

STATE OF SOUTH CAROLINA
 COUNTY OF YORK
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2010CP4602326

Juontonio Pinckney Addie Smith	Josephine Sciacca James Barone	Brock L Frankhauser Stonecrest Villas of Tega Cay Home Owners Association Inc Al-Mega Construction Inc Southeastern Group Inc Jose Jimenez	Frankhauser Property Group Inc Exterior Expressions of North Carolina Inc Procar Inc Lucas Lawn And Landscape Inc
Deborah Barone Valerie Gonzales Sandra Moore	Ismael Gonzales Joe Moore		
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

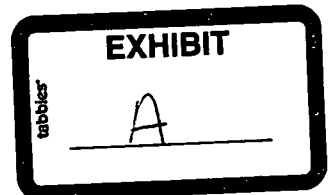
If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

S/John C. Hayes, JPP
 Circuit Court Judge
 CPFORM4M
 SCCA SCRPC Form 4C (Revised 10/2011)

2049
 Judge Code

8/27/2012
 Date



For Clerk of Court Office Use Only

This judgment was entered on August 27, 2012, and a copy mailed first class or placed in the appropriate attorney's box on August 27, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

*SEE ATTACHED CERTIFICATE OF SERVICE

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

Court Reporter

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STATE OF SOUTH CAROLINA
COUNTY OF YORK

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IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, S.C.

SCA. No.: 2010-CP-46-2326

Juontonio Pinckney, et al.,

Plaintiffs,

vs.

Brock L. Fankhauser, et al.,

Defendants.

ORDER

Re: Stonecrest Villas of Tega Cay
Condominium Owners' Motion for
Judgment on the Pleadings as to
Plaintiffs' Claim for Exterior Damages

Stonecrest Villas of Tega Cay Condominium Owners (COA) by this Motion asserts a standing issue as to Plaintiffs' claims for damages to the common elements of the Stonecrest Villas development.

Prior to the hearing the Court shared with the parties the attached order in the case of Pulliam v. M.U.I. Carolina Corporation. Counsel for the COA, while in no way bowing to the efficacy of the attached Order, recognizes the Court's prior disposition of this issue.

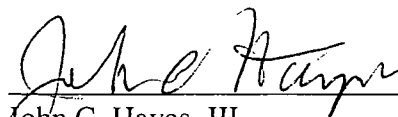
Realizing that foolish consistencies (without conceding that such are here created), are the hobgoblins of little minds the Court denies COA's motion for the reasons set forth in the Pulliam Order. The Pulliam Order, attached hereto, is incorporated by reference insofar as context permits.

To summarize, the Court recognizes a real problem with the dichotomy that seems to exist as to who may bring suit for damages regarding the common elements of condominium development and the right to recover damages for such damage.

Wherefore, the COA's motion is dismissed.

IT IS SO ORDERED.

August 6th, 2012
York, South Carolina



John C. Hayes, III
Presiding Judge

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
))
Brian and Deborah C. Pulliam,)
Monica Bradshaw, Helen K. Cook,)
Kala Craig, Victor E. Dirienzo,)
Cynthia Diturzi, J. Scott Drexel,)
Kathleen Kramer, Robert Loebe,)
Melanie McDaniel, Don and Debbie Neff,)
David Osborne, Celeste Arrowood,)
Vincent Dionna, Mikel Marcuse,)
James P. Wheaton, Jr., Joseph Manfredini,)
Elena Manfredini, David Cox,)
Jonathan B. Dillard, and Eric Wilson,)
and Marianna Junda,)
))
Plaintiffs,)
))
vs.)
))
M.U.I. Carolina Corporation, and)
Kensington Place Owners')
Association, Inc., and Regent Carolina)
Corporation,)
))
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

C.A. No.: 2008-CP-46-²¹⁵⁸~~2158~~

ORDER
"Catch 22"
Doc Daneeka¹

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DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

Catch-22, A situation in which a desired outcome is impossible because of inherently illogical rules or conditions. American Heritage College dic-tion-ar-y., 4thEd., 2002, page 227.

The Court heard arguments on several motions in this matter on March 24, 2011. No court reporter was present. Plaintiffs were represented by W. Jefferson Leath, Jr., Esq. and Michael S. Seekings, Esq.; MUI Corporation (MUI) and Regent Carolina Corporation (Regent) were represented by Robert T. Lyles, Jr., Esq. and Kensington Place Owners' Association, Inc. (KPOA) by Kenneth R. Raynor, Esq.

¹ Catch-22, Joseph Heller, Simon and Schuster (1961).



Back Ground

Briefly, Plaintiffs are owners of some of the condominiums in Kensington Place a Horizontal Property Regime (HPR). MUI is the developer of Kensington Place and Regent Carolina Corporation (Regent) is a subsidiary of MUI. MUI, as developer, established a property owners association (POA) and controlled same until it transferred the control of the POA to a Board comprised of the Kensington Place owners. The transfer established control and maintenance of the Kensington Place common elements in the Kensington Place POA (KPOA).

Plaintiffs claim that when MUI transferred control of the common areas to KPOA, these common areas were not in good condition, and MUI did not set aside enough funding to put the common areas in good, safe, usable order.

The Court will not elaborate on the struggle within KPOA as to the membership of the board and pursuit of claims regarding the common areas.

In an earlier Order, Judge S. Jackson Kimball, in addressing several motions, set forth this case's background succinctly, thusly²:

Plaintiffs brought this action against MUI and Kensington, asserting causes of action relating to the construction and maintenance of the condominium project in which each of them owns a unit. Kensington is made a party based on alleged breaches of duty owed by Kensington to Plaintiffs. The alleged breaches are premised upon the actions or inactions of the board of directors of Kensington, the homeowners association of the Horizontal Property Regime ("HPR"). Some of Plaintiffs are on the current board of Kensington.

² Defendant Regent Carolina Corporation was later added by amendment of the Complaint.

A handwritten signature in black ink, appearing to be 'AC' followed by a stylized flourish.

MUI's Motion for Summary Judgment

MUI argues it is entitled to summary judgment as to Plaintiffs' claims based on Plaintiffs' lack of standing to pursue same.

While the motions before Judge Kimball were motions to dismiss, he treated them as motions for summary judgment since the arguments and exhibits presented went beyond the pleading.

As to MUI's motion, Judge Kimball held:

It is clear that Plaintiffs may have the right to pursue their claims in their own right. Given the complexity of this litigation, I believe that the individual claims asserted by the Plaintiffs should be decided based on a full development of the facts as to each claim, and the defenses applicable to each claim, at trial. Therefore, the motion is denied.

The undersigned finds Judge Kimball's denial of summary judgment to MUI is the law of the case and may not be, in effect, reversed by the Court in ruling on MUI's instant motion.

The undersigned feels compelled to elaborate on MUI's motion as this is the eve of trial. As did Judge Kimball, MUI's motion for summary judgment is denied for the reasons set forth below in addition to Judge Kimball already denying MUI's previous motion for summary judgment. The status of Regent as a proper party is elsewhere discussed. For purposes of this Order, and this Order only, the Court treats Regent as amalgamated with MUI.

First, as observed, this is a complex case and a full record needs to be established.

Second, the undersigned finds the issue presented by MUI as to Plaintiffs' standing and their not being the real party in interest is a novel issue in South Carolina.

All parties rely on Concerned Dunes West Residents, Inc. v. Georgia Pacific Corporation, 349 S.C. 251, 562 S.E.2d 633 (Sup. Ct. 2002) to some extent. (Abbreviate CDWR herein). The

undersigned finds CDWR is dichotomous on the instant issue. In CDWR the Plaintiff was not the Dunes West POA³, but rather an incorporated group of Dunes West owners. The owner's posture in CDWR is analogous to that here.

The dichotomy occurs because throughout the Opinion the Court discussed the rights of property owners associations and nowhere addresses the rights of an individual owner, a group of owners, or a legal entity comprised of owners to bring a suit such as that here. The Court simply accepted the parties' posture as plead. That is, the property owners brought suit in their own right. No challenge to the institution of the suit by the owners is mentioned in CDWR.

It should be noted that CDWR is a case in which the Supreme Court answered certified questions from the United States District Court. None of the certified questions raised the standing or real party in interest issue and, therefore, the Supreme Court could not, or at least would not, address questions outside those certified. The Court confined its Opinion to examining three of the five questions certified from the District Court.

The Opinion does not address the CDWR Plaintiffs standing in the body of the Opinion.

The sole holding of CDWR is:

The developer of a PUD owes a duty to the POA to turn over common areas that are not substandard and that are in good repair. Failure to do so, subjects the developer to liability for bringing the common areas up to standard. (349 S.C. at 257).

CDWR does not address who may pursue the claim against the developer.⁴ In CDWR, it was not the POA, but rather a legal entity composed of individual owners that pursued the claim

³ Dunes West is a Planned Unit Development or PUD. Kensington Place is not a PUD, but the Court finds HPRs and PUDs are similar and the holding in CDWR applicable to a HPR.

⁴ There is no question, the POA could pursue the instant claim. See Queen's Grant Villas Horizontal Property Regimes I-V. vs. Daniel International Corp., 286 S.C. 555, 335 S.E.2d 365 (Sup. Ct. 1985).

against the developer. The Plaintiffs in CDWR do not differ significantly from Plaintiffs here other than CDWR's Plaintiffs' corporate formality.

Third, the By-Laws of KPOA (Exhibit "F" to the Master Deed of Kensington Place Horizontal Property Regime) have a section that establishes certain rights in individual members to sue the POA, its officers, or Board under certain circumstances (Article XV of By-Laws). This Article actually does not pertain to Plaintiffs' claims against the developer, MUI, but to claims against the KPOA, its officers or directors. Nothing has been cited to the Court that precludes any owner from seeking redress against the developer for a breach of its duties, as was done in CDWR. The By-Laws do not require owners to first request KPOA to act before proceeding on their own.

It seems fundamental that an individual may seek redress for any property rights they may have. That is not to say that these rights are exclusive to the individual owners. The duty owed by the developer is to the POA (*See* CDWR), and the POA could maintain the action. (*See Queen's Grand Villas Horizontal Property Regimes I-V. vs. Daniel International Corp.*, 286 S.C. 555, 335 S.E.2d 365 (Sup. Ct. 1985) and cases cited in CDWR from Florida and California).⁵

The Court should point out that the CDWR Court seems to confine the developer's liability to pay damages solely to the POA (349 S.C. at page 260). As observed by Judge Kimball, there may only be one recovery for damages pertaining to the common elements. CDWR, by implication, establishes the POA as the only entity entitled to recover damages, but the Court need not and indeed cannot make any findings or rulings as to the damages issue at this time. This will most probably require further development if Plaintiffs obtain a verdict. However, the Court would be derelict if it did not point out the CDWR language as to damages.

⁵ Counsel for MUI argues that the POA had the right, by statute and by-laws to represent all condominium owners. The Court cannot find this statutory authorize in Section 27-31-10, et seq., S.C. Code of Laws, 1976, as amended.

This is one of many points of contention. The Court observes that CDWR did not address who could pursue the claim against the developer as it did not have that issue before it. However, the Supreme Court seems to have established who is the beneficiary of any recovery. The Court uses the word “seems” advisedly. Here lies the catch 22. Plaintiffs can sue, but CDWR seems to vest the right of recovery in KPOA.

The issues here are not only complex, as observed by Judge Kimball, but novel. Novel issues should be decided with a full and complete record. Chastain v. Hiltabidle, 381 S.C. 508, 673 S.E.2d 826 (Ct. App. 2009). (See also KPOA’s Memorandum of March 22, 2011).

KPOA argues Plaintiffs cannot sue it because the Plaintiffs are in effect suing themselves. MUI adopts this argument also. There is a paucity of cases dealing with the relationship and rights of property owners relative to POAs.

In Murphy v. Yacht Cove Homeowners Assoc., 289 S.C. 327, 345 S.E.2d 709 (Sup. Ct. 1986), members of an unincorporated condominium association (husband and wife) sued the POA in tort. The Supreme Court held in Murphy that members of a condominium association could, pursuant to The Horizontal Property Act, sue the Association in contract or tort.

The Murphy Court held that the below language from Queen’s Grant Villas Horizontal Property Regimes I-V v. Daniel International Corporation, 286 S.C. 555, 335 S.E.2d 365 (sup. Ct. 1986), “implies that an association can be sued by the unit owners for its failure to discharge its duties,” 289 S.C. 368:

We have noted that [s]hould the Regime not uphold its duty to pursue a recovery for any alleged construction defects in the common elements which it maintains it may be liable to the homeowners for its omissions.
286 S.C. at 556.

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286 S.C. at 556.

The Supreme Court clairvoyantly foresaw the imbroglio extant here. The Murphy Court observed:

While the issues raised by appellant are a source of legitimate concern, it is the function of the Legislature and not this Court to anticipate problems such as the ones envisioned by appellant and enact legislation to deal with them. (289 S.C. at 369).

While the Horizontal Property Act has in part been amended since 1986, the Legislature has not addressed the problems foreseen by the Supreme Court in Murphy. (1999 Act. No. 25; 1999 Act No. 86; and 2006 Act No. 250).

MUI's Motion for Summary Judgment is DENIED.

Plaintiffs Motion for Partial Summary Judgment as to Liability Against POA

There exists genuine issues of material fact as to KPOA's liability, if any, and Plaintiffs are not entitled to judgment as a matter of law on this issue.

Plaintiffs have presented the affidavit of Michael R. Parades, PCAM, in support of their motion for partial summary judgment. This affidavit is insufficient to support Plaintiffs' motion. The affidavit relies on a survey of Gary Freeman, AIA, and Repair Estimates by Procon⁶. Such reliance is appropriate under SCREvid 703. However, a witness's reliance on the reports of others does not, per se, establish the correctness or general reliability of the reports. That is to say the expert, Mr. Parades, relies on the accuracy of third party reports. The reports are not presented as sworn affidavits nor have they been subject to scrutiny by cross-examination.

⁶ Plaintiffs' brief also references a Miller Dodson report which was not attached nor mentioned in Mr. Parades affidavit. Of course, a report is just that, nothing else.

Plaintiffs Motion to Substitute Real Party in Interest Defendants

MUI is, based on a corporate structure chart provided the Court⁷, a subsidiary of one or more other corporate entities. Plaintiffs have moved to add two legal entities they argue are so interrelated with MUI as to be necessary defendants. Plaintiffs argue these two entities are additional real parties in interest based on the theory of amalgamation pursuant to Kincaid v. The Landing Development, 289 SC 89, 344 S.E.2d 869 (Ct. App. 1986). Defendant Regent is one of many entities on the chart and, by earlier Order, has been added since Plaintiffs filed and served the original Complaint.

Plaintiffs' Motion is denied. Without giving the matter short shrift, the Court finds adding additional parties is not necessary for the resolution of Plaintiffs' claims, would delay trial scheduled within two months of this date, would prejudice the current parties as new claims or cross-claims may arise through the addition of parties, extensive and expensive discovery would have to be retreaded, and repairs would be pushed farther in the future, perhaps allowing more deterioration of the common elements and a greater cost to repair.

Plaintiffs' Motion to Dismiss Cross-Claim of KPOA

Plaintiffs argue that KPOA lacks standing to pursue the cross-claim. The basis for Plaintiffs' argument is that KPOA does not own the common elements or any part thereof, that KPOA has not obtained the necessary votes to pursue the cross-claim, and that Article XV, as noted above, gives the Plaintiffs the right to pursue this claim as do the laws of this State.

Donald Triplett, President of KPOA, has admitted, under oath, that KPOA has not been authorized to commence or prosecute any action against MUI. (Triplett's deposition, page 65,

⁷ Exhibit "C" to Plaintiffs' Memorandum in Support of their motion to add a statutory cause of action and to add a real party in interest.

line 12 through page 66, line 6).⁸ There is no evidence in any of the record before the Court that KPOA has properly voted to institute the cross-claim or ratified its institution. For this reason, KPOA may not maintain its cross-claim against MUI.

It might be argued that MUI would be the party to challenge the cross-claim⁹. However, Plaintiffs instituted this action and are entitled to have it litigated and resolved with only proper parties at the table. Also, as members of KPOA, Plaintiffs have a right to protect their interests as such and insist that KPOA function according to its by-laws.

The complexity of this case is highlighted by this instant motion. As noted, Judge Kimball, without additional comment, denied MUI's Motion to Dismiss KPOA's cross-claim. This is the law of the case as to MUI and KPOA. In spite of this, Plaintiffs have an independent right to move to dismiss the cross-claim as members of the POA. The Plaintiffs have exercised their independent rights and are entitled to the relief they seek, i.e., dismissal of the cross-claim. This creates a conundrum. KPOA's By-Laws do not address cross-claims in Article XI of the by-laws but does allow counterclaims in proceedings instituted against it. (Article XI(d)). The reason and wisdom in such distinction is not for the Court.

This conundrum is resolved by the undersigned finding (without any real authority to so do) that a subsequent, successful motion by Plaintiffs trumps the denial of MUI's motion by Judge Kimball and KPOA's cross-claim against MUI is dismissed.

As noted, Plaintiffs have a separate and distinct interest in the actions of KPOA. I find Plaintiffs' rights are direct, not tangential as MUI's are.

⁸ The deposition was taken November 11, 2009.

⁹ Judge Kimball has denied MUI's Motion to Dismiss KPOA's cross-claim.



**Plaintiffs Motion to add a cause of action pursuant to
Section 27-31-430, S.C. Code of Laws, as amended**

Section 27-31-430, South Carolina Code of Laws, 1976, as amended, relates to the conversion of rental units to condominium ownership. This Section requires certain disclosures to be reported to a purchaser. Plaintiffs assert that some Kensington units were rental units prior to their sale as condominium units.

The Plaintiffs' motion to add this cause of action is denied. There is no evidence any of the Plaintiffs purchased any rental unit. The nature of the rental of any units is unclear. Any cause of action under The Unfair Trade Practices Act under Section 27-31-140 would inure only to the purchaser of a particular unit which was a "rental unit."

Also, for the reason set forth as to Plaintiffs' Motion to Substitute Real Party in Interest, addition of a new cause of action would work to the prejudice of Defendants. Specifically, the trial of this case would necessarily be pushed into the future.

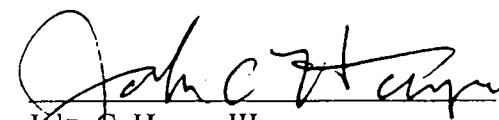
Plaintiffs' motion to add a cause of action pursuant to Section 27-31-430, S.C. Code of Laws, 1976, as amended is denied.

Wherefore:

1. MUI's Motion for Summary Judgment is DENIED, and
2. Plaintiffs Motion for Partial Summary Judgment as to Liability Against KPOA is DENIED, and
3. Plaintiffs' Motion to Substitute Real Party Interest is DENIED, and
4. Plaintiffs' Motion to Dismiss Cross-Claim of KPOA is GRANTED, and
5. Plaintiffs' Motion to Add a Cause of Action (§ 27-31-430) is DENIED.

Je H HCO

IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge #100

April 1, 2011
York, South Carolina

ADDENDUM ATTACHED

ADDENDUM

The court has gone through the morass of paperwork in this file in order to determine which pleadings are the operative pleadings and what issues are for trial. The Court begs correction, promptly, if the Court's grasp of the posture of this case as set forth below, is incorrect in any manner.

Fifth Amended Complaint

1. Defendants:

- A. MUI
- B. KPOA
- C. Regent

2. Causes of Action

- A. First; Breach of Fiduciary Duty as to all Defendants.
- B. Second; Breach of Implied Warranty of Habitability as to MUI and Regent.
- C. Third; Negligence as to all Defendants

Answers

1. Regent and MUI

- A. Qualified General Denial
- B. 12(b)(6) (handled through summary judgment motions)
- C. Statute of Limitations
- D. Statute of Repose
- E. Laches
- F. Waiver
- G. Accord and Satisfaction
- H. Settlement and Release
- I. Lack of Standing (ruled on)
- J. Set Off
- K. Conditions Precedent
- L. Joinder (out?)
- M. Real party in Interest (ruled on)
- N. Implied Warranties Disclaimed
- O. Failure to Mitigate
- P. Intervening and Superseding Negligence
- Q. Comparative Negligence

Je H H H

- R. Negligence of Third Party
(unnecessary as raised by qualified General Denial);
See Funderburke v. Johnson
253 S.C. 430, 171 S.E.2d 597 (1969)
- S. Acceptance
- T. Economic Loss Rule
- U. Open and Obvious
- V. Counterclaim (MUI Only)

2. Plaintiffs' Reply to MUI's Counterclaim

3. KPOA

- A. Qualified General Denial
- B. Standing (ruled on)
- C. Failure to comply with Rule 23 SCRPC (out)
- D. Counterclaim
 - 1. Breach of Contract by Plaintiffs
- E. Cross-claim against MUI and Regent (ruled on)

4. Plaintiffs Reply To KOPA's Counterclaim

5. Pending Motions

- 1. To exclude Evidence
- 2. To Quash Subpoena

Jc 74 #13