THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master In Equity

Appellate Case No: 2012-213333

The St. Clements Homeowners Association,

Appellant,

v.

BE-MI, Inc.,

Respondent.

FINAL BRIEF OF RESPONDENT

RECEIVED
APR 12 2013
SC Court of Appeals

Fred B. Newby
S.C. Bar No. 4202
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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE MASTER CORRECTLY BALANCED THE EQUITIES AND PROPERLY FOUND THAT APPELLANT IS NOT ENTITLED TO AN INJUNCTION?
2. WHETHER THE MASTER PROPERLY FOUND THAT APPELLANT'S REQUEST FOR INJUNCTION IS BARRED BY *RES JUDICATA*?
3. WHETHER THE MASTER PROPERLY FOUND THAT APPELLANT'S REQUEST FOR INJUNCTION IS BARRED BY ESTOPPEL?
4. WHETHER THE MASTER PROPERLY FOUND THAT RESPONDENT HAS THE RIGHT TO RETAIN AND MAINTAIN THE DECK AS HAS BEEN PRESENT FOR 20 YEARS?

STATEMENT OF THE CASE

Appellant filed this action seeking an injunction to remove Respondent's pool bar side deck, which has been present for over 20 years at the St. Clements Horizontal Property Regime ("St. Clements"). Respondent answered denying Appellant's claims and asserting numerous affirmative defenses and counterclaims, including balancing of the equities, equitable estoppel, *res judicata*, and declaratory judgment. The case was referred to the Master In Equity and a trial was conducted on August 24 and 25, 2009. By Order dated December 20, 2010, the Master denied Appellant's request for injunction and ruled that the Respondent had the right to maintain the side deck in its current location. The Master denied Appellant's motion to alter or amend and this appeal follows.

FACTS

Respondent has owned and operated the pool bar at St. Clements since 1988. [R. p. 234, lines 11 through p.235, line 5]. In 1990, Appellant granted Respondent permission and authority to construct a side deck for the pool bar. [R. p.190, line 7 through p.192, line 17; p.197, line 24 through p.198, line 1; p.199, lines 10-25; p.239, line 1 through p. 240, line 8]. The pool bar and

its side deck have been in existence and used by Appellant's board members, owners, guests and renters since it was built over 20 years ago. [R. p.153, line 24 through p.154, line 23; p. 200, line 24 through p. 202, line 1; p. 240, lines 2-13; p.344, line 14 through p. 265, line 12].

St. Clements is an oceanfront condominium-hotel project in Myrtle Beach generally consisting of 64 residential units. [R. p. 442-443]. St. Clements also includes two commercial units, one of which is the pool bar which Respondent purchased in 1988. [Id., R. p.234, lines 11-25, p.235, lines 1-5].

Early in its existence, the St. Clements pool and pool bar areas were congested and required more seating for guests. [R. p.190, lines 7-22; R. p.237, line 15 through p.239, line 17]. The Appellant's President of the Board of Directors at that time, Marshall Melton, believed that adding a side deck to the pool bar would be a good idea, and therefore he, together with the Appellant's board of directors, approved the pool bar addition to be built on one and a half parking spaces and Mr. Melton communicated that approval to Respondent. [R. p.187, lines 20-25, p.188, lines 1-25; R. p.190, line 7 through p.192, line 17; R. p.197, line 24 through p.198, line 1; R. p.199, lines 10-25; R. p.239, line 1 through p. 240, line 8; R. p.242, lines 3-16]. Based on Appellant's express approval, Respondent spent approximately $11,000.00 of its own funds to build the deck, which was completed in 1990.[1] [R. p. 491-497; R. p.235 line 3 through p.236, line 25; R. p.239, line 20 through p.240, lines 1-10; R. p.242, lines 3-19]. At that time, Appellant's president assumed and intended that the side deck would be a permanent addition to Respondent's pool bar. [R. p.199 line 10 through p.200 line 16].

The pool bar serves food and beverages to St. Clements owners, guests and renters, as well as members of the public. [R. p.153 line 24 through p.154 line 23; R. p.200, line 24 through

[1] In fact, the side deck was constructed primarily by Dwight Cox, who was the developer of St. Clements and was also Appellant's president of the board of directors before Mr. Melton. Since then, Respondent has continued to expend sums of money for maintenance, etc. [R. p. 235, lines 16-20, R. p.236, lines 2-16, R. p.242, lines 3-16].

p.202, line 1: p.237, lines 6-7; R. p.260, lines 2-13; R. p.344, line 14 through p. 345, line 12]. Moreover, through the years various members of the Appellant's board of directors and past presidents have enjoyed frequenting the pool bar and side deck. [Id.]. The side deck also provides additional seating with a covered roof and awning and is the only location that provides shade and comfort to those enjoying the pool area of St. Clements. [R. p. 491-497; R. p. 534; R. p.236, lines 15-25, p.237, lines 1-25, p.238, lines 1-25, p.241, lines 16-21]. For over 20 years, the side deck has been a benefit to the Appellant's pool area and a substantial part of Respondent's business. [R. p.236, lines 15-25, p.237, lines 1-25, p.238, lines 1-25, p.239, lines 1-17, p.283, lines 22-25, p.284, lines 1-6].

In 1996, Appellant decided to enhance access to the beach at St. Clements by modifying and utilizing Respondent's side deck. At this time, the Appellant did not demand that Respondent remove the side deck, but instead modified a portion of the side deck's fencing, removed some nearby vegetation, and constructed an additional wooden deck adjoining Respondent's side deck. [R. p. 491-497; R. p. 535-540; R. p.246, line 20 through p.250, line 25; p.252, lines 20-25, p.253 lines 4-25, p. 254, lines 1-25, p.255, lines 1-3]. In fact, Appellant constructed its deck in a manner so that it now shares a portion of Respondent's side deck fencing. [Id.]. Further, importantly, Appellant painted yellow lines along the half parking space adjoining Respondent's side deck as well as the step-up to Appellant's deck, which has since been followed by pedestrians to access the beach. [Id., R. p.154, lines 24-25; R. p.75, lines 1-25, p.76, lines 1-11, p.96, lines 5-12]. Also at the same time, Respondent made improvements to the side deck including extending the awning, to which Appellant did not object. [R. p.250, lines 7-20; R. p.350, line 21 through p.351, line 11].

Since 1990, the pool bar and its side deck have been continuously used by Appellant's board members, owners, guests and renters. [R. p.153, lines 24-25, p.154, lines 1-23; R. p.200,

lines 24 through p.122, line 1; R. p.260, lines 2-13; R. p.344, line 14 through p.345, line 12]. Since 1996, Appellant has incorporated Respondent's side deck as a common and intended use of the one and a half parking spaces by constructing its adjoining deck and enhancing the beach access walkway. In 2003, Appellant sued Respondent alleging Respondent's use of the pool bar violated the Master Deed but did not specifically claim that the side deck violated the Master Deed[2], and Appellant's owners, guests and renters thereafter continued to use and enjoy the side deck. [Id., R. p.158, lines 21-25, p.159, lines 1-16, p.342, lines 6-19, p.347, lines 17-25, p.348, lines 1-25, p. 349, lines 1-25, p.350, lines 1-15]. Tellingly, Appellant's current Board President testified that the side deck was not specifically part of the 2003 lawsuit because "it may not have been that important". [R. p.313, lines 1-19]. Now, however, nearly 20 years after the Appellant's own president and board approved the side deck, and after continuous use of the deck, and after modifying the side deck and integrating the side deck for Appellant's own purposes and as a common use of the property, Appellant brings this action asserting that the side deck must be immediately removed because Appellant allegedly failed to properly authorize its initial construction over 20 years ago.

STANDARD OF REVIEW

An action to enforce restrictive covenants by injunction is an action in equity. *South Carolina Dep't of Natural Res. v. Town of McClellanville,* 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). On appeal from an equitable action, an appellate court may find facts in accordance with its own view of the evidence. *Townes Assoc. v. City of Greenville,* 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). While this standard permits a broad scope of review, an appellate court will not disregard the findings of the trial court, which saw and heard the witnesses and was in a

[2] C/A: 2003-CP-26-6560.

better position to evaluate their credibility. *Tiger, Inc. v. Fisher Agro, Inc.,* 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989).

ARGUMENTS

1. THE MASTER PROPERLY BALANCED THE EQUITIES AND CORRECTLY DETERMINED APPELLANT IS NOT ENTITLED TO AN INJUNCTION

Ironically, the Appellant seeks to now disallow what it expressly authorized over 20 years ago. The Appellant seeks to now prohibit a use that it and its owners have enjoyed for over 20 years. The Appellant seeks to now remove from existence what has existed for over 20 years and has been integrated in Appellant's own property improvements.

The remedy of an injunction is a drastic one and ought to be applied with caution. *Forest Land Co. v. Black,* 216 S.C. 255, 57 S.E.2d 420 (1950). The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction. *Calcutt v. Calcutt,* 282 S.C. 565, 320 S.E.2d 55 (Ct.App.1984). In *Archambault v. Sprouse,* the South Carolina Supreme Court stated:

> "If there has been unreasonable delay in asserting claims, or if, knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, but suffers his adversary to incur expenses or enter into obligations or otherwise change his position, or in any way by inaction lulls suspicion of his demands to the harm of the other, or if there has been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse her aid for the establishment of an admitted right, especially if an injunction is asked." (Emphasis added).
> 215 S.C. 336 (1949)

Appellant argues that Respondent's side deck violates the St. Clements' Master Deed and that Appellant is therefore entitled to an order enjoining the continued existence and use of the side deck. However, even if there is a violation, a court does not automatically issue an injunction once it finds a restrictive covenant has been violated as the court must balance the equities between the parties; and if the harm to the defendant outweighs the plaintiff's benefit, no

relief will be granted. *Cedar Cove Homeowners Ass'n, Inc. v. DiPiertro*, 368 S.C. 254 (2006); *See also, Sea Pines Plantation Co. v. Wells,* 294 S.C. 266, 274 (1987) ("A court does not automatically issue a mandatory injunction once it finds a restrictive covenant has been violated [as][t]he court must balance the equities between the parties...."); *Hunnicutt v. Rickenbacker,* 268 S.C. 511, 515, 234 S.E.2d 887, 889 (1977) ("[I]t is not every case of a structure erected in violation of a restriction which will call for [a mandatory injunction]."); *Rabon v. Mali,* 289 S.C. 37, 40, 344 S.E.2d 608, 610 (1986) (holding equity will refuse her aid when a party, knowing his rights, suffers his adversary to incur expenses, enter into obligations, or otherwise change his position before asserting a claim for enforcement, "especially if an injunction is [requested]"); *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime,* 307 S.C. 339, 344–45, 415 S.E.2d 384, 387–88 (1992) (holding a horizontal property regime waived its right to enforce a restrictive covenant by failing to bring a claim for enforcement against a known violation until after a substantial amount was spent on improvements).

In this matter, the Master properly denied Appellant's request for an injunction by balancing the equities and concluding the harm caused by an injunction to Respondent outweighs the Appellant's alleged benefit. As noted by the Master, Respondent has expended considerable sums of money to build, expand and maintain the side deck. These monies were spent in reliance upon the express permission of the Appellant. Moreover, not only did Appellant's own president give express authorization to construct the side deck, Appellant's former president and St. Clements developer initiated the idea and actually built the side deck for Respondent. The side deck has been a substantial part of Respondent's business for nearly 20 years.

Additionally, Respondent provides, and has provided for nearly 20 years, a benefit to Appellant and its members, guests and renters. The side deck eliminates congestion and is the only place in the pool area where individuals can escape the sun and seek shade, and the side

deck provides additional seating that is necessary for the volume of individuals enjoying the St. Clements pool area. Of course, Appellant's members, and even certain officers and members of Appellant's board of directors or their guests or renters, have visited and enjoyed the pool bar and side deck over the years.

Moreover, Appellant did not object to the side deck prior to or during its construction nor when it was expanded several years later. Instead, Appellant constructed its own deck which borders Respondent's side deck and shares the side deck's fencing. The Appellant also removed a portion of Respondent's side deck fencing so Appellant's deck would be easier to access. Finally, Appellant has used and continues to permit regular use of the half parking space adjoining Respondent's side deck for pedestrian access to its deck and to the beach, even designating that area and curb step-up with yellow paint.

Appellant claims it is harmed by the side deck because, nearly 20 years ago, it was not paid for the use of one and a half parking spaces. Moreover, Appellant claims it is harmed because it is not getting reimbursed for the taxes paid on the one and a half parking spaces. These assertions are purely speculative as there is no evidence of either monetary figure in the record. Moreover, Appellant's own actions clearly show that the monetary figures, to the extent they even exist, were either so inconsequential or so outweighed by the benefit of the side deck that there was no desire to address these concerns for nearly 20 years. Indeed, the Appellant originally approved the side deck because its own president believed it was a valuable addition to St. Clements and Appellant now uses the side deck as a compliment to its own pool area, beach access and deck.

Appellant also claims it is harmed by the side deck because it takes up one and a half parking spaces and because the City of Myrtle Beach could seek legal redress under the City's zoning parking space ordinance. However, the side deck has existed for over 20 years and there

is no evidence in the record of any adverse action, or even any articulated threat of adverse action, by the City for nearly two decades. The Appellant's argument in this regard is purely speculative. In fact, the evidence of record clearly shows that parking is rarely, if ever, a problem for the St. Clements owners, guests and tenants. To be sure, the evidence actually shows that over the years, numerous owners have parked (or stored) their personal vehicles in the St. Clements parking lot for years at a time and there was still one vehicle permanently parked at the time of trial. [R. p. 541-546; R. p.139 line 22 through p.144 line 6; R. p.198 line 20 through p.199 line5; R. p.212, line 17 through p.215 line 9; R. p.255, line 7 through p.263 line 9; R. p.264, line 12 through p.268 line7; R. p.341, line 5 through p.342, line 25]. Moreover, the passage of time and Appellant's own construction of the adjoining deck and enhanced beach access show the common and intended use of the one and a half parking spaces has evolved from parking to benefiting all parties with the side deck.

The Master properly balanced the equities and correctly determined that Appellant is not entitled to an injunction and therefore the Master's Order should be affirmed.

2. THE MASTER PROPERLY DETERMINED THAT APPELLANT'S CLAIMS ARE BARRED BY *RES JUDICATA*.

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of *res judicata*, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues **which might have been raised** in the former suit." *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (S.C. 2011) (emphasis added).

Appellant sued Respondent in 2003 for violating the terms of Master Deed. [R. p.159-160]. In fact, Appellant's President admitted at trial that the parties were the same and that the legal dispute involved Appellant's claim that Respondent use of his property violated the terms

of the Master Deed. The Master stated that she had the court file regarding the prior litigation and would review the documents therein. [R. p.403, lines 2-9]. Based on that review, the Master concluded that there was a final, valid judgment entered on the merits of the case as evidenced by the "Amended Order Granting Permanent Injunction." Moreover, the Master found that the parties actually litigated their rights under the Master Deed in that lawsuit.

A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records. *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (S.C.App.1984). It is not error for a judge to take judicial notice of what was stated in a former opinion in a prior action of the same case. *Montalbano v. Automobile Ins. Co.*, 218 S.C. 367, 62 S.E.2d 829 (1950).

Appellant argues that the record fails to contain sufficient information about the prior case. In this regard, Appellant has failed to provide the necessary evidence to support its arguments on appeal and has therefore failed to properly preserve this issue for appeal.

Based on the Master's Order, and the Master's review of the court records, files and proceedings, as well as facts established in the court records, the Master properly denied Appellant's request for an injunction based on *res judicata*.

3. THE MASTER PROPERLY DETERMINED THAT PLAINTIFF'S CLAIMS ARE BARRED BY ESTOPPEL

Estoppel arises when a party, relying upon what another has said or done, changes his position to his detriment. *Russell v. Drivers Leasing Services, Inc.*, 282 S.C. 358, 361, 318 S.E.2d 579, 581 (Ct.App.1984) Additionally, estoppel arises when a party observes another dealing with his property in a manner inconsistent with his rights and makes no objection while the other changes his position in reliance on the party's silence; the party's silence is

acquiescence that estops him from later seeking relief. *McClintic v. Davis,* 228 S.C. 378, 383, 90 S.E.2d 364, 366 (1955); *Seabrook Island Property Owners Association v. Pelzer,* 292 S.C. 343, 348, 356 S.E.2d 411, 414 (Ct.App.1987).

In this case, the evidence clearly shows that Respondent constructed the deck relying on the express permission granted by Appellant's president of the board of directors. Further, not only did Appellant grant express permission to Respondent to build the side deck, the Appellant did not object to the side deck during its construction. Moreover, since that time, the Appellant and its board members, owners, guests and renters have continuously used the side deck for over 20 years.

Appellant asserts estoppel is improper in light of the elements outlined in *Provident Life and Accident Ins. Co. v. Driver*, 317 S.C. 471, 451 S.E.2d 924 (Ct. App. 1994):

> Under South Carolina law, the essential elements of estoppel are divided between the estopped party and the party claiming estoppel. *Southern Dev. Land and Golf Co. v. South Carolina Pub. Serv. Auth,* 311 S.C. 29, 426 S.E.2d 748 (1993), *aff'g in part and rev'g in part* 305 S.C. 507, 409 S.E.2d 428 (Ct.App.1991). As to the estopped party, the essential elements are: (1) conduct amounting to a false representation or concealment of material facts, or conduct calculated to convey the impression that the facts are otherwise than, and inconsistent with, the party's subsequent assertions; (2) intention or expectation that such conduct be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. Id. As to the party claiming estoppel, the essential elements are: (1) lack of knowledge or the means of acquiring, with reasonable diligence, knowledge of the true facts; (2) reasonable reliance on the other party's conduct; and (3) a prejudicial change in position. Id. Unlike waiver, the estopped party need not intend to relinquish or change any existing right for estoppel to arise. *Janasik v. Fairway Oaks Villas,* 307 S.C. 339, 415 S.E.2d 384 (1992). The reliance by the party claiming estoppel must be reasonable, and it must proceed in good faith. *Southern Dev., supra; Masonic Temple, Inc. v. Ebert,* 199 S.C. 5, 18 S.E.2d 584 (1942)

Appellant does not contest that it meets all the elements of an estopped party. Instead, Appellant asserts estoppel is improper because Respondent knew or had the means of knowing the Master Deed required written board approval for alterations of the common areas and

prohibiting an alternate use of the parking lot. Appellant's argument missed the point. Respondent built the deck relying on Appellant's express authorization. However, no review of the Master Deed would have revealed to Respondent whether the board gave "written" approval for the side deck. Indeed, to the extent that written authorization was ever required, Appellant now improperly seeks to hold Respondent responsible for Appellant's 20 year old mistake.

Moreover, importantly, the common and intended use of the one and a half parking spaces has evolved. Appellant expressly authorized use of the spaces for the deck more than 20 years ago. Appellant's board members, owners, guests and renters have used the deck for over 20 years, and Appellant integrated the side deck in the construction of its own deck. Clearly, even by the Appellant's own actions, the common and intended use of this common property is, and has been for 20 years, related to the pool bar side deck.

Even if Appellant's argument in this regard has merit, which is denied, estoppel remains proper because Appellant affirmatively misled Respondent. As stated in *Binkley v. Rabon Creek Watershed Conservation Dist.*, 348 S.C. 58 (S.C.App. 2001):

> "Because of the doctrine of constructive notice, there is little duty, *outside the avoidance of affirmative misleading acts,* which is imposed upon the holder of an interest in property, where his or her interest in the land is disclosed by the public records." (emphasis in the original)(citing 28 Am.Jur.2d *Estoppel and Waiver* § 100, at 524 (2000). *Binkley*, 348 S.C. at 74.

Of course, Appellant's current argument is at best an admission that Appellant affirmatively misled Respondent by its own actions and words when it expressly authorized the construction of the side deck and failed to object during the construction of the side deck or during the extension of the side deck and continued to use the side deck for enjoyment and as a component of its own deck and beach access. The record plainly shows that Respondent had no reason to disbelieve Appellant's president, and there is absolutely no evidence suggesting that Respondent had a duty to scour the Master Deed before building the deck just in case Appellant

was misleading him and may change its mind and file suit nearly 20 years later. See, *Watkins v. Mobile Corp.*, 291 S.C. 352 (Ct. App. 1986)(holding that to establish apparent agency a party must prove that the purported principal by either affirmative conduct or conscious and voluntary inaction has represented another to be his agent or servant and reliance upon the representation and a change of position to his detriment in reliance on the representation).

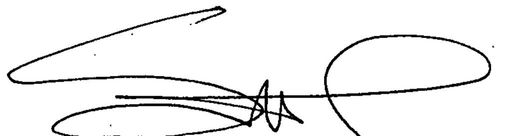
Based on the above, the Master's Order finding that estoppels bars Plaintiff's claims should be affirmed.

4. THE MASTER PROPERLY DETERMINED THAT RESPONDENT IS ENTITLED TO RETAIN AND MAINTAIN THE SIDE DECK AT ITS CURRENT LOCATION.

The Master's conclusion that Respondent is entitled to retain and maintain the side deck simply mirrors the finding that Appellant is not entitled to an injunction. Therefore, based on the facts and arguments above, the Master's Order in this regard should be affirmed.

CONCLUSION

For the above reasons, the Master properly found that Respondent has the right to retain and maintain the side deck with its existing improvements because Appellant is not entitled to an injunction under a balancing of the equities and because Appellant's request for an injunction is barred by *res judicata* and estoppel.



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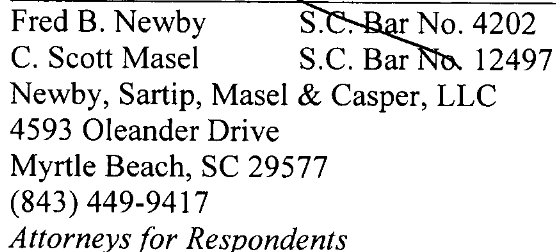
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR. The Undersigned further certifies that this Final Brief complies with the Supreme Court's Order of August 13, 2007 regarding personal identifiers and sensitive information.



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PROOF OF SERVICE

The undersigned hereby certifies that she is an employee of the law firm of Newby Sartip Masel & Casper, LLC, attorneys for the Respondent, BE-MI, Inc. in the within matter, and that a copy of the Final Brief of Respondent and Respondent's Designation of Matter was served upon counsel for the Appellant on April 11th, 2013 by depositing the copies in the United States

Mail, postage prepaid to the address below, as indicated on the attached copies of the letter to the same.

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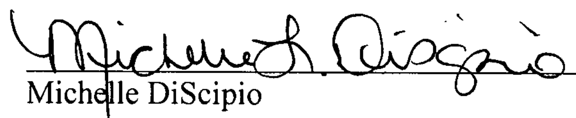

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