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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2020-000056

Sterling Hills Homeowners' Association, Inc. — Respondent,

v.

Elliot Hayes, — Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in referring this case to the Master-in-Equity where Appellant's legal counterclaims were properly dismissed and Respondent's remaining claims are equitable?

II. Did the circuit court err in dismissing Appellant's counterclaims for breach of contract and violation of the Unfair Trade Practices Act where Appellant failed to identify a breach of contract, cannot identify a breach of contract, and where Respondent is not subject to the Unfair Trade Practices Act?

III. Did the circuit court err in granting summary judgment as to Appellant's "*ultra vires*" declaratory judgment claim where Respondent irrefutably did not operate *ultra vires*?

STATEMENT OF THE CASE

On August 30, 2018, Sterling Hills Homeowners' Association, Inc. ("Respondent") filed a Summons & Complaint against Elliot Hayes ("Appellant") in the circuit court of Richland County. Appellant filed its Answer & Counterclaim on October 10, 2018. Respondent filed its Reply to the Answer & Counterclaim on December 5, 2018. Respondent's Complaint was amended on June 27, 2019. (R. pp. 17 - 48).

Respondent's Amended Complaint enumerated causes of action for "Breach of Covenants," "Enforcement of Restrictive Covenants," "Specific Performance," "Injunctive Relief," and "Declaratory Judgment." Appellant's Answer & Counterclaim enumerated counterclaims for Breach of Contract, Violation of Unfair Trade Practices Act, Declaratory Judgment, and Failure to Allow Access to Records.[1] (Amended Complaint; R. pp. 40 - 48).

On July 24, 2019, Appellant filed a Motion for Summary Judgment as to Plaintiff's Claims. On August 12, 2019, Respondent filed its Motion to Dismiss Defendant's Counterclaims and for Order of Reference to Master in Equity. On October 4, 2019, Respondent filed its Motion for Summary Judgment as to Defendant's Counterclaims. (R. pp. 65 - 116). On October 14, 2019, a hearing was held before the Honorable Thomas A. Russo at the Richland County Courthouse. On November 22, 2019, the circuit court issued its Order Dismissing Defendant's Motion for Summary Judgment, Granting Plaintiff's Motion to Dismiss and for Summary Judgment, and Order of Reference to Master-In-Equity. (R. pp. 1 - 10). Appellant subsequently filed a Motion to Reconsider on December 2, 2019. (R. pp. 11 - 13). Respondent filed a Memorandum in Opposition to the Motion to Reconsider on December 6, 2019. The court denied Appellant's Motion to Reconsider on December 19, 2019. (R. pp. 11 - 13). Appellant's appeal

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[1] Appellant voluntarily withdrew its counterclaim for Failure to Allow Access to Records at the October 14, 2019 hearing. (R. p. 137 - 172).

followed.

STATEMENT OF FACTS

Respondent is a nonprofit corporation serving as the homeowners' association for the Sterling Hills subdivision. (R. p. 18). Appellant is the owner of that certain real property designated as Lot 66, located in the Sterling Hills subdivision, bearing the address of 8 High Glen Court, Columbia, South Carolina 29229 ("Subject Property"). (R. pp. 26 - 27). The Subject Property is subject to the Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Sterling Hills (the "Declaration"), recorded May 31, 2000 in Deed Book R413 at Page 92, ROD Office for Richland County. (R. pp. 67 - 96). By taking ownership of the Subject Property, Appellant agreed to be bound by the Declaration. (R. pp. 19 – 21; 67-96).

Appellant's time at Sterling Hills has been marked by unceasing violations of the restrictive covenants with the Association and antagonistic behavior (R. pp. 178, 183-196). Prior actions involving the Association have resulted in what Appellant's Counsel has described as "heated" arguments with the Master in Equity. (R. pp. 128; 170). Appellant has continuously and repeatedly violated numerous provisions of the Declaration to include its prohibitions against offensive activities and its provisions that the landscaping and exterior features of Lots be maintained. One significant complaint which has been remedied as of the time of this brief included Appellant allowing an individual to live on his front porch, changing clothes and urinating in view of the neighboring residents. (R. p. 44). While this violation, upon Respondent's belief, has been remedied, the more persistent and continuous violations include drastically unkempt conditions as to the exterior of Appellant's dwelling and the yard/landscaping of Respondent's Lot demonstrated by the photographs of the Subject Property presented to the circuit court and in the record before this Court (R. pp. 180 – 192, 195 - 199).

These violations have persisted despite the multitude warnings and notifications from the Association and its counsel.

Having exhausted all other avenues, Respondent was eventually forced to file its Amended Complaint on June 27, 2019. In response, Appellant raised meritless and unsubstantiated allegations of improper dealings and *ultra vires* acts by Respondent rather than simply tend to the Subject Property and comply with the covenants applicable thereto. (R. pp. 26 - 33).

STANDARD OF REVIEW

Summary Judgment:

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard of review as the trial court; summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *Zurich Am. Ins. Co. v. Tolbert*, 378 S.C. 493, 496, 662 S.E.2d 606, 607 (Ct. App. 2008). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354.S.C. 397, 404, 581 S.E.2d 616, 165 (2003).

A trial court may grant summary judgment "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 in entitled to summary judgment as a matter of law. Rule 56(c), SCRCP. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields,* 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). Summary judgment should be granted when it is

perfectly clear that no genuine issue of material fact exists and inquiry into facts is not desirable to clarify application of the law. *See Wortman v. Spartanburg*, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

Dismissal pursuant to Rule 12(b)(6), SCRCP:

Under Rule 12(b)(6), SCRCP, a trial judge in the civil setting may dismiss a claim when it is demonstrated that the pleading party has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. *Doe v. Marion*, 361 S.C. 463, 469, 605 S.E.2d 556, 559 (Ct. App. 2004) (citing *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995)). The trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support relief under any theory of law. *Id.* (citing *Tatum v. Medical Univ. of South Carolina*, 346 S.C. 194, 552 S.E.2d 18 (2001)).

The appellate court applies the same standard of review implemented by the trial court. *Id.* (citing *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001)).

Referral to Master-In Equity; Right to Jury Trial:

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Bateman v. Rouse*, 358 S.C. 667, 673, 596 S.E.2d 386, 389 (Ct. App. 2004) (citing *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997)). Whether an action is legal or equitable is primarily determined by the allegations in the Complaint. *Id.* (citing *Nat'l Bank of South Carolina v.*

Daniels, 283 S.C. 438, 440, 322 S.E.2d 689, 690 (Ct. App. 1984)). "A request for monetary relief should not be viewed in isolation to convert what is otherwise an equitable claim to a legal claim." *Thomerson v. DeVito*, 430 S.C. 246, 259, 844 S.E.2d 378, 385 (2020) (citing *Watson v. Pub. Serv. Co. of Colo.*, 207 P.3d 860, 865-66 (Colo. App. 2008) ("Even though a plaintiff seeks to recover money damages, the plaintiff is not entitled to a jury trial if the essence of the action is equitable in nature.")).

"[T]he circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case." Rule 53(b), SCRCP.

ARGUMENT

I. The circuit court properly referred this case to the Master-in-Equity as Respondent's claims are equitable, and Appellant's legal counterclaims have been properly dismissed.

The circuit court properly referred this case to the master in equity. Pursuant to Rule 53(b), SCRCP, the circuit court may, upon motion of a party, direct a reference of some or all of the causes of action in a case to a master in equity. Appellant argues that the circuit court erred in referring this case, claiming that Respondent raised legal claims against Appellant, providing a right to a jury trial, and that the now-dismissed counterclaims raised by Appellant were also legal in nature. On the contrary, Respondent's entire action against Appellant is *equitable*, not legal, as properly determined by the circuit court. Moreover, arguendo, even if Appellant's at-law counterclaims had not been dismissed, Appellant's counterclaims would not preclude the referral to the master in equity as they were not compulsory counterclaims to begin with.

A. Respondent's claims are equitable, and Appellant is therefore not entitled to a jury trial.

The circuit court properly referred this case to the Master in Equity. In light of the proper

dismissal of Appellant's frivolous legal counterclaims by the circuit court, the only remaining causes of action in this matter are equitable. (R. pp. 1 - 10). It is well settled in South Carolina that there is no right to trial by jury for equitable actions. *Lester*, 327 S.C. at 267, 491 S.E.2d at 242. Appellant argues that the circuit court erred in referring this case based on assertions that Respondent has raised legal claims. To the contrary, as counsel for Respondent made clear at the motions hearing and in memoranda submitted to the circuit court, Respondent merely brings equitable claims to enforce the covenants against the Subject Property. (R. pp. 167-168, 237 - 247).

Respondent's Amended Complaint enumerated causes of action for "Breach of Covenants," "Enforcement of Restrictive Covenants," "Specific Performance," "Injunctive Relief," and "Declaratory Judgment." (R. p. 40 - 48). Whether an action is legal or equitable is primarily determined by the allegations in the Complaint. *Bateman*, 358 S.C. at 673; 596 S.E.2d at 389. In the present case, all of the claims enumerated in Respondent's Amended Complaint resound in equity. Appellant's repeated assertion that Respondent has brought a legal claim for "Breach of Contract" is demonstrably false and not supported in the pleadings and/or record. Regardless, each and every claim raised in the Amended Complaint merely requests the court to apply and enforce the restrictive covenants of Sterling Hills. An action to enforce restrictive covenants by injunction is in equity. *Gibbs v. Kimbrell*, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993) (citing *Holling v. Margiotta*, 231 S.C. 676, 679, 100 S.E.2d 397, 398 (1957)). "Specific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties." *Ingram v. Kasey's Associates*, 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000) (citing *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984)).

Clearly, as the circuit court properly found, Respondent's claims were equitable, not legal. The sentence in Respondent's Amended Complaint in its prayer for relief which requests "actual and consequential damages" does not itself convert the action to a legal action. "A request for monetary relief should not be viewed in isolation to convert what is otherwise an equitable claim to a legal claim." *Thomerson v. DeVito*, 430 S.C. 246, 259, 844 S.E.2d 378, 385 (2020) (citing *Watson v. Pub. Serv. Co. of Colo.*, 207 P.3d 860, 865-66 (Colo. App. 2008) ("Even though a plaintiff seeks to recover money damages, the plaintiff is not entitled to a jury trial if the essence of the action is equitable in nature.")). The clear essence of this case is equitable, simply put, the application and enforcement of restrictive covenants as to Appellant's Subject Property. Respondent has made it clear it merely seeks the equitable relief of enforcement of the covenants. (R. pp. 47, 167-168, 237 - 247).

Therefore, in light of the circuit court's proper dismissal of Appellant's counterclaims, there remains only the equitable action brought by Respondent in which Appellant has no right to a jury trial. Accordingly, the circuit judge did not err in referring this matter to the Master in Equity upon Respondent's motion, and the circuit court's ruling should be affirmed.

B. Even if Appellant's legal counterclaims had not been dismissed, the referral to the mast in equity would still be appropriate because the counterclaims were not compulsory.

As noted above, each of Appellant's counterclaims were properly dismissed by the circuit court, leaving only Respondent's equitable claims remaining. Nevertheless, even if the counterclaims had not been dismissed, the counterclaims would not have precluded a referral to the Master in Equity as Appellant's counterclaims were not compulsory. "A party does not waive its right to a jury trial on a counterclaim asserted in an equity action if the counterclaim is legal *and compulsory* in nature." *North Carolina Federal Sav. And Loan Ass'n v. DAV Corp.*, 298 S.C.

514, 517, 381 S.E.2d 903, 905 (1989) (emphasis added) (citing *Johnson v. South Carolina National Bank,* 292 S.C. 51, 354 S.E.2d 895 (1987)).

By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim. *Id.* at 517 (citing Rule 13(a), SCRCP). Appellant's at-law counterclaims, which were properly dismissed, for Breach of Contract and violate on of the Unfair Trade Practices Act in no way originated from the same transactions or occurrences as Respondent's claims. Therefore, Appellant's counterclaims would merely be permissive. Respondent brought claims to enforce the covenants of Sterling Hills concerning the lack of upkeep and maintenance by Appellant of his Lot, which has remained in an unkempt and unsightly condition. Appellant's allegations under the Unfair Trade Practices Act pertain to alleged improprieties regarding fines, assessments, and actions "against members or purported members of Plaintiff." It is abundantly clear on the face of the pleading that this counterclaim did not arise from the same transaction or occurrence which led Respondent to bring suit to compel the upkeep of Appellant's unkempt property. Moreover, while it is unclear how Appellant alleges Respondent breached a contract, which is why the counterclaim was dismissed pursuant to Rule 12(b)(6), but it is not conceivable that such a Breach of Contract claim arises from the equitable claims brought by Respondent to enforce the restrictive covenants of Sterling Hills. Again, Appellant's counterclaims were properly dismissed regardless, but it is clear they would not have precluded the referral to the Master in Equity had they survived.

As Counsel for Respondent explained at the motions hearing on October 14, 2019, the present case is merely an equitable action involving claims raised by the homeowners' association for the purpose of enforcing the restrictive covenants applicable to the Subject Property. (R. pp. 167-168, 237-247). At the motions hearing, Counsel for Appellant requested

that if the case was to be referred, that it not be referred to the Honorable Joseph M. Strickland, arguing he felt Judge Strickland would recuse himself from the case because Appellant's prior appearances before Judge Strickland "got heated." (R. pp. 128, 170). Respondent again submits such a decision would best be left to the sound discretion of Judge Strickland himself. For all the reasons set forth above, the circuit court properly referred this case to the Master in Equity, and its decision should not be disturbed.

II. The circuit court properly dismissed Appellant's counterclaims for Breach of Contract and violation of the Unfair Trade Practices Act.

Appellant argues the circuit court erred in dismissing his counterclaims for Breach of Contract and violation of the Unfair Trade Practices Act. However, Appellant's pleadings failed to identify a contract or breach thereof, and Respondent is not under the purview of the Unfair Trade Practices Act. Under Rule 12(b)(6), SCRCP, a trial judge in the civil setting may dismiss a claim when it is demonstrated that the pleading party has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. *Doe v. Marion*, 361 S.C. 463, 469, 605 S.E.2d 556, 559 (Ct. App. 2004) (citing *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995)). Accordingly, the circuit court acted properly in dismissing the counterclaims for Breach of Contract and violation of the Unfair Trade Practices Act under Rule 12(b)(6), SCRCP.

A. The circuit court properly dismissed Appellant's counterclaim for breach of contract as Appellant failed to plead or identify a breach, which is an indispensable element of breach of contract.

The elements of a cause of action for Breach of Contract are (1) the existence of the

contract, (2) its breach, and (3) damages caused by such breach. *Southern Glass & Plastics Co., Inc. v. Kemper*, 399 S.C. 483, 491-492, 732 S.E.2d 205, 209 (Ct. App. 2012) (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). As the circuit court correctly held, Appellant failed to allege any facts sufficient to identify a breach of a contract. (Order; R. p. 2 - 3). Appellant's counterclaim pleading effectively recites the elements of a breach of contract cause of action while alleging with no specificity as to what constituted a breach of the contract. Appellant argues that the obligation enumerated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-1965 (2007), to provide more than mere labels and conclusions rather than a formulaic recitation of the elements of a cause of action, is inapplicable in South Carolina. Respondent submits that *Twombly's* provision is applicable and instructive to the present case, but regardless, it is well settled that a motion to dismiss must be based solely upon the allegations set forth on the face of the pleading. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995) (citing *State Board of Medical Examiners v. Fenwick Hall, Inc.*, 300 S.C. 274, 387 S.E.2d 458 (1990)). The face of Appellant's Answer & Counterclaim fails to identify or allege any specific breach of a contract, an indispensable element of a Breach of Contract action.

Appellant's reliance on *Watts v. Metro Security Agency*, 346 S.C. 235, 550 S.E.2d 869 (Ct. App. 2001) and Rule 8, SCRCP, is misplaced. While Rule 8, SCRCP does mandate that a pleading contain "ultimate facts" rather than "evidentiary facts" to state a cause of action, this does not absolve Appellant of their obligations under Rule 12, SCRCP to plead facts sufficient to constitute a cause of action. Moreover, even Appellant's cited *Watts* opinion provides that "ultimate facts fall somewhere between the verbosity of 'evidentiary facts' and the sparsity of 'legal conclusions." *Watts*, 346 S.C. at 240, 550 S.E.2d at 871. Appellant's pleading for "Breach

of Contract" resounds in the realm of sparse legal conclusions. Respondent is left to only wonder what contract was breached, how it was breached, and what damages could have conceivably resulted, and is therefore not on sufficient notice to defend against this sparse legal conclusion. Accordingly, the circuit court properly dismissed the claim pursuant to Rule 12(b)(6), SCRCP.

B. The circuit court properly dismissed Appellant's counterclaim for violation of the Unfair Trade Practices Act, as the Unfair Trade Practices Act as the Unfair Trade Practices Act is not applicable to Respondent.

Appellant argues the circuit court erred in dismissing the counterclaim for violation of the Unfair Trade Practices Act. However, the Unfair Trade Practices Act is inapplicable to Respondent and this action, and accordingly, Appellant has not and cannot state a claim for violation of said Act against Respondent. Pursuant to the Unfair Trade Practices Act, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any *trade or commerce*" are unlawful. S.C. Code § 39-5-20 (emphasis added). The Act defines "trade or commerce" as "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code § 39-5-10.

As the circuit court correctly observed, Respondent, a nonprofit corporation, is a homeowners' association and not an entity engaged in trade or commerce as defined by the Unfair Trade Practices Act. (R. p. 3 - 4). Respondent's actions enumerated in Appellant's pleadings are merely actions in furtherance of enforcing the restrictive covenants; simply put, enforcement of restrictive covenants is not "trade or commerce."

Appellant's reliance on *Baker v. Chavis*, 306 S.C. 203, 410 S.E.2d 600 (Ct. App. 1991) to argue that the Unfair Trade Practices Act should apply to homeowners' associations and

Respondent is misplaced. This Court in *Baker* did note that the language of the Act suggests the legislature did not intend to limit "trade" and "commerce" to only the listed transactions. *Id.* at 208-209. However, *Baker* was readily distinguishable from the present case, and addressed conduct drastically different from that of a homeowners' association. In *Baker*, this Court was analyzing the Act within the context of a for-profit time-share, and merely held that the term "trade" was broad enough to encompass the buying and selling of leases in a time-share. Applying "trade or commerce" even more broadly than *Baker*, the enforcement of restrictive covenants by a nonprofit corporation homeowners' association would still not constitute trade or commerce.

Moreover, while Respondent is not involved in conduct of any trade or commerce, even assuming *arguendo* that some functions of Respondent such as maintaining common elements constitute "trade or commerce," this would be irrelevant because the Act only applies if the specifically alleged unfair or deceptive acts were in the conduct of the actual "trade or commerce." In *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 104, 431 S.E.2d 587, 591 (1993), the South Carolina Supreme Court held that a railroad company's removal and subsequent refusal to reinstall a railroad crossing was not the conduct of trade or commerce. Of course, a railroad company would certainly be engaged in "trade or commerce" in some of its other actions, but not in the conduct at issue. Likewise, even if Respondent theoretically engaged in "trade or commerce" at some point, Appellant has not enumerated any party or act in this action which is under the purview of the Unfair Trade Practices Act.

Appellant alleges the circuit court erred by relying on this Court's unpublished opinion from *Brown v. Spring Valley Homeowners Association, Inc.*, App. Case No. 2014-002587, Unpublished Opinion No. 2016-UP-343 (Ct. App. 2016), where this Court upheld a grant of

summary judgment dismissing an Unfair Trade Practices Claim against a homeowners' association and cited the definition of "trade" and "commerce." Respondent did bring this unpublished opinion to the circuit court's attention, but expressly provided that this was indeed an unpublished opinion. Regardless, the circuit court's Order indicates the circuit court independently found Respondent was not an entity engaged in trade or commerce as defined by the Unfair Trade Practices Act. (R. pp. 3 - 4). Clearly, the circuit court did not need to rely on the unpublished opinion from a case in which Appellant's Counsel had previously unsuccessfully raised the same argument, as it is independently clear that the Act is inapplicable to Respondent in this matter. For all these reasons, this Court should affirm the circuit court's proper dismissal of this counterclaim.

C. Appellant should not be allowed to amend in an effort to "cure" the deficiency of Appellant's pleadings, and regardless, amendment would be futile and not alter the analysis under which the claims were dismissed.

Appellant asserts that if this Court sees the counterclaims as lacking, then he should be allowed to amend his pleadings. Respondent submits that South Carolina case law does not support the notion that Appellant should now be allowed to amend, but regardless, any amendment would be ineffectual in actually overcoming proper dismissal of the counterclaims.

Appellant's reliance on South Carolina case law such as *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019) is misplaced. (App. Brief p. 22). The *Skydive* opinion, which cites the *Twombly* case Appellant alleged in its brief to be inapplicable in South Carolina, is misplaced. First, as a procedural matter, *Skydive,* along with the South Carolina cases cited in *Skydive* to support granting the *Skydive* party leave to amend, were

analyzing cases in which the party had moved to amend their pleading but been denied.[2] In fact, the Court noted in *Skydive*, "Each time [the parties submitted proposed orders to the court], Skydive requested in writing it be allowed to amend its complaint to cure any pleading defects…" 426 S.C. at 179. Appellant, in stark contrast, never moved to amend its pleading and only now raises the proposition. To *now* allow Appellant leave to amend its pleading would be inequitable, not to mention the futility.

Notwithstanding the procedural consideration, to allow Appellant leave to amend its pleading would be futile, as the counterclaims would still be dismissed. Leave to amend may be denied when amendment would be clearly futile. *See Skydive*, 426 S.C. 175 (citing *Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) ("Although leave to amend should generally be 'freely given,' … it may be denied where the proposed amendment would be futile.")) As the circuit court correctly noted in its Order, while the counterclaims under Unfair Trade Practices Act and Breach of Contract were dismissed under Rule 12(b)(6), SCRCP, no evidence was produced to provide any evidentiary support for the two dismissed counterclaims regardless. (R. p. 4.) To allow leave to amend would not alter this fact, and there would be no issue of material fact as to the two counterclaims. Moreover, amending the Counterclaim would not somehow expand the purview of the Unfair Trade Practices Act to apply to Respondent or its conduct. Furthermore, Appellant cannot conceivably identify a breach of a contract on the part of the Respondent, nor has Appellant been able to produce any evidence of the same. The circuit court properly found that there was no issue of material fact to support allegations of any *ultra*

[2] Indeed, *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019); *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227 (1962); *Dockside Ass'n, Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988); *Patton v. Miller*, 420 S.C. 471, 804 S.E.2d 252 (2017); and *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005) all analyzed cases where leave to amend had been sought and denied before the appellate level, distinguishable from the present case where Appellant now requests leave to amend in its Initial Brief.

vires acts of Respondent. Accordingly, it would be inappropriate and futile to allow Appellant to amend, and the circuit court's order should be affirmed.

III. The circuit court properly granted summary judgment as to Appellant's declaratory judgment counterclaim as Respondent irrefutably did *not* operate *ultra vires*.

The circuit court properly granted summary judgment as to Appellant's Declaratory Judgment counterclaim. "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). A trial court may grant summary judgment "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. Rule 56(c), SCRCP. "[A]n adverse party may not rest upon the mere allegations or denial of his pleading, but his response, by affidavit or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial…" Rule 56(e), SCRCP. Appellant alleges that Respondent is and "for quite some time has been operating in an *ultra vires* state" and that none of Respondent's actions during this "long time period" have been lawful or valid. (R. p. 56). However, these allegations are conclusively refuted by the record before this Court and applicable law.

All Appellant has provided to purportedly substantiate this claim are allegations that Respondent is operated unlawfully by persons "claiming to be its directors although the required quorum of [Respondent's] members to elect directors has not participated in a director's election," that the Board of Directors of Respondent "simply purports to appoint themselves as

the putative directors…" (R. p. 173 - 174). This is demonstrably meritless. Again, Respondent is a nonprofit corporation and therefore subject to the provisions of South Carolina's Nonprofit Corporation Act, S.C. Code § 33-31-101 et seq. Pursuant to the Act at S.C. Code § 33-31-803(a), a board of directors must consist of no less than three directors. Under S.C. Code § 33-31-805(d), despite the expiration of a director's term, the director continues to serve until the director's successor is elected, designated or appointed, and qualifies, or until there is a decrease in the number of directors. Therefore, being that a required quorum of Members to elect new directors has not attained throughout the relevant time period, as indicated by the affidavits of Director Ella Calvert's and property manager Kayla Stokes in addition to Appellant's own discovery response above, then the board of directors is merely complying with the Nonprofit Corporation Act in maintaining the current directors. (R. pp. 176, 178). Therefore, Respondent has not been operating *ultra vires* and likewise Appellant's allegation that Respondent's actions have therefore been illegal is meritless as a matter of law.

Appellant's argument that "a reasonable inference may be drawn that Ms. Calvert did not obtain her position on the board through any means authorized by law" is misguided and unsupported by any evidence before the court. Ms. Calvert's affidavit testimony is simply that since 2015, there has not been a quorum necessary for the members to elect new directors. (R. p. 176). Nothing in Respondent's discovery responses, despite Appellant's baseless allegations, refutes the fact that Ms. Calvert has permissibly remained on the Board since her time in 2015 due to the fact that a quorum has not been established. The discovery responses indeed show that Ms. Calvert was a director and officer of the association, specifically the treasurer, prior to 2015. Pursuant to Article VIII, Section 1(e) of the By-Laws of the Sterling Hills Homeowners' Association, Inc. (the "Bylaws"), the Board of Directors has the power to employ a Treasurer of

the Association or such other employees as they may deem necessary. (R. p. 176). Pursuant to Article IX, Section 1 of the Bylaws, "the offices of this Association shall be a President and Vice President, who shall at all times be Members of the Board of Directors, a Secretary and a Treasurer, and such other officers as the Board of Directors from time to time by resolution create." (R. p. 217). Furthermore, Article IX, Section 2 of the Bylaws provides that all officers shall be appointed by the Board of Directors. (R. p. 217). Then, in 2013, as the minutes produced in discovery reveal, Ms. Calvert did step down from Treasurer and the Board because she had been unable to attend meetings. This was in accordance with Article IX, Section 5 of the Bylaws concerning removal and resignation of Directors. (R. p. 218). As a natural consequence of Ms. Calvert's resignation, a vacancy was of course created on the Board of Directors. After no other would-be directors materialized, the remaining Directors eventually filled the vacancy by Ms. Calvert herself in 2015 in accordance with S.C. Code § 33-31-811(a)(2) and Article IX, Section 6 of the Bylaws, which both allow for the directors to appoint another director to fill a vacancy. It, of course, stands to reason that said appointment would be necessary in light of failure to reach a quorum for the Members to fill the vacancy.

Notwithstanding, even assuming *arguendo* there was a procedural deficiency in Ella Calvert's appointment to the Board or current position on the Board, this would not render any action at issue in this case *ultra vires*. Appellant has identified no act which, even if Ella Calvert's appointment was procedurally imperfect, would be outside of the powers of the Association. Notwithstanding the fact that Ms. Calvert is a procedurally proper director, the Board would still maintain the authority under Article VIII, Section 1 to exercise the powers vested in it by the Declaration and Bylaws, including but not limited to the enforcement of covenants and the levying of assessments, to include the levying of noncompliance assessments

for breaches of the covenants. (R. pp. 214 - 216). Even if the Board somehow acted *ultra vires* despite support from the Nonprofit Corporation Act and Bylaws to appoint Ms. Calvert to serve as a director, the mere act of appointing her would be *ultra vires*, not every act ever taken by the association. Nevertheless, as Appellant's brief notes, "[a] corporation may exercise only those powers granted to it by law, its charter or articles of incorporation and any bylaws made pursuant thereto," and Respondent here acted pursuant to powers granted to it both by law and its Bylaws. *See Fisher v. Shipyard Village Council of Co-Owners, Inc.*, 415 S.C. 256, 271, 781 S.E.2d 903, 911 (2016). Appellant has failed to identify or substantiate with evidence any specific procedural flaw in the makeup of the Board of Directors, but to the extent that any technicality exists which has yet to be identified, it is axiomatic that equity looks to "substance rather than form," which evolved out of judicial regard for that which out to be done. *See Regions Bank v. Wingard Prop., Inc.*, 394 S.C. 241, 253, 715 S.E.2d 348, 354 (Ct. App. 2011) (citing *Wilkie v. Phila. Life Ins. Co.*, 187 S.C. 382, 393-94, 197 S.E. 375, 380 (1938)). It would be an absurd result for a technicality which has not been described in any specificity by Appellant to render the acts of a nonprofit corporation with multiple board members who acted pursuant to their Bylaws *ultra vires*.

For these reasons, the circuit court correctly granted summary judgment against Appellant's counterclaim, and this Court should affirm.

CONCLUSION

For the reasons stated herein, this Court should affirm the rulings of the circuit court.

{*Signature page to follow*}

Respectfully Submitted,

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