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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Common Pleas

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No.: 2022-000031

Royal Garden Resort Regime Homeowners Association, Inc. .....Respondent

v.

Sea Breeze Property Management & Contract Services, Inc.; Calvin Donaldson; and Phoenix of the Strand, Inc. ..... Appellants,

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Initial Brief of Appellants

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STATEMENT OF THE ISSUES ON APPEAL

I. **WHETHER THE CIRCUIT COURT MAY ENTER A MANDATORY INJUNCTION AGAINST APPELLANTS WHEN RESPONDENT HAS FAILED TO SATISFY THE STANDARD FOR SUCH RELIEF, AS IS ESTABLISHED BY RULE 65 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE AND SOUTH CAROLINA COMMON LAW.**

STATEMENT OF THE CASE

The lawsuit underlying this appeal primarily concerns disputes over management of the Royal Garden Resort, which is located at 1210 N. Waccamaw Drive, Murrells Inlet, South Carolina 29576, and ownership of various units and elements therein. The Respondent in this case, Royal Garden Resort Regime Homeowners Association, Inc. ("HOA"), is the homeowners association for the Royal Garden Resort. Appellant Phoenix of the Strand, Inc. ("Phoenix") is the owner of various units and common elements within the Royal Garden Resort. Appellant Sea Breeze Property Management & Contract Services, Inc. ("Sea Breeze") was the property manager hired by Respondent HOA to manage the Royal Garden Resort property for more than twenty (20) years until on or around December 31, 2018. (Third Am. Compl., p. 4, para. 14, 10/25/2018 Aff. of Parrish, p. 1, para. 3, Exhibit 1 to Affidavit of Judy Parrish). Appellant Calvin Donaldson is the president of both Appellant Phoenix and Appellant Sea Breeze. (04/27/2021 Aff. of Donaldson, p. 1, para. 1).

On June 12, 1984, Royal Garden Resort, Inc. created the Royal Garden Horizontal Property Regime (the "Regime") by virtue of a Master Deed, which was recorded in the Horry County Register of Deeds on June 13, 1984, in Deed Book 875 at page 638 (hereinafter, the "Master Deed"). (05/04/2019 Jeffcoat Aff., p. 2, para. 5). The Regime consists of three (3) commercial condominium units and 206 residential units in fifteen (15) floors, as well as general common

elements and limited common elements assigned to specific condominium units. (Id. at p. 2, para. 6).

Of the three (3) commercial units within the Regime, Commercial Unit One (1) and Commercial Unit Two (2) are located on the second floor, and Commercial Unit Three (3) is on the ground floor. (Id. at pp. 2-3, para. 7). Commercial Unit One (1) includes the lobby, front desk, and offices adjacent to the lobby. (Id. at p. 3, para. 7(a)). Commercial Unit Two (2) consists of the area delineated as such on the Regime Plans and includes the kitchen, dining area, lounge, and restrooms of the Regime. (Id. at p. 3, para. 7(b)). Commercial Unit Two (2) also exclusively includes the following limited common elements of the Regime: the trash chutes and storage rooms (supply closets) on every floor of the building, and eight (8) "honeycombs"[1] on the ground floor of the building. (Id.). Commercial Unit Three (3) consists of the area delineated as such on the Regime Plans and includes the area on the ground floor described as "Comm. III" on the Regime Plans. (Id. at p. 3, para. 7(c)).

Since 1990, Appellant Phoenix has owned Commercial Unit Two (2) and Commercial Unit Three (3) within the Regime. (Ans. to Third Am. Compl., p. 5, paras. 36-38, 11/08/2019 Order, pp. 1, 6). Although Respondent HOA challenged Appellant Phoenix's ownership of Commercial Unit Two (2), by Order entered on November 8, 2019, the Circuit Court held Appellant Phoenix is and has been the record fee simple owner of Commercial Unit Two (2) since 1990. (11/08/2019 Order, pp. 1, 6). As stated above, Commercial Unit Two (2) is comprised of various common elements of the Regime, including the storage rooms/supply closets on every floor of the building (which are the units contemplated by the parties' Storage Facility Agreement discussed below)

[1] The Regime Plans indicate the eight (8) "honeycombs" that are a part of Commercial Unit Two (2) are as follows: three (3) honeycombs are walk-throughs or hallways, one (1) of the honeycombs is Commercial Unit Three (3), and the remaining four (4) honeycombs are general common areas. (Id. at pp. 3-4, para. 7(d)).

and eight "honeycombs" on the ground floor of the building, which include Commercial Unit Three (3). (05/04/2019 Jeffcoat Aff., p. 3, para. 7(b)).

Respondent HOA owns Commercial Unit One (1). (Ans. to Third Am. Compl., p. 5, para. 39). However, Respondent HOA began leasing Commercial Unit One (1) to Appellant Sea Breeze in 1989 and has extended the term of such lease through 2046. (See 04/29/1989 Am. to Lease Ag., 10/03/2003 Am. to Lease Ag., 04/14/2010 Am. to Lease Ag.). Therefore, Appellants either own or control all three commercial units within the Regime.

In or around 2012, Respondent HOA sought to lease Appellant Phoenix's storage units, which are a part of Commercial Unit Two (2), for the purpose of placing Time Warner Cable switch boxes therein. (See 02/01/2012 Storage Facility Ag., 05/04/2019 Jeffcoat Aff., p. 6, para. 10(f)). Therefore, on February 1, 2012, Respondent HOA entered into a Storage Facility Agreement with Appellant Phoenix, wherein Appellant Phoenix agreed to lease to Respondent HOA fifteen (15) storage units on each walkway in the building in exchange for Respondent HOA's payment to Appellant Phoenix of $255.00 per month. (See 02/01/2012 Storage Facility Ag.). The Storage Facility Agreement has not been terminated to-date. (See Id.).

Respondent HOA filed this lawsuit on October 25, 2018.[2] Respondent's Third Amended Complaint generally asserts claims seeking: (1) a declaratory judgment determining ownership of various units and common areas within the Regime, (2) damages concerning Appellant Sea Breeze's management of the Regime property and collection of HOA dues; and (3) injunctive relief, including, but not limited to enjoining Appellants from interrupting any telecommunications, cable television, or internet services at the Regime. (See Third Am. Compl.). The Third Amended Complaint does not include a cause of action to rescind or otherwise terminate

[2] Respondent HOA has amended its complaint in this lawsuit three times.

the Storage Facility Agreement. (Id.). The Third Amended Complaint also does not seek a declaratory judgment concerning ownership or right to access or use the storage units contemplated by the Storage Facility Agreement. (Id.).

On February 1, 2019, Respondent HOA's Board sent Appellant Phoenix written notice that it would no longer be paying rent for use of the storage units at issue in the Storage Facility Agreement. (See 02/01/2019 Letter Re: Storage Facility Ag.). The cable television equipment for the Resort is stored within these storage units and remains undisturbed in such units to-date. However, as a result of Respondent HOA's failure to pay rent pursuant to the terms of the parties' Storage Facility Agreement, Appellant Phoenix has not allowed to Respondent HOA to access the storage units at issue.

On April 28, 2021, Respondent HOA filed a motion entitled "Motion to Allow Entry." (See 04/28/2021 Motion to Allow Entry). Respondent HOA's Motion to Allow Entry seeks "an Order of the Court barring [Appellants] from charging Plaintiff to use the access and/or supply closets for cabling and other telephone equipment necessary to provide cable tv services to the entire Resort." (Id. at p. 2). Although it is not labeled as such, the relief Respondent HOA's Motion to Allow Entry requests is that of a mandatory injunction. (Id. at pp. 1-2). Respondent HOA did not include in its Motion support for any of the three elements required by courts in order to grant injunctive relief.[3] (Id. at pp. 1-2).

Respondent HOA's Motion to Allow Entry was before the Circuit Court for hearing on August 4, 2021. (See Hearing Transcript, p. 1). Present at the August 4, 2021 hearing were Kirby D. Shealy, III and Gene M. Connell, Jr., attorneys for Respondent HOA, and Douglas M. Zayicek, attorney for Appellants. (Id.). At the hearing, counsel for Respondent HOA argued it should be

[3] See infra pp. 12-16.

allowed to enter and access Appellant Phoenix's storage closets because the HOA has decided it wants to switch cable television providers from Spectrum to Horry Telephone Cooperative ("HTC"). (Id. at pp. 19-23). In other words, Respondent HOA sought an order requiring Appellant Phoenix to allow Respondent HOA and HTC to enter the storage closets, to rip out and install a new cable television system without having to comply with the parties' Storage Facility Agreement (i.e., without paying Appellant Phoenix rent pursuant to the contract's terms). (Id.).

During the hearing, counsel for Respondent HOA did not present any evidence or set any forth arguments as to the necessity of changing cable television providers or having the work done by HTC. (Id.). Respondent HOA also did not present evidence demonstrating it would be harmed if it were not allowed access to the storage units. (Id.). In fact, Respondent HOA did not set forth any arguments whatsoever in support of the necessary elements for a grant of injunctive relief (i.e., Respondent HOA did not even attempt to demonstrate: (a) it would be irreparably harmed if not for entry of the injunction it sought, (b) a likelihood of success on the merits of its underlying claims, or (c) that it did not have an adequate remedy at law). (Id.). Although counsel for Appellants raised the issue of Respondent HOA's requirement, under Rule 65 of the South Carolina Rules of Civil Procedure ("SCRCP"), to pay a bond as security for a grant of injunctive relief, counsel for Respondent HOA did not offer or agree to do so and Judge Hood similarly did not comment on the issue of bond. (Id. at pp. 21-23).

On September 15, 2021, Judge Hood granted Respondent HOA's Motion to Allow Entry, ordering, "[Appellants] shall, within ten (10) days of the date of this Order provide access to the storage closets on each of the floors (1-16) of the Royal Garden Resort, and, further, that [Appellants] shall provide keys to each of the storage closets on those floors (1-16) for the purpose of allowing Horry Telephone Cooperative to begin the installation process." (09/15/2021 Order

Granting Motion to Allow Entry, p. 2). The Court's September 15, 2021 Order Granting Respondent HOA's Motion to Allow Entry contains no security (bond) requirement. (Id. at pp. 1-2). The September 15, 2021 Order further contains no findings of fact or conclusions of law supporting a finding that: (1) Respondent HOA would suffer irreparable harm if the injunctive relief had not been granted; (2) that Respondent HOA would likely succeed on the merits of the underlying litigation; and (3) that Respondent HOA had no adequate remedy at law. (Id.). None of the above three (3) pre-requisites to a grant of injunctive relief are mentioned within either Respondent HOA's Motion or the September 15, 2021 Order granting such Motion. (See Id., 04/28/2021 Motion to Allow Entry).

On September 21, 2021, Appellants filed a Motion to Reconsider, or Alter or Amend the Court's September 15, 2021 Order seeking the Court reconsider, alter, or amend its decision ordering Appellants to allow Respondent HOA to access Appellants' storage closets without paying the rent required by the parties' Storage Facility Agreement, or, at the very least, without a bond requirement. (09/21/2021 Motion to Reconsider). The grounds for Appellants' Motion to Reconsider were that Respondent HOA's Motion to Allow Entry, regardless of how it was labeled, was, in reality, a Motion for Mandatory Injunction. (Id. at p. 1). Accordingly, Respondent HOA was required to demonstrate all elements entitling it to injunctive relief under South Carolina law and a bond should have been required pursuant to Rule 65(c), SCRCP. (Id. at p. 3).

Respondent HOA filed a Response opposing Appellants' Motion to Reconsider on October 13, 2021. (See Respondent's Resp. to Appellants' Motion to Reconsider). In its Response, Respondent HOA did not address any of Appellants' arguments regarding the pre-requisites to obtaining injunctive relief; rather, it stated, in a conclusory fashion, that the Court's September 15, 2021 was proper and no bond was necessary. (Id. at p. 1). By Form 4 Order entered on December

30, 2021, the Court denied Appellants' Motion to Reconsider without any substantive discussion thereof. (12/30/2021 Form 4 Order Denying Motion to Reconsider).

On January 10, 2022, Appellants filed their Notice of Appeal herein. Appellants now file this brief seeking the reversal of the Circuit Court's September 15, 2021 Order Granting Respondent HOA's Motion to Allow Entry and December 30, 2021 Form 4 Order Denying Appellants' Motion to Reconsider.[4]

STANDARD OF REVIEW

From review of South Carolina common law, there appears to be two different standards concerning an appellate court's review of a lower court's issuance of an injunction. In some equitable actions concerning injunctions, the South Carolina Court of Appeals has held it has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. See Lefurgy v Long Cove Owners Ass'n, 313 S.C. 555, 557, 443 S.E.2d 577, 578 (Ct. App. 1994) (citing Blanks v. Rawson, 296 S.C. 110, 370 S.E.2d 890 (Ct. App. 1988) and Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 391 S.E.2d 538 (1989)); see also Ray v. City of Rock Hill, 428 S.C. 358, 368, 834 S.E.2d 464, 469 (Ct. App. 2019) (quoting (Denman v. City of Columbia, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010)) ("In equitable actions, an appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence.").

In other cases concerning appellate court review of injunctions granted by lower courts, the South Carolina Court of Appeals has held the grant of an injunction will not be reversed absent an abuse of discretion. See AJG Holdings, LLC v. Dunn, 382 S.C. 43, 48-49, 674 S.E.2d 505, 507

[4] This appeal seeks the reversal of both the Circuit Court's September 15, 2021 Order Granting Respondent HOA's Motion to Allow Entry and the Circuit Court's December 30, 2021 Form 4 Order Denying Appellants' Motion to Reconsider. However, for purposes of brevity, any time Appellants refer to the Circuit Court's error in granting Respondent HOA's Motion to Allow Entry by Order dated September 15, 2021, Appellants also include by reference Appellants allegation that the Circuit Court further erred in denying Appellants' subsequent Motion to Reconsider by Form 4 Order dated December 30, 2021.

(Ct. App. 2009) (citing City of Columbia v. Pic-A-Flick Video, Inc., 340 S.C. 278, 282, 531 S.E.2d 518, 520-21 (2000) and Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005) (Ct. App. 2005). Under the abuse of discretion standard, a decision of the Circuit Court may be reversed when such decision is unsupported by the evidence or controlled by an error of law. Dunn, 382 S.C. at 49, 674 S.E.2d at 507 (citing Peek, 367 S.C. at 454, 626 S.E.2d at 36 and County of Richland v. Simpkins, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002)).

Notwithstanding the foregoing, the facts and arguments set forth herein demonstrate the lower court erred, and its September 15, 2021 Order Granting Respondent HOA's Motion to Allow Entry and December 30, 2021 Form 4 Order denying Appellants' Motion to Reconsider should be reversed, under application of either standard.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING A MANDATORY INJUNCTION AGAINST APPELLANTS AND IN DENYING APPELLANTS' SUBSEQUENT MOTION TO RECONSIDER.

A. The Circuit Court Erred In Granting A Mandatory Injunction Against Appellants In the Absence of Respondent Satisfying the Requisite Standard For a Grant of Such Equitable Relief.

The Circuit Court's September 15, 2021 Order Granting Respondent HOA's Motion to Allow Entry and subsequent December 30, 2021 Form 4 Order Denying Appellants' Motion to Reconsider should be reversed because Respondent HOA failed to demonstrate: (1) Respondent HOA would suffer irreparable harm if the injunction was not granted; (2) Respondent HOA will likely succeed on the merits of the underlying litigation; and (3) Respondent HOA has no adequate remedy at law.

A plaintiff's complaint must allege facts sufficient to constitute a cause of action for injunction and demonstrate it is reasonably necessary to protect the legal rights of the plaintiff pending in the action. Dunn, 382 S.C. at 50-51, 674 S.E.2d at 508 (internal citations omitted). In order for an injunction to be granted, the plaintiff must demonstrate: (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. Dunn, 382 S.C. at 51, 674 S.E.2d at 508 (internal citations omitted), Peek, 367 S.C. at 454, 626 S.E.2d at 36 (internal citations omitted).

The purpose of a temporary injunction is to preserve the status quo in a case while litigation is pending. Zabinski v. Bright Acres Associates, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001), County Council of Charleston v. Felkel, 244 S.C. 480, 484, 137 S.E.2d 577, 578 (1964) ("The sole object of a temporary injunction is to preserve the subject of controversy in the condition which it is at the time of the Order until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation."), Dunn, 382 S.C. at 51, 674 S.E.2d at 509, Peek, 367 S.C. at 455, 626 S.E.2d at 37; see also JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 511 (2nd ed., 1996) ("A temporary injunction preserves the status quo pending the completion of the case."). "An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." Dunn, 382 S.C. at 50, 674, S.E.2d at 509 (internal quotation omitted). Because injunctive relief is an extreme remedy, it should be cautiously applied. See Scratch Golf Co. v. Dunes Residential Golf Props, Inc., 361 S.C. 117, 603 S.E.2d 905 (2004), Lefurgy, 313 S.C. at 558, 443 S.E.2d at 578).

When an injunction compels the performance of an affirmative act in order to undo an alleged wrong, it ***changes*** the status quo, rather than preserving the status quo. Such an injunction is a mandatory injunction, which is "***an especially drastic remedy and is rarely granted***." Johnson

v. Phillips, 315 S.C. 407, 417, 433 S.E.2d 895, 901 (Ct. App. 1993) (*rev'd in part on other grounds by* Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995)) (citing Forest Land Co. v. Black, 216 S.C. 255, 57 S.E.2d 420 (1950)) (emphasis added).

Despite how Respondent HOA's Motion to Allow Entry was labeled and presented to the Circuit Court, Respondent HOA's Motion seeks nothing short of a mandatory injunction in this case because it seeks an order requiring Appellants to allow Respondent HOA and third parties to enter onto Appellant Phoenix's property to rip out, replace, and install new cable television boxes (i.e., an affirmative action that changes the status quo rather than preserving it). (See 04/28/2021 Motion to Allow Entry). A mandatory injunction is thus exactly what the Circuit Court granted against Appellants in its September 15, 2021 Order Granting Respondent HOA's Motion to Allow Entry. However, the Circuit Court erred in doing so because Respondent HOA has utterly failed to demonstrate any of the elements required by South Carolina law before a party is entitled to injunctive relief. The Circuit Court thus also failed in denying Appellants' Motion to Reconsider by Form 4 Order dated December 30, 2021.

1. Respondent HOA Has Not Alleged Sufficient Facts Within Its Complaint To Set Forth A Valid Cause of Action for Mandatory Injunction Concerning Access and Use of Appellant Phoenix's Storage Units.

Respondent HOA's Third Amended Complaint does not allege facts sufficient to constitute a cause of action for a mandatory injunction requiring Appellants to allow Respondent HOA and/or third parties to enter onto Appellant Phoenix's property to rip out, replace, and install new cable television boxes. Additionally, Respondent HOA's Third Amended Complaint does not allege facts sufficient to demonstrate such a mandatory injunction is reasonably necessary to protect Respondent HOA's legal rights. Respondent HOA's Third Amended Complaint contains only two conclusory sentences on this issue, which are, as follows:

> The [Respondent] further asks for a mandatory injunction enjoining the [Appellants] from interrupting any telecommunications, cable television[,] or internet services on the property...
>
> The [Respondent] requests the Court immediately issue such an emergency injunction as such is necessary for the Plaintiff to continue its ongoing business as an Association and without this documentation, records, and other items listed above[,] [Respondent] Association will be unable to operate the real property.

(Third Am. Compl., p. 3, paras. 8, 10). The above is clearly insufficient to demonstrate why or how a mandatory injunction is necessary to prevent irreparable injury in this case, and clearly and expressly shows that Respondent HOA was asking the Court for injunctive relief in its Motion to Allow Entry, despite failing to label its motion as such. Respondent HOA has not alleged Appellants have interrupted any telecommunications, cable television, or internet services on the property. (See Third Am. Compl.). Respondent HOA has not alleged, much less proven, Appellants have taken any actions to damage or harm the equipment within the storage units, or that there have been any issues whatsoever with the equipment therein. (Id.). Respondent has also not alleged or demonstrated how any action or inaction of Appellants regarding the storage closets at issue has rendered Respondent HOA unable to operate the Royal Garden Resort. (Id.). The above allegations in Respondent HOA's Third Amended Complaint contains are thus unsupported and are conclusory in nature.

Moreover, there is a contract that governs the parties' rights at issue in this matter – the Storage Facility Agreement. (See Storage Facility Ag.).[5] Pursuant to the Storage Facility Agreement, Respondent HOA is required to pay rent to Appellant Phoenix for access to Appellant Phoenix's storage closets, where the equipment is stored. (Id.). The Storage Facility Agreement

[5] It is axiomatic that Respondent HOA cannot ask the court for equitable relief, such as an injunction, when the rights between the parties on the very issue is governed by a contract.

further provides that Respondent "wishes to lease a portion of storage facilities..." (Id.). Therefore, Respondent sought to enter into the Storage Facility Agreement in order to obtain rights to lease the subject storage facilities from Appellant Phoenix. However, Respondent HOA's Third Amended Complaint does not mention the Storage Facility Agreement, much less assert any cause of action to rescind or void such contract. (See Third Am. Compl.). Rather, Respondent has attempted to avoid its obligations under such contract by omitting reference to such contract entirely. With the exception of the two (2) sentences from Respondent HOA's Third Amended Complaint that are presented above, Respondent HOA's Third Amended Complaint does not make mention of any property rights concerning the storage units. Therefore, Respondent HOA failed to sufficiently allege facts in its complaint to assert a valid cause of action for injunctive relief as it pertains to accessing and using the storage units at issue in the parties' Storage Facility Agreement. See Dunn, 382 S.C. at 50-51, 674 S.E.2d at 508 (internal citations omitted).

2. Respondent HOA Failed to Demonstrate The Requisite Elements Entitling It To Injunctive Relief Within Its Motion to Allow Entry And During Its Oral Arguments In Support Thereof.

Although it is clear the relief Respondent HOA seeks in its Motion to Allow Entry is a mandatory injunction against Appellants, Respondent HOA wholly omits any reference to the word "injunction" within its Motion. Respondent HOA further fails to set forth even a shred of evidence in support of the three elements required by a plaintiff in order to be entitled to an injunction, which are: (1) irreparable harm; (2) likelihood of success on the merits; and (3) an inadequate remedy at law. See Dunn, 382 S.C. at 51, 674 S.E.2d at 508 (internal citations omitted), Peek, 367 S.C. at 454, 626 S.E.2d at 36 (internal citations omitted). At no point within its Third Amended Complaint, its Motion to Allow Entry, or during the August 4, 2021 hearing on its Motion to Allow Entry, did Respondent HOA even allege, much less prove, it would suffer

irreparable harm without the entry of a mandatory injunction requiring Appellants to allow Respondent HOA and third parties to enter Appellant Phoenix's storage closets to rip out, replace, and install new cable television boxes. (See Third Am. Compl., 04/28/2021 Motion to Allow Entry, August 4, 2021 Hearing Transcript, pp. 19-23). The residents of the Royal Garden Resort have cable television service and Respondent HOA has presented no evidence that such service has been interrupted. (August 4, 2021 Hearing Transcript, pp. 19-23). During the August 4, 2021 hearing on Respondent HOA's Motion to Allow Entry, Respondent's Counsel made clear that the HOA ***wants*** to enter Appellant Phoenix's property and/or to allow third parties to do so simply because the HOA ***wants*** to change its television provider from Spectrum to HTC. (August 4, 2021 Hearing Transcript, pp. 19-20).[6] Such language is telling. Respondent HOA may ***want*** to change cable television providers, but it does not ***need*** to do so. Respondent HOA proved no injury whatsoever, much less an irreparable one.

Respondent HOA has also failed to demonstrate a likelihood of success on the merits. First and foremost, Respondent HOA's Third Amended Complaint does not even allege a cause of action regarding Respondent HOA's purported right to access Appellant Phoenix's storage closets, which are a part of Commercial Unit Two (2) that the Circuit Court has already determined[7] is owned by Appellant Phoenix. Accordingly, Respondent HOA cannot satisfy the likelihood of success element of entitlement to injunctive relief because there is no underlying cause of action upon which Respondent HOA may succeed that encompasses the property rights at issue.

Despite the foregoing, Respondent HOA did argue, in its Motion to Allow Entry, that it is entitled to access Appellant Phoenix's storage closets pursuant to easement language contained in the Regime's Master Deed, which "grant[s] an easement...over and under all of the [Regime]

[6] "We wrote [Appellants] a letter and said we want to change television service from Spectrum to Horry Telephone."
[7] (See 11/08/2019 Order, pp. 1, 6).

Property for...installations, replacing, repairing, and maintaining a master television antenna[8] system..." (04/28/2021 Motion to Allow Entry, p. 1). Respondent HOA's argument is still insufficient to demonstrate a likelihood of success in this case. Although Respondent HOA has not asked for a declaratory judgment concerning the validity of and/or its rights arising out of the above-referenced easement within its Third Amended Complaint, even if the Circuit Court were to ultimately determine such easement to be valid and applicable to Respondent HOA, the rights of an easement owner are limited. See Snow v. Smith ex rel. Stoudenmire, 416 S.C. 72, 86, 784 S.E.2d 242, 249 (Ct. App. 2015). Moreover, restrictions on the use of property, such as the easement Respondent HOA relies upon, are to be strictly construed in favor of the property owner, with all doubts resolved in favor of the property owner's free use of the property. See Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006) (holding courts are to construe any ambiguity in a restrictive covenant in favor of limited duration and against restricting property, with all doubts resolved in favor of the free use of the property).

The easement language cited by Respondent HOA does not appear to apply here because there is no "master television antenna" on the Resort property. Moreover, the easement language does not extend to permanently storing equipment for free on Appellant Phoenix's property, which is what Respondent HOA's Motion to Allow Entry requests and the Circuit Court's September 15, 2021 Order requires. (See 04/28/2021 Motion to Allow Entry, p. 1). That is why there is a contract in place between the parties governing these exact issues. (See Storage Facility Agreement). The Storage Facility Agreement expressly provides, in pertinent part:

> [Respondent HOA] wishes to lease a portion of storage facilities...
>
> [Respondent HOA] agrees to pay [Appellant Phoenix] an amount of $255.00 per month for use of referenced facilities...

[8] There is no "master television antenna" on or in Appellants' property, so the easement language does not apply to Appellants' property.

> [Respondent HOA] is guaranteed ingress and egress to storage facilities at any time for the purpose of making repairs to cable system.

(Id. at p. 1). Even if the easement gave Respondent HOA the right to briefly access the storage units at issue for a limited purpose, compliance with the Storage Facility Agreement is required to provide Respondent HOA with any right to long-term use of the storage units. Respondent HOA thus cannot demonstrate a likelihood of success on the claim it makes within its Motion to Allow Entry – that it should be allowed to access and use Appellant Phoenix's property (i.e., the storage closets) free of charge, in perpetuity.

Finally, Respondent HOA failed to prove there was an inadequate remedy at law if a mandatory injunction was not granted requiring Appellants to allow Respondent HOA and third parties to enter Appellant Phoenix's storage closets to rip out, replace, and install new cable television boxes. Appellant Phoenix consistently provided Respondent HOA access to Appellant Phoenix's storage closets while Respondent HOA complied with the terms of the parties' Storage Facility Agreement and paid monthly rent in the amount of $255.00 per month. Had Respondent HOA continued to pay rent pursuant to the parties' contract, Respondent HOA would have continued to have access to the storage closets and could have done what it purportedly desires to do – change the cable television services from Spectrum to HTC. In the event the Circuit Court ultimately determined the Storage Facility Agreement was invalid or that Respondent HOA does not have to pay rent for access to the storage closets, damages in the amount of the rent paid could be awarded against Appellants and Respondent HOA could be made whole.[9] Therefore, there is a

[9] As pointed out several times herein, Respondent HOA has not alleged any cause of action to rescind the parties' Storage Facility Agreement or any declaratory judgment cause of action concerning ownership of or easement rights concerning the storage units.

clear remedy available at law concerning this issue. Respondent HOA failed to even attempt to allege or demonstrate otherwise.

Given its inability to demonstrate the requisite factors entitling it to injunctive relief, it is not surprising Respondent HOA avoided labeling its Motion to Allow Entry as a motion for injunctive relief and has attempted to bypass all necessary requirements for a grant of injunctive relief. However, it cannot be ignored that the relief Respondent HOA seeks within its Motion to Allow Entry, is, in fact, a mandatory injunction. As a result, Respondent HOA must comply with South Carolina law and satisfy all requisite elements entitling it to a mandatory injunction. See Dunn, 382 S.C. at 51, 674 S.E.2d at 508 (internal citations omitted), Peek, 367 S.C. at 454, 626 S.E.2d at 36 (internal citations omitted). Respondent HOA has failed to do so. Therefore, the Circuit Court erred in granting a mandatory injunction against Appellants and the Circuit Court's September 15, 2021 Order Granting Motion to Allow Entry and December 30, 2021 Form 4 Order Denying Appellants' Motion to Reconsider should be reversed accordingly.[10]

B. The Circuit Court Erred In Granting A Mandatory Injunction Against Appellants Without Requiring Respondent HOA To Issue Bond.

In addition to the foregoing, the Circuit Court erred in granting a mandatory injunction against Appellants because it did not require Respondent HOA to provide security for such injunction. Rule 65(c), SCRCP, provides, in pertinent part, as follows:

> Except in divorce, child custody and non-support actions where the giving of security is discretionary, ***no restraining order or temporary injunction shall issue except upon the giving of security by the applicant***, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

[10] Appellants raised the issues outlined in this section within their Motion to Reconsider, or Alter or Amend. (See 09/21/21 Motion to Reconsider). However, the trial court denied Appellants' Motion to Reconsider by Form 4 Order without any substantive discussion thereof. (See 12/30/2021 Form 4 Order Denying Motion to Reconsider).

(emphasis added). The South Carolina Supreme Court has further held that even a nominal bond does not satisfy Rule 65(c), SCRCP. Dunn, 382 S.C. at 49, 674 S.E.2d at 508 (citing Atwood Agency v Black, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007)). In Atwood, the South Carolina Supreme Court found that a nominal bond was improper "because it erroneously assume[d] the injunction [was] proper instead of providing an amount sufficient to protect appellants in the event the injunction [was] ultimately deemed improper." Id.

As outlined in detail above, Respondent HOA's Motion to Allow Entry seeks a mandatory injunction against Appellants. During the August 4, 2021 hearing on Respondent HOA's Motion to Allow Entry, counsel for Appellants argued that if the trial judge was inclined to grant Respondent HOA's motion, bond should be required. (August 4, 2021 Hearing Transcript, pp. 20-23). The parties' Storage Facility Agreement sets forth an amount of monthly rent required for Respondent HOA to be entitled to access and use Appellant Phoenix's storage closets. (See Storage Facility Agreement). Therefore, for ease of calculation of a bond, during the August 4, 2021 hearing on Respondent HOA's Motion to Allow Entry, counsel for Appellants suggested bond be required in an amount equal to the amount owed in monthly rental payments under the parties' contract. (August 4, 2021 Hearing Transcript, pp. 20-23). Despite the foregoing, neither opposing counsel, nor the trial judge discussed the issuance of bond at the hearing. (Id.).

In granting Respondent HOA's Motion to Allow Entry, the Circuit Court entered a mandatory injunction against Appellants. (See 09/15/2021 Order Granting Motion to Allow Entry). However, the Circuit Court's September 15, 2021 Order Granting Respondent HOA's Motion to Allow Entry does not require any security/bond from Respondent HOA. (Id.). In its Motion to Reconsider, or Alter or Amend, counsel for Appellants again raised the bond requirement as an issue necessitating, at the very least, a revised order. (See 09/21/21 Motion to

Reconsider, p. 2, para. 4). The Circuit Court denied Appellants' Motion to Reconsider in its entirety without any substantive discussion. (See 12/30/2021 Form 4 Order Denying Motion to Reconsider). Therefore, it appears the Circuit Court refused to consider or require bond with the mandatory injunction it entered. The Circuit Court's September 15, 2021 Order Granting Respondent HOA's Motion to Allow Entry and subsequent December 30, 2021 Form 4 Order denying Appellants' Motion to Reconsider are thus in clear violation Rule 65(c), SCRCP, and should be reversed accordingly.

C. The Circuit Court Erred In Failing To Include In Its Order Granting A Mandatory Injunction Against Appellants Any Findings of Fact or Conclusions of Law That Respondent HOA Demonstrated All Necessary Elements For The Grant of A Mandatory Injunction.

The Circuit Court erred in granting a mandatory injunction against Appellants in the absence of making any findings of fact and conclusions of law that Respondent HOA proved: (1) irreparable injury if not for the grant of a mandatory injunction; (2) a likelihood of success on the merits of the underlying case; and (3) an inadequate remedy at law.

Rule 65(d), SCRCP, requires, "Every order granting an injunction...shall set forth the reasons for its issuance...[and] shall be in specific terms..." As set forth in detail hereinabove, in order to be entitled to injunctive relief, the moving party must demonstrate: (1) irreparable injury; (2) a likelihood of success on the merits of the underlying claims; and (3) an inadequate remedy at law. See Dunn, 382 S.C. at 51, 674 S.E.2d at 508 (internal citations omitted), Peek, 367 S.C. at 454, 626 S.E.2d at 36 (internal citations omitted). Not only did Respondent HOA fail to demonstrate any of the foregoing requirements were met prior to the issuance of the injunction, the Circuit Court's September 15, 2021 Order granting a mandatory injunction against Appellants neither states Respondent HOA satisfied these requirements, nor mentions these requirements at all. (See 09/15/2021 Order Granting Motion to Allow Entry). The Circuit Court made no finding

that but for its Order, Respondent HOA would suffer irreparable harm.[11] (Id.). Likewise, the Circuit Court made no finding that Respondent HOA was without an adequate legal remedy. (Id.). Because Respondent HOA has not alleged any underlying cause of action regarding the purported easement, the parties' Storage Facility Agreement, or ownership of the storage closets, the Circuit Court could not have concluded Respondent HOA was likely to succeed on any such claim at trial.

In fact, the Circuit Court's September 15, 2021 Order fails to specify any reason for its issuance with the exception that the Circuit Court reviewed the easement in the Master Deed and concluded Respondent HOA was entitled to access the storage closets thereunder. (Id. at p. 2). Thus, it appears the Circuit Court completely disregarded the standard for granting injunctive relief in its consideration of Respondent HOA's Motion to Allow Entry. For the foregoing reasons, the Circuit Court erred in granting a mandatory injunction against Appellants and its September 15, 2021 and December 30, 2021 Orders should be reversed accordingly.

CONCLUSION

Based on the foregoing, the Circuit Court erred in granting Respondent HOA's Motion to Allow Entry and entering a mandatory injunction against Appellants. The Circuit Court further failed in failing to reverse its September 15, 2021 Order. Therefore, the Court of Appeals should reverse both: the Circuit Court's September 15, 2021 Order Granting Respondent HOA's Motion

[11] The September 15, 2021 Order states, "[Respondent HOA] claims that it is entitled to access to those storage closets so that they can provide Horry Telephone Cooperative with access to install certain equipment including television cable, conduit and cable boxes so each of the homeowners would be able to continue receiving a television signal." (09/15/2021 Order Granting Motion to Allow Entry, p. 1). However, such statement by counsel for Respondent HOA was contradicted by counsel for Appellants, was not supported by any evidence, and the Court did not hold that the Resort's homeowners would be deprived of cable but for the issuance of the mandatory injunction within its September 15, 2021 Order. (See August 4, 2021 Hearing Transcript, pp. 19-23, 09/15/2021 Order Granting Motion to Allow Entry, pp. 1-2).

to Allow Entry and December 30, 2021 Form 4 Order denying Appellants' Motion to Reconsider.

Respectfully submitted,

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March 28, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2022-000031

Royal Garden Resort Regime Homeowners Association, Inc.....Respondent

vs.

Sea Breeze Property Management & Contract Services, Inc.; Calvin Donaldson; and Phoenix of the Strand, Inc.....Appellants

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PROOF OF SERVICE

The undersigned certifies that she is employed by the law firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., attorneys for the Appellants, Sea Breeze Property Management & Contract Services, Inc.; Calvin Donaldson; and Phoenix of the Strand, Inc., that she has mailed and emailed a copy of the Appellants' Initial Brief, Designation of Matter, and Proof of Service to counsel listed below this 28th day of March, 2022, with proper postage attached thereto.

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March 28, 2022

VIA ELECTRONIC MAIL (AND U.S. MAIL, AS NOTED)
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Re: Royal Garden Resort Regime Homeowners Association, Inc. v. Sea Breeze Property Management & Contract Services, Inc.; Calvin Donaldson; and Phoenix of the Strand, Inc.
Case No. 2018-CP-26-06033
Appellate Case No. 2022-000031

Dear Ms. Kitchings:

Enclosed for filing are the following: (1) Appellants' Initial Brief; (2) Designation of Matter; and (3) Proof of service of Appellants' Initial Brief and Designation of Matter. Please return clocked copies to us, via electronic mail. By copy of this letter, I hereby serve the Respondent, through its attorneys of record, with the foregoing documents.

Sincerely,

Holly M. Lusk

Douglas M. Zayicek
Holly M. Lusk

Enclosures
cc: Client (via email only)
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