THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2011-CP-23-03200

---

100 Court Street Property Owners Association, Inc., Appellant,

v.

Court Street, LLC and Grace Community Church of South Carolina, Respondents.

FINAL BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. **DID THE TRIAL COURT ERR IN GRANTING RESPONDENTS' MOTION TO DISMISS BY NARROWLY CONSTRUING APPELLANT'S COMPLAINT?**

II. **DID THE TRIAL COURT ERR BY FAILING TO APPLY THE HORIZONTAL PROPERTY ACT, SC CODE ANN. § 27-31-10, *ET SEQ.* TO THE MASTER DEED?**

STATEMENT OF THE CASE

On May 11, 2011, Appellant, 100 Court Street Property Owners Association, Inc., ("Association") filed a complaint against the respondents, Court Street, LLC ("Developer") and Grace Community Church of South Carolina ("Church"), in the Circuit Court of Greenville County. On June 2, 2011, this complaint was amended to include five separate causes of action: Declaratory Judgment, Reformation of Master Deed, Collection, Unjust Enrichment, and Nuisance. (R. pp. 12-211) The Church and Developer filed separate motions to dismiss on August 25, 2011 and September 6, 2011 respectively.

On October 28, 2011, a hearing was conducted before the Honorable D. Garrison Hill regarding the two motions to dismiss. On November 23, 2011, the circuit issued an order dismissing the Plaintiff's causes of action for a Declaratory Judgment, Reformation of Master Deed, and Collection on the grounds Appellant's amended complaint paragraph eight states **"The Phase II space has been excluded from the Master Deed and the Regime[.]"** (R. pp. 2-9)(Emphasis in original) The order further denied punitive damages for the plaintiffs Unjust Enrichment and Nuisance causes of action. On December 14, 2011, the Association filed a motion to alter or amend the November 23rd Order, which was subsequently denied by the trial court on the same day as it was filed. (R. pp. 213-216; R. pp. 10-11)

STATEMENT OF FACTS

Defendant, Court Street LLC (the "Developer"), purchased a .82 acre parcel of property (the "Developer Property") located in Greenville County, on April 29, 1999 from Downtown Baptist Church ("DBC"). The property as a whole constitutes the historic original campus of the First Baptist Church of Greenville. The Developer Property and the Church Property constitute

portions of the same integrated structure that already is in existence. (R. pp. 42-25) The property is bounded by South Laurens Street, West Court Street, River Street, and property now or formerly owned by DBC (the "Church Property").

The Developer then developed the entire property, including the Church Property, into a horizontal property regime purportedly to be done in two phases. (R. p. 262) The developer initially remodeled the interior spaces of Phase I into a series of condominiums. The Phase I condominiums are now governed by Appellant 100 Court Street Property Owners' Association, Inc. The Master Deed reserved the right to develop the Phase II portion which consists of some of the interior space of the original church sanctuary, a kitchen, and several other smaller Sunday school rooms on two levels of the structure. (R. pp. 42-45) The Phase II property is exempt from any of the assessment obligations which burden Phase I portions until it is to be submitted to the regime. (R. pp. 262-263) A series of common walls separates one phase of the property from the other. (R. pp. 42-45) The Developer initially maintained ownership of Phase II while selling the newly renovated condominiums to the individual owners.

The Developer then leased the Phase II space to DBC for a term of 99 years, with an option to extend for an additional 20 years. (R. pp. 251-258) As part of this lease, the Developer gave DBC the right to use certain common elements located in the Developer property, including portions controlled by Appellant, under a Reciprocal Easement Agreement between Developer and DBC. (R. pp. 238-250) The Master Deed reserves the right to submit the Phase II Space to the Regime for the balance of the lease with DBC or until September 19, 2075. (R. p. 143, § F) Upon information and belief, for a significant period of time, Respondent Grace Church (the "Church") and not DBC occupied the Phase II space and the Church Property. Upon information

and belief on March 3, 2011, DBC merged into the Church. (R. p. 15, ¶ 19) Upon information and belief, on March 4, 2011, the Developer sold, transferred and conveyed the Phase II space to the Church. (R. p. 15, ¶ 20) The Church continues to use common elements of the Phase I space without paying any amount to common expenses. (R. p. 15, ¶¶ 22, 24) The Church is likewise not required to contribute toward the Appellant's payments for insurance that covers the entire property. (R. p. 15, ¶ 23)

STANDARD OF REVIEW

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). The trial court must base its ruling solely upon allegations set forth on the face of the Complaint. Doe v. Greenville County Sch. Dist., 375 S.C. 63, 66, 651 S.E.2d 305, 307 (2007); Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). A Court may also consider matters attached to or included by reference to the Complaint on a motion dismiss pursuant to a Rule 12(b)(6) motion without converting the motion into one for summary judgment. Brazell v. Windsor, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper. Id; Sloan Const. Co. v. Southco Grassing, Inc., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008).

"The question is whether, in the light most favorable to the plaintiff, and with every doubt

resolved in his behalf, the complaint states any valid claim for relief." Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). "The trial court and this [C]ourt on appeal must presume all well pled facts to be true." Morrow Crane Co. v. T.R. Tucker Constr. Co., 296 S.C. 427, 429, 373 S.E.2d 701, 702 (Ct. App. 1988). "[P]leadings in a case should be construed liberally so that substantial justice is done between the parties. Further, a judgment on the pleadings is considered to be a drastic procedure by our courts." Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). The court should not dismiss the complaint merely because there exists doubt that the plaintiff will prevail in the action. Marion, 373 S.C. at 395, 645 S.E.2d at 248. The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. Capital City Ins. Co. v. BP Staff, Inc. 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009); Ashley River Props. I, LLC v. Ashley River Props. II, LLC, 374 S.C. 271, 278, 648 S.E.2d 295, 298 (Ct.App.2007). Ultimately, a complaint should not be dismissed under Rule 12(b)(6) "unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief." Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir.1993); Stiles, supra.

A declaratory judgment action is neither legal nor equitable, but instead its character is determined by the nature of the underlying issue. Edwards v. State Law Enforcement Div., 395 S.C. 571, 575, 720 S.E.2d 462, 464 (2011); Felts v. Richland Cnty., 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). The interpretation of a master deed is an equitable matter. Wayburn v. Smith, 263 S.C. 518, 211 S.E.2d 560 (1975); Heritage Federal Sav. and Loan v. Eagle Lake and Golf Condominiums, 318 S.C. 535, 539, 458 S.E.2d 561, 564 (Ct.App.1995). "In an appeal from an action in equity, tried by a judge alone, this court may find facts in accordance with its own

view of the preponderance of the evidence." Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct. App. 2008).

ARGUMENT

I. TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS BY NARROWLY CONSTRUING APPELLANT'S COMPLAINT.

The trial court erred when it narrowly construed Appellants' Complaint by fixating on one phrase in one paragraph. The trial court held the sentence "The Phrase II space has been specifically excluded from the Master Deed and Regime[.]" in Paragraph 15 of the Amended Complaint was a conclusive admission. However, the Court failed to construe the entirety of that single paragraph and the rest of the Complaint. The entirety of Paragraph 15 reads as follows:

> The Phase II Space has been specifically excluded from the Master Deed and the Regime; however, the LLC, in the Master Deed, reserves the right to submit the Phase II Space to the Regime.

The trial court treated this declaration in the Master as dispositive of the issue of whether Phase II was subject to the Master Deed. Master deeds of condominium projects are subject to and must comply with the South Carolina Horizontal Property Act (HPA) to be valid. Heritage Federal, supra. The rest of the Complaint speaks of various legal theories by which the Phase II space was submitted to the Regime; and/or the Church is now a Unit Owner under the terms of the Master Deed as alleged in Paragraphs 8, 9, 20, 28, 29, 30, 32. Plaintiff asked for a declaration that the phrasing in the Master Deed which removed Phase II from the Regime violates various provisions of the Horizontal Property Act, and a reformation of the Master Deed to include the Phase II space into the regime. (R. p. 16, ¶¶ 26-27, 30-32) The trial court failed to consider Appellant's Amended Complaint properly stated a claim for relief when it asked the trial court to strike provisions of the Master Deed that violate the Horizontal Property Act. Therefore, the trial

erred when it very narrowly construed Appellant's Complaint.

II. THE TRIAL ERRED WHEN IT FAILED TO APPLY THE HORIZONTAL PROPERTY ACT TO MASTER DEED.

The trial court erred when it treated the mere fact the Master Deed exempted a portion of an existing structure by the Developer from the regime as dispositive. In South Carolina, an owner of a fee or leasehold interest in certain real property may declare the property to be subject to a horizontal property regime. S.C. Code Ann. § 27-31-30; Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp., 368 S.C. 342, 360, 628 S.E.2d 902, 912 (Ct. App.2006). Therefore, the Court erred when it failed to analyze whether the Master Deed violated the HPA, and this Court should remand this action for a trial on the merits of this contention.

A. Master Deed violates HPA by exempting Developer and Developer's reserved property from the regime.

The Master Deed violates the HPA when it exempted Phase II from the regime. A horizontal property regime is a creature of statute, and the statute must strictly complied with in order to create a horizontal property regime. Battery Homeowners Ass'n v. Lincoln Fin. Resources, Inc., 309 S.C. 247, 422 S.E.2d 93 (1992); Harrington v. Blackston, 319 S.C. 1, 459 S.E.2d. 309 (Ct. App. 2005), *opinion vacated*, 322 S.C. 470, 473 S.E.2d 47 (1996); 4 S.C. Juris. Condominiums § 5 (1991); Clampit v. Cambridge Phase II Corp., 884 S.W.2d 340 (Mo.App.E.D.1994); Suntide Condominium Ass'n, Inc. v. Div. of Florida Land Sales and Condominiums, 463 So.2d 314 (Fla.App. 1 Dist.1984); Prestwick Landowner's Ass'n v. Underhill, 429 N.E.2d 1191 (1980).

The mere declaration that certain real estate to be included in a condominium does not

make it so; this is especially true where there has not been strict compliance with the HPA. Battery, supra; Hall Manor Owner's Ass'n v. City of West Haven, 561 A.2d 1373 (1989); see also 15A Am.Jur.2d. Condominiums § 12 (1976). In Battery, homeowners bought their property subject to a Declaration of Covenants, Conditions and Restrictions; however, the Master Deed did not contain the words "Horizontal Property Regime" as required by the Horizontal Property Act. Our Supreme Court held the Act had not been complied with and a regime had not been created.

In the instant case, the reservation of the Phase II violates various portions of the HPA. S.C. Code Ann. § 27-31-20 provides in part:

> (a) "Apartment" means a part of the property intended for any type of independent use (whether it be for residential, recreational, storage, or business) including one or more rooms or enclosed spaces located on one or more floors (or parts thereof) in a building or if not in a building in a separately delineated place whether open or enclosed and whether for the storage of an automobile, moorage of a boat, or other lawful use, and with a direct exit to a public street or highway, or to a common area leading to such street or highway;
>
> (b) "Building" means an existing or proposed structure or structures, containing in the aggregate two or more apartments, comprising a part of the property;
>
> (k) "Property" means and includes (1) the land whether leasehold or in fee simple and whether or not submerged, (2) the building, all improvements, and structures on the land, in existence or to be constructed, and (3) all easements, rights, and appurtenances belonging thereto.
>
> S.C. Code Ann. § 27-31-100 provides in part:
>
> (g) In the event the owner of property submitting it for establishment of a horizontal property regime proposes to develop the property as a single regime but in two or more stages or proposes to annex additional property to the property described in the master deed, the master deed shall also contain a general description of the plan of development, including:
>
> > (1) The maximum number of units in each proposed stage of development;
> > (2) The dates by which the owner submitting such property to condominium ownership will elect whether or not he will proceed with

> each stage of development;
> (3) A general description of the nature and proposed use of any additional common elements which the owner submitting property to condominium ownership proposes to annex to the property described in the master deed, if such common elements might substantially increase the proportionate amount of the common expenses payable by existing unit owners;
> (4) A chart showing the percentage interest in the common elements of each original unit owner at each stage of development if the owner submitting property to condominium ownership elected to proceed with all stages of development.

S.C. Code Ann. § 27-31-110 provides in total:

> There must be attached to the master deed or lease, at the time it is filed for record, a map or plat showing the horizontal and vertical location of any building which is proposed or in existence and other improvements within the property boundary, which shall have the seal and signature of a registered land surveyor licensed to practice in this State. There must also be attached a plot plan of the completed or proposed construction showing the location of the building which is proposed or in existence and other improvements, and a set of floor plans of the building which must show graphically the dimensions, area, and location of each apartment therein and the dimension, area, and location of common elements affording access to each apartment. Other common elements, both limited and general, must be shown graphically insofar as possible and must be described in detail in words and figures. The building plans must be certified to by an engineer or architect authorized and licensed to practice his profession in this State.

As explained by this Court in Queen's Grant II, supra, "condominium is actually a vertical property regime composed of horizontal slices of airspace ... within the vertical column." Condominium statutes, like South Carolina's Horizontal Property Act, merely created a new way to own and regulate airspace; it does not create new property. Id.

Article IV of the Master Deed defined the boundaries of the "property" and "the land" of the regime to include the entire building which included the Phase II space. It is important to stress that Phase II was in existence at the same time as Phase I. Thus, the entirety of the property (including Phase II) was subjected to the requirements of the Master Deed since a regime merely creates "airspace" and not new property. Pursuant to the Act (and even this

Master Deed) there can be no excepted portion of the airspace within the vertical column of the regime.

A more logical reading of the HPA, and one rooted in equity and fairness pursuant to Queen's Grant II, indicates the attempt to reserve airspace within the vertical column should be held to be invalid. In Queen's Grant II, supra, this court set forth five conditions which must be met in order for a developer to reserve the right to amend or impose new restrictive covenants running with the land:

> (1) the right to amend the covenants or impose new covenants must be unambiguously set forth in the original declaration of covenants; (2) the developer, at the time of the amended or new covenants, must possess a sufficient property interest in the development; (3) the developer must strictly comply with the amendment procedure as set forth in the declaration of covenants; (4) the developer must provide notice of amended or new covenants in strict accordance with the declaration of covenants and as otherwise may be provided by law; and (5) the amended or new covenants must not be unreasonable, indefinite, or contravene public policy.

The Master Deed creates a unit within the defined common elements of the regime. The Master Deed, REA, and Lease provide the Developer and Church with full access and benefit of the common elements paid and kept up by Appellant for free. As will be discussed, *infra*, a developer cannot exempt themselves from the duty pay assessments or burden co-owners with an increase share of common expenses. Therefore, it is a violation of both HPA and equity to allow developers to characterize a unit as "future development" for the purpose of avoiding assessments. It is important to note Appellant was never allowed to do discovery regarding the *bona fides* of this Phase II arrangement.

B. Master Deed violates HPA by exempting Developer and Developer's

reserved property from assessments.

A developer, such as Respondent, may not exempt themselves under the Master Deed from paying assessments on unsold units. S.C. Code Ann. § 27-31-190 provides in full:

> The co-owners of the apartments are bound to contribute pro rata in the percentages computed according to Section 27-31-60 toward the expenses of administration and of maintenance and repair of the general common elements and, in the proper case, of the limited common elements of the property and toward any other expense lawfully agreed upon.
>
> No co-owner may exempt himself from contributing toward such expenses by waiver of the use or enjoyment of the common elements or by abandonment of the apartment belonging to him.

The HPA does not make a distinction in the nature of a co-owner between the original developer and a subsequent purchaser. While there is no South Carolina case on point, there is a significant amount of authority from other jurisdictions which state a developer cannot exempt themselves from assessments. The Third District Court of Appeal of Florida[1] in Century 21 Commodore Plaza, Inc v. Commodore Plaza at Century 21 Condominium Association, Inc, 340 So. 2d 945 (1976), reviewed documents and statutory provision very similar to those in our Act and determined that the contractual provision was in direct conflict with the statutory provisions and was therefore void. This decision was supported by later Florida cases reviewing, essentially, the same questions of Law and Statutory construction. *See generally* Margate Village Condominium Association, Inc. v Wilfred, Inc., 350 So. 2d 16, (1977); Dorset House Association, Inc. v Dorset, Inc., 371 So. 2d 5441 (1979); Brooks v. Palm Bay Towers Condominium Association, Inc., 375 So. 2D 348, (1979); Brickell Biscayne Corporation v. The Palace Condominium Association, 526 So. 2d 982 (1988). While the provision of the Florida

[1] This Court has previously acknowledged that Florida is the leader in condominium law, and the decisions of Florida courts are persuasive authority. Queen's Grant II, 368 S.C. at 362-363, 628 S.E.2d at 913 – 914, fn. 12.

Condominium Statutes has since been amended, of note is that the language being reviewed by the Courts in the cases above was similar to the language contained in our current Act as both appear to be based, in part, on a national Model Condominium Act created in the early 1960s.

Like Florida many other jurisdictions have reviewed this specific issue and have come to the same determination that a Developer is a Co-Owner and subject to assessments like all other Co-Owners despite any contractual provision to the contrary. The Kentucky Supreme Court reviewed a statutory provision nearly identical to the South Carolina provision in Plaza Condominium Association, Inc. v. Wellington Corporation, 920 S.W. 2d 52 (1996). Likewise, the following decisions from the following states are in accord with Florida and Kentucky: Maerker Point Villas Condominium Association, Inc v. Szymski and Parkway Bank Trust Company, 655 N.E.2d 1192 (1995)(Illinois); The Board of Mangers of Weathersfield Condominium v. Schaumburg Limited Partnership, 717 N.E.2d 429 (1999)(Illinois); Richard Gill Company and Bayhouse Limited v. Jackson's Landing Owners' Association, Inc., 758 S.W.2d 921 (1988)(Texas); Fairway Villas Venture v. Fairway Villas Condominium Association, 815 S.W. 2d 912 (1991)(Texas); Hatfield v. LaCharmant Home Owners' Association, 469 NE 2d 1218 (1984)(Indiana); Investors Limited of Sun Valley v. Sun Mountain Condominiums, 683 P.2d 891 (1984)(Idaho); Dunes South Homeowners Association, Inc. v. First Flight Builders, Inc., 459 S.E.2d 477 (1995)(North Carolina); Ocean Club Condominium Association, Inc. v. Albert N. Gardner, 723 A.2d 623 (1998)(New Jersey).

Developer has created apartments which enjoy the benefits of the regime without any of the obligations thereof. Developer did so as an attempt to avoid assessments on the existing Phase II space instead of a *bona fide* plan to create a future expansion.

C. Master Deed violates HPA because it prejudices the rights of unit

owners.

The provisions in the Master Deed that relate to the expansion of the regime to include Phase II also prejudices the rights of the co-owners in violation of the HPA. The Master Deed allowed the Developer to wait 70 years to add Phase II into the regime while the Developer granted the occupants of the Phase II space an unfettered right to use the space and common areas without compensating the Appellant. The reservation of a right to include an expansion may not prejudice the rights of a unit owner by increasing his "share of the common expenses nor increase the purchase price of the Apartment unit." Heritage Federal, 318 S.C. at 541, 458 S.E.2d at 565. This burden now lasts effectively forever because the Developer did not submit Phase II into the regime prior to the sale. Furthermore, once common elements are set aside and vested in the co-owners, such co-owners may not be unilaterally deprived of their interests in the common elements by the actions of the developer. S.C. Code Ann. §§ 27-31-70, -130; 4 S.C. Juris. Condominiums § 18 (1991); Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime, 329 S.C. 206, 211, 494 S.E.2d 465, 468 (Ct. App. 1997).

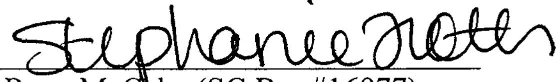
This Court should find the Master Deed in the instant case contravenes the clear policy of this State because it is unreasonable and indefinite. In particular, it imposes upon Phase I to maintain and support the activities on Phase II forever without Appellant having the ability to seek recompense for the same from the owner of Phase II.

CONCLUSION

For the reasons stated, this Court should reverse the order of the Circuit Court Judge and

reinstate Appellants' causes of action.

Respectfully submitted,



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Certificate of Counsel

The undersigned hereby certifies that Appellant's Final Brief complies with Rule 211(b).

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Judge

Case No. 2011-CP-23-3200

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100 Court Street Property Owners Association, Inc., Appellant,

v.

Court Street LLC and Grace Community Church of South Carolina, Respondents.

PROOF OF SERVICE

I, Stephanie C. Trotter, an attorney with the Law Firm of McCabe, Trotter & Beverly, P.C., attorneys for the Appellant, hereby certify that I have served a copy of the foregoing document(s) upon the below named individuals and/or counsel this the 12 day of April, 2013 via U.S. Mail, postage prepaid and addressed as follows:

DOCUMENT(S) SERVED:

Appellant's Final Brief
Appellant's Final Reply Brief

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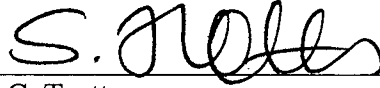

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