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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

CASE NO: 2019-CP-10-06058

Bay Light, LLC,……..……..……Respondent
v.
Westgate Office Park Landowners' Maintenance Association Inc…….Appellant

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APPELLANT'S INITIAL BRIEF

Filed& Served: January 19, 2022
DeficiencyCorrection: January 31, 2022

JANUARY 31, 2022

s/Erika V. Harrison
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STATEMENT OF THE ISSUES ON APPEAL

A. Although Respondent did not formally respond to the Motion, Summary Judgment should only begranted, if appropriate?

B. Based on the record before the Court, did the Trial Court error in finding Lot B-2 was not the sameproperty conveyed to L. Waring in 1966 and described in the Master Deed?

C. Did the Trial Court err in finding the First Amendment to the Master Deed was an invalidconveyance?

STATEMENT OF THE CASE

On August 3, 2018, Plaintiff, Bay Light, LLC received title to property described as "Lot B-2on a map entitled "Plat of Westgate Office Park Horizontal Regime, City of Charleston, Charleston County, SC" . . . recorded May 12, 1997 in the Charleston County RMC in Plat Book EB, at Page 810." (Bay Light LLC Title to Real Estate Book 0738 at Page 104). Over a year later, in November 2019, Plaintiff filed a Declaratory Judgment Action alleging Defendant did not have a right of ingress/egress or to park on the property: More particularly, the Plaintiff claimed:

(1) Lot B-2 was not one of the properties submitted to establish the Westgate Office ParkHorizontal Property Regime:

(2) the Master Deed did not describe Lot B-2;

(3) the Master Deed did not include a Plat depicting the Regime's property andboundaries;

(4) the re-recorded Master Deed's Plat depicting Lot B-2 was not a conveyance or expressgrant of an easement to the Defendant; and

(5) The First Amendment to the Master Deed was an invalid conveyance.(Plt. Complt.)

In January 2020, Arthur McFarland, one of the Westgate Regime's Developers and a Co-Owner in Defendant filed and served Defendant's Answer to the Complaint and reaffirmed it had avalid easement for ingress/egress and parking across Lot B-2. (Def. Answer). Thereafter, Plaintiffmoved for Summary Judgment admissions in Defendant's Answer. (Plts Mtn for Summary Judgment).A hearing on Plaintiff's motion was scheduled on June 15, 2020. In the interim, Defendant retained new counsel, the undersigned, who then requested a continuance. At the June 15, 2020 hearing, the Court continued the hearing and scheduled a status hearing for June 25, 2020.

At the status hearing, the Court decided to hear Plaintiff's oral argument for Summary Judgment. The Court permitted Defendant's counsel to file a memorandum opposing the motion, although the court advised it would grant the motion based on it review the file.

The time to file opposing papers expired. Thereafter, the Trial Court filed a Form 4 order granting Plaintiff's Summary Judgment Motion. (Form 4 Order _). Defendant timely filed a Motion to Reconsider, which the Court denied without a hearing. (Def. Mtn to Reconsider and Form 4 Order.

Shortly after, the Plaintiff filed a proposed written order for the Trial Court Judge to execute, which he signed and entered. (Order_). The Plaintiff filed its objection and comments to Plaintiff's proposed order. (Letter from Harrison to Trial Court). The Court entered a Form 4 Order vacating Summary Judgment. (Form 4 Order) The parties dispute the net effect the order. (Letter from Massalon to Judge Price). The Plaintiff resubmitted its original proposed written Order and Defendant submitted a proposed Written Order denying Summary Judgement.[1] (Letter from Harrison to Judge Price) The Trial Court signed and entered Plaintiff's original proposed Order granting Summary Judgment and Denying the Motion to Reconsider, without any changes or modifications.

The Defendant timely filed a Rule 59(e) Motion to Reconsider and Rule 60 Motion to Alter and Amend the Judgment, which the Court denied in December 2020. (Mtn to Reconsider; and Order)Defs Motion to Reconsider and Alter or Amend the Judgmen)**z**

[1] While the pending orders were under consideration the proposed orders, the Defendant, filed aMotion to Amend the Answer and Motion to Intervene on behalf the individual unit owners and developers

ARGUMENTS

I. STATEMENT OF THE FACTS

Appellant, Westgate Office Park Landowners Maintenance Association, Inc., a forfeited nonprofit, was originally created to formally organize the Council of Co-Owners created under the Master Deed for the Westgate Office Park Horizontal Property Regime dated, October 30, 1996 and recorded May 30, 1997 in book U284 at Page 117("Westgate Regime") . In 1997, Appellant forfeited its status as a nonprofit. A majority of the Defendant's former members still own units in the Westgate

Regime, thus, the Co-Owner's manage the Regime business, as an unincorporated association., TheDefendant's current and former Co-Owners, are:

(i) Fmr. City of Charleston Councilmember, Louis Waring, Sr. ("L. Waring"), Co-Owner. [2],[3]
(ii) City of Charleston Councilmember Perry K. Waring , Jr. ("K. Waring"),
(iii). Arthur C. McFarland, Esquire (McFarland')
(iv) Anthony B. O'Neil, Esquire ("O'Neil");
(v) Dr. Larry J. Ferguson and Mabel Ferguson, (the "Fergusons");
(vi). Dr. Sarbabi Masindet ("Masindet"), and
(vii) Ashley Hall LLC ("Ashley Hall LLC")

Additionally, the same individuals and entities are members of the Westgate Office Park Cluster Association, an unincorporated association, established under the Declaration of Protective Covenants restrictions and Conditions Westgate Office Park Landowners Maintenance Association, dated October 30,1996 and recorded on May 30, 1997 in Book V284 at Page 582.

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[2] L. Waring is P. Waring's father.

[3] L. Waring passed away at age 94 on April 16, 2020. Thus, his Co-ownership in the regime is now part of theCharleston County Probate Matter, Estate of L. Waring, filed in the Charleston County Probate Court, C/A No. 2020 ES 10-01191, and the Estate's Personal Representative is P. Waring.

(Dec. Protective Covenants Westgate V284 at Page 582)

The Appellant contends, L .Waring submitted as the Declarant, the property conveyed to him by Deed dated August 28, 1966 and recorded in Book P086 at Page 11 and the same property is depicted in Plat recorded in Plat Book V at Page 48. (Exh. A and Exh B_ This is the same property re-platted and identified as Lot B-2 in Plat Book BW at Page 45 in 1989. Further, it is the same Lot B-2 for the Property Line Adjustment was recorded in July 21, 1994 in Plat Book EA at Page 662 platand identified as Lot B-2. Finally, it is same Lot B-2 which L. Waring dedicated on a Plats and easements across Lot B-2 in favor of Lot B-1 and Lot B-3B which was recorded on May 12, 1997 in Plat Book EB at Page 810 ("1997 Plat"). The 1997 Plat was attached to the original Master Deed and the Re- Recorded Master Deed.

L. Waring owned for 30 year the Lot described as a Portion of Lot B between corners A-B-C-D-A. In 1996 he and his son started to develop the parcels. Lot B-2 remained undeveloped after itwas submitted to the Regime and in 1998, L. Waring conveyed his interest in Lot B-2, but it remainedwithin the Regime. In 2005, the Regime filed an Amendment and Recorded the Amendment to the Master Deed. The Amendment purposes was to a (1) consent to the removal of Lot B-2, (2) Grant easements and rights to the Owners of Lot B across the Regime (3) as the Defendants as the ownersof the undivided interest in the property Owners until "acquiescence" expressly granted an easementto the regime before Lot B-2 is removed.

Respondent, Bay Light, LLC, alleged in its Complaint Lot B-2 was not originally conveyed or submitted to create the Westgate Regime and moreover, the Co-owners have no rights across Lot B2for ingress/egress or Parking. Co-Owners

> ¶13. The Master Deed did not convey Lot B-2 to Defendant as part of the Regime.
> ¶14. The Master Deed did not convey to condominium owners in the Regime any rights of ingress/egress or easements on Lot B-2.
> ¶15. Defendant Does not own and has never owned Lot B-2 as part of the Regime nor does Defendant have any rights to use Lot B-2 for parking or ingress /egress.
> . . .
> ¶ 18. However, the re-recorded deed includes and Exhibit B that was not included in the original Master Deed.

¶19. Exhibit B. of the Master Deed does not contain a description or image of the real propertyand contains only an image of a compass arrow.

¶20. Exhibit B. of the rerecorded deed depicts the Regime and Lot B-2 in a manner indicating Lot B-2 contains easements for the use by the condominium owners in the Regime. These Easement are not included in the original Master Deed.

(Plt. Complaint ¶¶13-15,18-20.)

At the June 25, 2020 status update hearing, The Court proceeded to permit Respondent to argue its Motion. (See 6/15/2020 Transc Page 8: Line 1-2,

MR. MASSALON: . . .

This plat [Exhibit B Plat to Re-Recorded Master Deed] here [indicates] was not part of the originally recorded master deed. They re-recorded the master deed sometime after that and it included this plat that we're looking at here.(6/25/2020 Transc. Page 7 Line 2-5)

. . .

We are not aware of any other easement. There is no easement of record. There are no easements that I have seen recorded anywhere about this lot. Lot B-2 is part of Westgate. It never has been a part of Westgate. (6/25/2020 Transc. Page 7 Line 11-14)

The only thing in the public record is this one plat that is attached to the re-recorded master deed that refers to an easement. But as far as we can tell it does not exist. (6/25/2020Transc. Pag 7 Line 23 -25 Page 8 Line 1-2 Line 11-14)

. . .

We've got a plat that refers to an easement, no easement documents. The property that is supposedly burdened by it isn't part of this regime and never has been. (6/25/2020 Transc Page 9 Line 1-5)

II. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

A. *COURT MUST VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE NONMOVING PARTY.*

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. HK New Plan Exch. Prop. Owner I, LLC v. Coker, 375 S.C. 18, 22, 649 S.E.2d 181, 183 (Ct. App. 2007) citing (George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001))

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c): summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Id. ; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). The

appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non- moving party below. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001); accord Williams v.Chesterfield Lumber Co., 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976)' 129, 138, 542 S.E.2d 743, 747 (Ct. App. 2001); HK New Plan Exch. Prop. Owner I, LLC v. Coker, 375 S.C. 18, 22, 649 S.E.2d 181, 183 (Ct. App. 2007).

B. *SUMMARY JUDGMENT MUST BE APPROPRIATE EVEN IF THE MOTION IS NOT OPPOSED.*

When ruling on a summary judgment motion, a court "is obligated to search the record and independently determine whether or not a genuine issue of fact exists." Jiminez v. Dreis & Krump Mfg. Co., 736 F.2d 51, 53 (2d Cir. 1984). Furthermore, a court should not grant summary judgment "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." Phoenix Sav. & Loan, Inc. v. Aetna Casualty & Sur. Co., 381 F.2d 245, 249 (4th Cir. 1967); Campbell v. Hewitt, Coleman & Assocs., 21 F.3d 52 (4th Cir. 1992). The failure to respond is not in itself grounds for granting summary judgment. Hoff v. Davis, 2009 US Dist Lexis 132329. Although the failure of a party to respond to a summary motion may leave uncontroverted those facts established by the motion, the moving party must still show that the uncontroverted facts entitled the party to a "judgment as a matter of law. Id (quoting, Custer v. Pan American Life Ins. 12 F.3d 410, 416 (4th Cir. 1993) If the opposing party does not respond, summary judgment should, if appropriate, be entered against that party". Without regard to a party's failure to respond, this Court must determinewhether Summary Judgment is appropriate. Id.

III. THE TRIAL COURT'S FINDING LOT B-2 WAS NOT THE SAME PROPERTY CONVEYED TO L. WARING IN 1966 SUGGESTS THE COURT DID NOT VIEW THE RECORD IN THE LIGHT MOST FAVORABLE TO THE DEFENDANT.

The Trial Court found that neither the Master Deed nor the Re-recorded Master Deed constituted a conveyance of Lot B-2 to the Defendant. (Order_). Further, the Plot Plan attached tothe Master depicting easements across Lot B-2 did not operate to convey an interest in Lot B-2. (Order) Since the TMS No for Lot B -2 did not match any of the TMS No. for the properties described in the Master Deed the Court's written order uses this as evidence to support its conclusion the Regime's property did not include Lot B-2.

To adopt a finding based on matching TMS numbers, the Trial Court disregarded, the actuallanguage contained within the four corners, that is, the legal descriptions for properties, recorded plats, plot plans, survey notes, derivation clauses, and property record cards. A review of the recorded documents in this matter raises questions about Lot B-2 being the same property L. Waringwas conveyed in 1966 and submitted to the regime. Tupper v. Dorchester Cty., 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) (Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law . . . Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.) From the record before the Trial Court, there are numerous questions that are raised about Lot B-2 requiring further investigation and would result in leading to further investigation to ascertain more facts:

- Nothing in Plaintiff's evidence points to how it was conveyed Title or its legaldescription,
- Plaintiff"s property description for Lot B-1 refers to the "Plat Showing the PropertyLine Adjustment of Lot B-1 and B-2 in Plat Book EA Page 662 ; and Lot B-1 was conveyed to L. Waring and others.

- Thus, the court could infer that Lot B-1 was not the property conveyed toWaring in 1966.

- The Property Description for Lot B-3B references it was conveyed by L. Waring tohis son K. Waring. We can conclude this not the 1966 Lot.
- The Property Description for the property known as a. Portion of Lot B betweenpoint A-B-C-D-A was platted and conveyed to L. Waring in 1966. It notes a distance along Wallace Road at certain points. The description says 320ft from Ashley River Road along Wallace roa , and the Northwest property line runs approximately 196 feet.
    - The plot plan indicates the distance to Lot B-1 corner from Wallace Road isless than 320 feet.
    - The Plot Plan attached to the Master Deed indicates the NW line for Lot B-2 is 199 feet and that Lot B-2 sole owner is L. Waring.
- L. Waring owned the lot ending in TMS no. 039 for thirty years before submitting itto the regime;
- The Plat attached to the Master Deed does not reference any lot as having a TMSnumber ending in 099.

IV. INTERPRETING OR PARSING THE FIRST AMENDMENT TO THE MASTER DEED DOES DEMONSTRATE A GENUINE ISSUE OF FACT EXISTS.

> WHEREAS, by its Master Deed dated October 30, 1996, and recorded May 30, 1997, in the RMC Office for Charleston County in Book U284, at Page 117 and re-recorded in Book R287, at Page 175 (the "Master Deed"), Perry K. Waring, Louis L. Waring, Jr., Larry J. Ferguson, Mabel G. Ferguson, Anthony B. O'Neill and Arthur C. McFarland created and established Westgate Office Park Horizontal Property Regime; and
>
> WHEREAS, the aforesaid Master Deed provided that a parcel of land identified as a portion of Lot B with comers lettered A-B-C-D- A, as shown on a plat recorded in the RMC

> Office for Charleston County in Plat Book V, page 48, was to be included as regime property; and
>
> WHEREAS, the aforesaid parcel, reconfigured and currently designated as Lot B-2 a as shown on a plat recorded in the Charleston County RMC Office in Plat Book EB, page 810 was never to have been a part of the Westgate Office Park Horizontal Property Regime but was to be an out parcel adjacent to the Westgate Office Park Horizontal Property Regime; and
>
> WHEREAS, the owners of the condominium units within Westgate Office Park Horizontal Property Regime desire to correct the aforesaid error and set out the rights of the out parcel to use.

The court concluded the First Amendment was an invalid conveyance; however, A reading of the entire First Amendment and the Re-Recorded First Amendment should result in inferences and conclusion in favor of Defendant as the Deed is unambiguous. In construing a deed, "the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." Windham v. Riddle, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009) (quoting Wayburn v. Smith, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977)). "In determining thegrantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." Id. at 201, 672 S.E.2d at 583 (quoting Gardner v. Mozingo, 293 Sd.C. 23, 25, 358 S.E.2d 390, 391-92 (1987)). "The intention of the grantor must be found within thefour corners of the deed." Id. (quoting Gardner, 293 S.C. at 25, 358 S.E.2d at 392).

The remainder of the First Amendment, walks through the express easement granted (a) theCo-Owners consent to removing Lot B-2; (b) granting Lot B-2 owners an easement across the property; and (c) the Defendants granting an easement to the Regime because prior to its removal from the Regime each owner has an undivided interest in Lot B-2.

In fact, it clearly conflicts with Plaintiff's entire argument that Lot B-2 was never submittedbecause the document clear states it was submitted. The language in a deed is

ambiguous if it is reasonably susceptible to more than one interpretation." Penza, 404 S.C. at 204, 743 S.E.2d at 853 (quoting Proctor v. Steedley, 398 S.C. 561, 573 n.8, 730 S.E.2d 357, 363 n.8 (Ct. App. 2012)). In making this determination, the master must consider the language of the entire deed rather than the effect of an "isolated clause." Doyle, 381 S.C. at 242, 672 S.E.2d at 803. The master "is without authority to consider parties' secret intentions" and "words cannot be read into a [deed] to impart an intent unexpressed" when the deed was recorded. Id. at 241, 672 S.E.2d at 802. Therefore, "summaryjudgment is proper and a trial unnecessary whe[n] the intention of the parties as to the legal effect of the [deed] may be gathered from the four corners of the instrument itself." Coker, 375 S.C. at 23, 649S.E.2d at 184 (quoting First-Citizens Bank & Tr. Co. v. Conway Nat'l Bank, 282 S.C. 303, 305, 317 S.E.2d 776, 777 (Ct. App. 1984)). When the deed language contains ambiguities that require extrinsic evidence to determine the intentions of the parties, the inquiry becomes a question of fact and summary judgment must be denied. Edgewater on Broad Creek Owners Ass'n v. Ephesian Ventures, LLC, 430 S.C. 400, 406-07, 845 S.E.2d 211, 214 (Ct. App. 2020).

CONCLUSION

Respondent, Bay Light, LLC, alleged in its Complaint Lot B-2 was not originally conveyed or submitted to create the Westgate Regime and moreover, the Co-owners have no rights across Lot B2for ingress/egress or Parking. Co-Owners

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At the June 25, 2020 status update hearing, The Court proceeded to permit Respondent to argue its Motion. (See 6/15/2020 Transc Page 8: Line 1-2,

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> We've got a plat that refers to an easement, no easement documents. The property that is supposedly burdened by it isn't part of this regime and never has been. (6/25/2020 Transc Page 9 Line 1-5)

The Court originally granted Summary Judgment based on Plaintiff demonstrating that the Plat was not attached to the Master Deed. Upon Defendant refuting this claim in its Motion to Reconsider. The Trial Court"s written order found that since the TMS number for Lots in the regime do not match Lot B2's TMS No, Plaintiff's Property was never submitted to the Regime. Despite allevidence, conclusions and inferences contrary to its finding, the Trial Court fashioned a finding not based on legal description, metes and bounds, or plats but property identification numbers for tax purposes. At this point, it is difficult to determine if the Court has viewed the evidence in the light most favorable to the nonmoving party or if it has declined to review the evidence under the "if appropriate" framework. The Defendant respectfully requests this Court reverse the Trial Court's order granting Summary Judgment to Plaintiff