

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Master-in-Equity

Mikell R. Scarborough, Master-in-Equity

Case No. 2012- 213155

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COURT OF APPEALS

Rivers Point Row Horizontal Property Regime a/k/a/ Rivers Point Row Property Owners Association, Inc.,.....Respondents,

v.

Palms Properties, LLC,.....Defendant.

Palms Properties, LLC,.....Third-Party Plaintiff,

v.

Rivers Point Row, LLC, John Derbyshire, Linda Derbyshire, and John Hagerty,
.....Appellants.

FINAL BRIEF OF RESPONDENT

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S.C. R. Civ. P. 568

STATEMENT OF THE ISSUE ON APPEAL

1. Whether the Master-in-Equity's grant of Summary Judgment to Respondent Rivers Point Row Property Owners Association in a Declaratory Judgment action to invalidate a deed for sale of real property by Appellants to Defendant/Third-Party Plaintiff which was a part of the real property previously deeded to Respondents under a Master Deed that created a horizontal property regime is proper and appropriate as a matter of law.

STATEMENT OF THE CASE

Respondent Rivers Point Row Horizontal Property Regime a/k/a Rivers Point Row Property Owners Association ("POA") brought this Declaratory Judgment action by filing a Summons and Complaint on April 25, 2008, after discovering that a portion of the property that had been deeded to it previously by the Developer, Appellant Rivers Point Row, LLC ("Developer" or "Declarant") as the Declarant by recordation of a Master Deed creating a horizontal property regime for the entire development under the South Carolina Horizontal Property Act, S.C. Code Ann. § 27-31-10 et seq. (1976), had been sold and transferred by warranty deed in fee simple to Defendant Palms Properties, LLC ("Palms") by the same Appellants. (Summons and Complaint) (R. pp. 21-26). This transfer occurred as a result of a plat survey made and recorded after the Master Deed was filed, carving out a small parcel which was purchased from Developer by Palms. (Id.) (R. pp. 21-26). The sole issue presented to the court under S.C. Code Ann. § 15-53-30 (1976) of the Uniform Declaratory Judgments Act as enacted in South Carolina was to obtain judicial

determination of the validity of the filed deed evidencing the ownership transfer of this portion of the property to Palms from Developer. (Id.) (R. pp. 21-26).

An Answer to the Complaint was received from Palms by the POA on June 25, 2008, and through a Third-Party Complaint pled with the Answer, Developer was joined as a Third-Party Defendant with Palms raising various defenses and alleging cross-claims in the action as pled. (Answer and Third-Party Complaint) (R. pp. 27-38). The claims asserted against Developer by Palms as a result of the POA's action alleged breach of contract, breach of warranty deed/indemnity, fraud, negligent misrepresentation, and violation of the S. C. Unfair Trade Practices Act. (Id.) (R. pp. 27-38). The only remaining substantive defense raised by Palms against POA concerns the conduct of Developer, the third party defendant. (Second Amended Answer and Third-Party Complaint, Filed February 28, 2012) (R. p. 91). Palms subsequently amended their Answer and Third-Party Complaint to add as defendants the individual members of the Developer LLC on motion granted by the court. (Id., Motion to Amend) (R. pp. 86-109; R. pp. 60-62).

Developer submitted its First Answer to Palms' Third-Party Complaint on December 8, 2008, alleging various defenses and included a lone counterclaim against Palms and POA for attorney fees and costs of defending the action. (Answer to Third-Party Plaintiff's Complaint and Counterclaims) (R. pp. 39-47). Developer has filed additional Answers on two occasions, each in response to Palms filing of an Amended Answer and Third-Party Complaint upon granting of motion by the court. (Answer to Third-Party Plaintiff's Amended Complaint, filed March 28, 2011; Answer to Third-Party Plaintiff's Amended Third-Party Complaint, filed March 19, 2012) (R. pp. 110-118). Each Answer by Developer maintained a sole counterclaim for attorneys' fees and costs. (Id.)

(R. pp. 110-118). Reply was made by POA to counterclaim for attorneys' fees and costs made by Developer in its Answer(s), asserting as erroneous Developer's interpretation of the terms of the Master Deed regarding the basis of Developer's claim for fee reimbursement. (Reply by Plaintiff to Counterclaim of Rivers Point Row, LLC, filed December 31, 2008) (R. pp. 48-50).

Upon consent of all parties, judgment was filed on December 14, 2009 to have the case referred from the Charleston County Common Pleas docket to the Master-In-Equity pursuant to Rule 53, SCRPC. (Form 4, Judgment in a Civil Case) (R. p. 20). The case was scheduled for a settlement conference with the Honorable Mikell R. Scarborough on August 16, 2010 which resulted in issuance of a Scheduling Order for the case. (Masters Scheduling Order, filed August 18, 2010) (R. p. 3) The scheduling Order was subsequently amended by Judge Scarborough extending the deadlines by six months for certain case related activities. (Amended Scheduling Order, filed February 25, 2011) (R. p. 4).

Developer filed a motion for summary judgment in the case on January 18, 2011. (Notice of and Motion for Summary Judgment) (R. pp. 54-56). POA filed a motion for summary judgment on the sole issue of the validity of the deed for the property sold to Palms by Developer on May 1, 2012. (Notice of Motion and Motion for Summary Judgment) (R. pp. 119-122). POA also filed a Memorandum of Law in Support of its Motion for Summary Judgment which included a series of Exhibits for the court and the parties that contained copies of documents filed with the Charleston County Register of Mesne Conveyance (RMC) Office pertaining to public records regarding the real property at issue in this case. (Memorandum of Law in Support of Plaintiff's Motion for Summary

Judgment, with Exhibits A, B, C, D, E, F, and G) (R. pp. 134-310). A motions hearing was held with all parties before Judge Scarborough on June 1, 2012, and all parties presented their respective arguments in support of and opposition to the respective motions. (Court Hearing Transcript, June 1, 2012) (R. pp. 1289-1356). At the hearing counsel for POA was asked by Judge Scarborough to supplement the record with chronological unit sales dates to determine when seventy-five percent of the units were deeded from Developer to individual owners. (Court Hearing Transcript, June 1, 2012, page 42) (R. p. 1330, lines 4-8). Counsel prepared and submitted this information to the court on June 26, 2012 after completing deed research and compilation from public records filed in the Charleston County RMC Office. (Supplement to Plaintiff's Memorandum of Law in Support of Summary Judgment and Exhibit H) (R. pp. 313-1141). On September 17, 2012, Judge Scarborough issued Orders granting POA's motion and denying Developer's motion. (Order Granting Plaintiff's Motion for Summary Judgment; Order Denying Third-Party Defendant's Motion for Summary Judgment) (R. pp 5-19). A Notice of Appeal of the grant of Plaintiff's Motion for Summary Judgment was filed by Developer on October 11, 2012. (Notice of Appeal) (R pp. 1142-1151). This appeal contests the declaratory relief sought and granted to the POA by the Court as it is a final determination of the POA's sole issue in this case. (Order Granting Plaintiff's Motion for Summary Judgment) (R. pp. 5-11).

STATEMENT OF FACTS

The facts of this case originate with Developer's incorporation as a LLC in South Carolina on February 20, 2004 and subsequent purchase of an apartment complex in the Charleston area for purposes of a condominium conversion, soliciting deeded sales of all

the residential units to individual purchasers as part of a horizontal property regime. A Master Deed creating the POA as this entity under the South Carolina Horizontal Property Act, S. C. Code Ann. § 27-31-10 et seq. (1976) (the “Act”), was executed and filed by Developer as Declarant with the Charleston County RMC Office on May 4, 2004. (Master Deed and Exhibits) (R. pp. 151-212). One of the named individual defendants and Developer LLC member John Hagerty, a licensed South Carolina attorney, drafted the Master Deed as filed. (Id.) (R. p. 151). This apartment/condominium complex sat on a contiguous platted area of 8.49 acres of land as surveyed by E.M. Seabrook, Jr., Inc. dated July 3, 1996 and revised on March 18, 2004. (Master Deed, Exhibit “B” at page 25) (R. p. 178). The complex consisted of a total of 132 individual units in 17 buildings, along with a pool, tennis courts, and a clubhouse. (Master Deed and Exhibits) (R. pp. 151-212). No separately owned, deeded or subdivided parcel of property was included, however Developer did reserve a right to build a structure identified as “Building 2” as part of the development under the Master Deed. (Master Deed and Exhibits) (R. pp. 151-212). No specific building plans or location for the building were included with or noted in this document. (Id.) (R. pp. 151-212).

On January 26, 2005, Developer and Palms entered into an agreement to buy and sell real estate for a 0.38 acre vacant area located in the community which at that time was not identified on the plat or subdivided out of the original property development. (Plaintiff’s Memorandum of Law in Support of Summary Judgment and Exhibit “E”) (R. pp. 134-136, pp. 220-223). This was at a point in time subsequent to the entire parcel being deeded by the Developer to the POA as a horizontal property regime on recording of the Master Deed under the Act, and following the sale of more than three-quarters of the

units made available by and through the development to individual owners. (Master Deed and Exhibits, Supplement to Plaintiff's Memorandum of Law in Support of Summary Judgment, Exhibit "H") (R. pp. 151-212; R. pp. 313-1141). This transaction closed on May 12, 2005 and a deed was issued to Palms by Developer for this vacant area. (Plaintiff's Memorandum of Law in Support of Summary Judgment, Exhibit "B") (R. pp. 147-150). Just prior to the closing, on May 4, 2005, the 8.49 acre tract of the POA as deeded to it was resurveyed by E.M. Seabrook and a 0.38 acre parcel described therein as Tract B2 which is the subject of this action was subdivided out of the original 8.49 acre parcel, and this plat was recorded in the Charleston County RMC Office at Plat Book EH Page 904. (Id., Exhibit "E") (R. p 223). The deed for the Tract B2 evidencing fee simple transfer from Developer to Palms was subsequently filed with the RMC at Book X541 Page 464 on June 22, 2005. (Id., Exhibit "B") (R. pp. 147-150). By the date of closing of the transaction between Palms and Developer, all but six (6) of the one hundred thirty-two (132) units had been sold and transferred by deed to various individual owners under the regime, and indeed, by the time the deed for the subject transaction was recorded, only two (2) of the units were not yet transferred by recorded deed. (Supplement to Plaintiff's Memorandum of Law in Support of Summary Judgment, Exhibit "H") (R. pp. 313-1141).

Article IV, Section 4 of the Master Deed entitled "Selection of Board of Directors" states that "[p]rior to Loss of the Controlling Interest (as defined below), the Board of Directors shall consist of not less than three (3) nor more than five (5) individuals, as determined by the Declarant from time-to-time. (Master Deed) (R. p. 161) (emphasis added). "Loss of the Controlling Interest" is then defined in this same section as the happening of an event which "shall occur at the earlier of (i) the conveyance by Declarant

of ownership of three fourths (3/4) of all units, or (ii) the date on which the Declarant notifies the Unit Owners in writing that it is relinquishing Controlling Interest.” (Id.) (R. p. 161). In accordance with this definition and occurrence of the event as described in part (i), the Developer as Declarant automatically lost controlling interest in the Board of Directors of the POA on or about December 18, 2004, the date that three fourths (99 of the 132) units had been sold and transferred from the Developer to individual owners by fee simple deed recordation. (Supplement to Plaintiff’s Memorandum of Law in Support of Summary Judgment, Exhibit “H”) (R. pp. 313-1141). Since the happening of this event occurred prior to the closing of the sales transaction, deed recordation, and even prior to the initial contract for sale entered into between Developer and Palms, it was a basis for the Master’s decision to grant POA summary judgment declaring the deed transfer from Developer to Palms invalid as a matter of law. (Order Granting Plaintiff’s Motion for Summary Judgment) (R. pp 5-11).

The terms “Common Area” or Common Element” are defined by both the Master Deed of the POA and the Act, with the Master Deed defining these terms to mean “General common elements as defined in the Act and more specifically defined in Article III, Section 4 of this Master Deed.” (Master Deed, Article II at Section 1(g)) (R. p. 155). “It includes all of the Property and improvements thereon other than the units.” (Id.) (R. p. 155). The validity of the subsequent sale and deed transfer of a portion of this property by Developer to Palms which was previously deeded to the POA as part of the Common Area or Common Elements is the matter at issue between the parties.

ARGUMENT

1. **No right or authority existed for Developer to transfer by General Warranty Deed to a third party for value a portion of the Common Area or Common Elements of a real property development that Developer as Declarant previously deeded in its entirety to POA under a Master Deed creating a horizontal property regime, no genuine issues of material fact exist, and a grant of summary judgment declaring the deed transfer to be invalid as a matter of law is proper.**

“The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder.” George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2011). Rule 56(c) of the South Carolina Rules of Civil Procedure (SCRCP) provides that “a motion for summary judgment shall be granted 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 a judgment as a matter of law”. “Summary judgment is appropriate in those cases in which plain, palpable and undisputable facts exist on which reasonable minds cannot differ.” Thompkins v. Festival Centre Group I, 306 S.C. 193, 194, 410 S.E.2d 593, 594 (Ct. App. 1991). “It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine.” Id.

Horizontal property regimes are governed by the South Carolina Horizontal Property Act (the “Act”). S.C. Code Ann. §§ 27-31-10 et seq. (1976). The Master Deed of Rivers Point Row recorded on May 4, 2004 in Charleston County created this particular horizontal property regime and caused the entire property as described in Exhibit A of the Master Deed to be subject to the terms of the deed and statutes of the Act. Two amendments to the Master Deed were subsequently recorded, but neither changed or altered vestment of deeded ownership of any part of the property with regard

to the Plaintiff. (First and Second Deed Amendments) (R. pp. 214-219). Certain sections of the Act provide that once common elements are set aside and vested in the co-owners of property subject to a Master Deed, such co-owners may not be unilaterally deprived of their interests in the common elements by the actions of the developer. Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime, 329 S.C. 206, 211, 494 S.E.2d 465, 468 (Ct. App. 1997) (citing S.C. Code Ann. §§ 27-31-70, -130 (1991 & Supp. 2011); 4 S.C.Juris. Condominiums §18 (1991)).

The facts in *Reyhani* are similar to the facts of this case, where a deed in fee simple for part of a property subject to a Master Deed as a common element was transferred from a mortgagee (NCNB) to a third party purchaser for value (*Reyhani*) after the mortgagee's recovery of the property through foreclosure action against the original developer. On appeal the Master's ruling was reversed and the Court held that absent an agreement assented to by the condominium owners or an amendment to the Master Deed allowing transfer, no successors in interest could acquire the right to hold fee a simple deed to a part of the tract previously submitted by the deed as common elements and that the property be returned to the regime. Reyhani, 329 S.C. at 214, 494 S.E.2d at 469.

"The Act requires that the master deed include a comprehensive list of particulars, including a description of the full legal rights and obligations, both currently existing and which may occur, of the apartment owner, the co-owners, and the person establishing the regime." Queens Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 365, 628 S.E.2d 902, 915 (Ct. App. 2006) (citing S.C. Code Ann. § 27-31-100(f)). *See also* Heritage Fed. Sav. & Loan Assoc. v. Eagle Lake & Golf Condos., 318 S.C. 535, 541, 458 S.E.2d 561, 565 (Ct. App. 1995) ("S.C. Code Ann. § 27-31-100(f) permits a

developer to reserve certain rights provided he states those rights with specificity in the master deed.”) As part of the Master Deed, Developer as Declarant reserved only the right to build another building as part of the development at a point subsequent to recordation of the Master Deed. (Master Deed Exhibit H) (R. p. 212). The extent of the right reserved by Developer as Declarant in reference to future development was self-limited to “build Building 2 at a future date as follows: (i) containing a maximum of 8 Townhouse Units; (ii) to be built within three years from the recording of the Master Deed; (iii) making use of the existing Common Areas without substantial increase to the proportionate share amount of the Common Expenses payable by existing Unit Owners.” (Id.) (R. p. 212).

Developer as Declarant later recorded two amendments to the Master Deed, the first on May 24, 2004, and the second on June 22, 2005. (First and Second Master Deed Amendments) (R. pp. 214-219). The First Master Deed Amendment in this regard changed nothing more than the reference to the percentage interest in the Common Areas from Exhibit H of the Master Deed to Exhibit D by deleting Exhibit H in its entirety and replacing it with the language of the Amendment. (First Master Deed Amendment at 10) (R. p. 215). The Second Master Deed Amendment changed this preface wording for the parameters for the development to supposedly clarify Exhibit H (which was previously declared deleted in its entirety by the First Amendment) “by confirming that Declarant shall cause the building of Building 2 as follows:...” and without further changes to the parameters for constructing the building. (Second Master Deed Amendment at 2) (R. p. 218) (emphasis added).

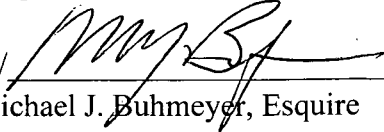
Neither the Master Deed or Amendments thereto as recorded provided for the subdivision and sale by fee simple deed transfer to a third party purchaser for value any portion of the property previously deeded to POA as common areas or elements. (Master Deed and Amendments) (R. pp. 151-219) Nor has Developer produced as evidence any agreement assented to by the co-owners of the property subject to this Master Deed and Amendments thereto giving their approval to the events which Developer put into motion and culminated in the sale by deed transfer of the property at issue to Palms subsequent to the threshold triggering event of sale of three fourths of the units as identified by the Master in the Order Granting Summary Judgment to POA, an event that occurred as defined in the Master Deed before the transaction at issue and resulted in Developer's loss of controlling interest in the regime.

CONCLUSION

For the reasons set forth above, the Court of Appeals should affirm the Order for Summary Judgment issued by The Honorable Mikell Scarborough, Charleston County Master-in-Equity, granting POA the relief requested, as there can be no genuine dispute of any material fact in this case which would support the validity of the subdivision, sale and transfer from Developer to Palms by General Warranty Deed of a portion of the common area/elements of the property previously transferred to POA under the Master Deed and Amendments thereto as recorded which established and control this horizontal property regime.

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Respectfully submitted,

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April 12, 2013

THE STATE OF SOUTH CAROLINA

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PROOF OF SERVICE


I hereby certify that I served the Final Brief of Respondent on Appellants Rivers Point Row, LLC, John Derbyshire, Linda Derbyshire, and John Hagerty; and Palms Properties, LLC, by depositing a copy of it in the United States Mail with sufficient postage prepaid, on April 12, 2013, addressed to the parties' respective attorneys of record:

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April 12, 2013

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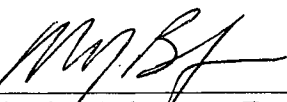
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Rivers Point Row, LLC, John Derbyshire, Linda Derbyshire, and John Hagerty,
.....Appellants.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

April 12, 2013

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