty (30) foot private right of way easement by intentionally and wrongfully omitting any references thereof in various recorded documents, and also in their submissions and representations to the City of Charleston to obtain development approval of the Property, and/or assisting in these nefarious efforts, as part of a deceitful scheme to have the Property developed without affording any provisions or reservations for the thirty (30) foot private right of way easement.

45. Upon information and belief, as intended by the Zurlo and/or all the Defendants, the Property now appears primed for development without any provision or reservation made for the Plaintiff's thirty (30) foot private right of way easement across the Property.

COUNT I
(Declaratory Judgment - Easement)

46. Plaintiff re-alleges the Paragraphs above as though fully set forth herein verbatim.

47. This is an action for declaratory judgment pursuant to South Carolina Code § 15-53-10, et. seq.

48. There is a bona fide dispute between the Plaintiff and Defendants that constitutes a justiciable controversy.

49. Plaintiff seeks a judgment declaring that it has a thirty (30) foot private right of way easement across the Property, the location and condition of which is to be mutually agreed upon at the completion of Pitchfork Road.

50. Plaintiff has retained TAROKH LAW, PLLC, to initiate and maintain this action and is obligated to pay it a reasonable fee for its services in bringing this action.

WHEREFORE, Plaintiff requests a declaratory judgment declaring that it has a thirty (30) foot private right of way easement across the Property, the location and condition of which is to be mutually agreed upon at the completion of Pitchfork Road, including a separate award of attorney's fees and costs against the Defendants, and for such further relief as this Court deems just and proper.

COUNT II
(Declaratory Judgment – Restrictive Covenant)

51. This count is pled in the alternative to Count I.

52. Plaintiff re-alleges the Paragraphs above as though fully set forth herein verbatim except for the Paragraphs comprising Count I.

53. This is an action for declaratory judgment pursuant to South Carolina Code § 15-53-10. et. seq.

54. There is a bona fide dispute between the Plaintiff and Defendants that constitutes a justiciable controversy.

55. The very language of the Resolution for the grant of a thirty (30) foot private right of way across the Property upon the completion of Pitchfork Road constitutes a restrictive covenant that runs with the land in that the parties to the Resolution intended that the covenant run with the land, and the covenant touches and concerns the land.

56. By developing the Property without making any reservation of provision for the thirty (30) foot private right of way, the Defendants are intentionally violating the restrictive covenant.

57. Plaintiff seeks a judgment declaring that the creation of a thirty (30) foot private right of way upon the completion of Pitchfork Road as set forth in the Resolution is a restrictive covenant that runs with the land.

58. Plaintiff has retained TAROKH LAW, PLLC, to initiate and maintain this action and is obligated to pay it a reasonable fee for its services in bringing this action.

WHEREFORE, Plaintiff requests a declaratory judgment that the Resolution for the grant of a thirty (30) foot private right of way across the Property upon the completion of Pitchfork Road constitutes a restrictive covenant that runs with the land, including a separate award of attorney's fees and costs against the Defendants, and for such further relief as this Court deems just and proper.

COUNT III
(Civil Conspiracy)

59. Plaintiff re-alleges the Paragraphs above as though fully set forth herein verbatim except for the Paragraphs comprising Counts I and II.

60. This is an action for damages based upon the civil conspiracy committed by the Defendants.

61. Upon information and belief, after 1776 acquired the Property and despite all Defendants having actual knowledge of the thirty (30) foot private right of way easement, Defendants, at the direction, guidance, and/or persuasion of Zurlo, surreptitiously concealed the thirty (30) foot private right of way easement by intentionally and wrongfully omitting any references thereof in various recorded documents, and also in their submissions and representations to the City of Charleston to obtain development approval of the Property, and/or assisting in these nefarious efforts, as part of a deceitful scheme to have the Property developed without affording any provisions or reservations for the thirty (30) foot private right of way easement.

62. As a result, the Plaintiff has suffered damages.

63. Plaintiff has suffered special damages in that its adjacent lot has lost the value of a (30) foot private right of way easement across the Property.

64. Plaintiff is entitled to punitive damages as result of the Defendants' unfair and fraudulent conduct.

64. Plaintiff has retained TAROKH LAW, PLLC, to initiate and maintain this action and is obligated to pay it a reasonable fee for its services in bringing this action.

WHEREFORE, Plaintiff requests a judgment for damages against the Defendants, including special and punitive damages, and also including a separate award of attorney's fees and costs against the Defendants, and for such further relief as this Court deems just and proper.

COUNT IV
(Temporary Injunction)

65. Plaintiff re-alleges the Paragraphs above as though fully set forth herein verbatim except for the Paragraphs comprising Counts I, II and III.

66. This is an action for a temporary injunction.

67. Upon information and belief, the Plaintiff is entitled to a temporary injunction against Zurlo, 1776 and Beach Fenwick to enjoin them from developing the Property so as to preserve the status quo until after a trial on the merits and a judgment rendered so that the status quo can be maintained pending this litigation.

68. Plaintiff will suffer irreparable harm if an injunction is not granted because the development of the Property can presently proceed in total disregard to, and without any provision or reservation for, Plaintiff's right to a thirty (30) private right of way easement upon the completion of Pitchfork Road.

69. Thus, a temporary injunction is reasonably necessary to protect the rights of the Plaintiff pending this litigation.

70. Plaintiff has a likelihood of success on the merits.

71. There is no adequate remedy of law.

72. Plaintiff has retained TAROKH LAW, PLLC, to initiate and maintain this action and is obligated to pay it a reasonable fee for its services in bringing this action.

WHEREFORE, Plaintiff requests a temporary injunction against Zurlo, 1776 and Beach Fenwick to enjoin them from developing the Property so as to preserve the status quo until after a trial on the merits and a judgment rendered so that the status quo can be maintained pending this litigation, and also including a separate award of attorney's fees and costs against the Defendants, and for such further relief as this Court deems just and proper.

REQUEST FOR JURY TRIAL

73. The Plaintiff requests a trial by jury on all issues so triable.

Respectfully submitted,

TAROKH LAW, PLLC
PO BOX 10827
TAMPA, FL 33679
813-922-5510

/s/ Jason M. Tarokh
JASON M. TAROKH
SOUTH CAROLINA BAR # 72837

January 13, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE #: _____

MAYBANK 2754, LLC,

Plaintiff,

v.

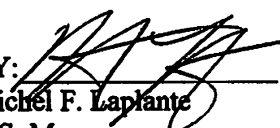
EUGENE J. ZURLO, Individually and as Co-Trustee
of the Eugene J. Zurlo Living Trust Dated December
11, 1997; 1776, LLC; BEACH FENWICK, LLC;
THE BEACH COMPANY; SEAMON, WHITESIDE
& ASSOCIATES, INC.; PENNY CREEK ASSOCIATES,
LLC; JOHN DOE AND MARY ROE;

Defendants,

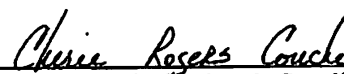
VERIFICATION

PERSONALLY APPEARED before me, Michel F. Laplante, Manager of MAYBANK
2754, LLC, who after first being duly sworn, deposes and says that he has read the foregoing
Verified Complaint and the statements contained therein are true, except those made on
information and belief, and as to those he believes them to be true.

MAYBANK 2754, LLC

BY: 
Michel F. Laplante
ITS: Manager

SWORN to and subscribed before me
this 13th day of January, 2020.


Notary Public for South Carolina
My Commission Expires: September 26, 2027

CHERIE ROGERS COUCHE
Notary Public - State of South Carolina
My Commission Expires September 26, 2027

**RESOLUTION OF THE SOLE SHAREHOLDER
OF PENNY CREEK ASSOCIATES, L.L.C.**

At a meeting of the Members of Penny Creek Associates, L.L.C. (the "Company") held at the Company's offices in Charleston, South Carolina, the Members of the Company hereby adopt the following resolutions:

WHEREAS, the Company is the sole member of Maybank 2754, LLC, a South Carolina limited liability company (the "Maybank 2754, LLC"); and

WHEREAS, pursuant to the terms and conditions of that certain Contract for Assignment of Interest, dated October 9, 2013, by and between the Company, Inc. (as Seller thereunder) and John H. Laplante, Michel F. Laplante, Peter F. Laplante, Marianne Laplante-Scarlata, or their assigns (as Purchasers thereunder) (the "Agreement"), the Seller desire to sell, assign, transfer and convey certain Membership Interest in the Company to those certain Purchasers mentioned above and according to the provisions of the Agreement; and

WHEREAS, pursuant to the Agreement, the Company hereby certifies that the Company has complied with all provisions of the Company operating documents, with respect to the aforementioned sale, assignment and/or transfer of the Company Membership Interest in the Maybank 2754, LLC to the Purchaser, in consideration of Four Hundred Thousand and no/100 Dollars (\$400,000.00) and that the Members of the Company consent to the same; and

WHEREAS, as a condition of closing, the Company has agreed to grant, transfer, sell and convey to Purchasers, their successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of Seller known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES)," having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 ("30' Private R/W"), the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road ("Pitch Fork Road"). Upon the completion of Pitch Fork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30' Private R/W.

NOW THEREFORE IT IS RESOLVED, that the Company approves the Agreement; the sale, assignment, transfer and conveyance of Membership Interest in the Company thereunder; and any and all other documents necessary to facilitate the Company's execution of the Agreement and its compliance with the transactions contemplated thereunder.

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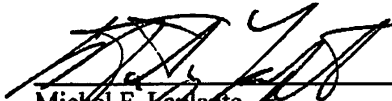
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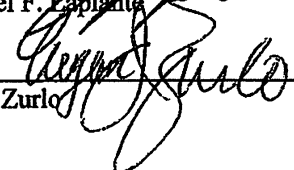
BE IT FURTHER RESOLVED, that upon the completion of Pitch Fork Road, the Company shall grant to Purchasers, their successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of the Company known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES)," having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 ("30' Private R/W"), the location and condition of which shall be mutually agreed upon at a future date.

BE IT FURTHER RESOLVED, that Michel F. Laplante in his capacity as Manager of the Company is hereby authorized to execute and deliver on behalf of the Company any and all agreements, assignments, satisfactions, releases, discharges, papers, documents, lending and collateral documents, offers, applications, leases, affidavits, certificates, certifications, verifications, non-disturbance agreements, guaranties, bonds, notes, subordination agreements, security agreements, resolutions, settlement statements, and any and all other contracts, papers or documents required in the course of the execution of the Agreement and the assignment and transfer of Membership Interest in the Company.

The undersigned Members of the Company do hereby certify that as of this 4th day of October, 2013 the above to be a true and correct transcript of the Resolutions passed by the Company at the time and place above stated.

MEMBERS:


Michel F. Laplante (SEAL)


Gene Zurlo (SEAL)