

RECEIVED
May 09 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Master in Equity

Marvin H. Dukes, III, Master in Equity
Case No: 2020-CP-07-01547

Appellate Case No. 2022-000301

Todd E. TaylorRespondent,

vs.

Amar and Kennie Gill Living Trust Dated
March 15, 2019; Kennie Lee Miller Gill,
Trustee of the Amar and Kennie Gill
Living Trust Dated March 15, 2019;
Kenneth V.L. Miller; and Anna M. Miller..... Appellants,

vs.

South Beach Village Lagoon Villas, II,
Horizontal Property Regime LVIIRespondent.

APPELLANTS' RETURN TO RESPONDENT'S
MOTION TO DISMISS APPEAL

Appellants, Amar and Kennie Gill Living Trust Dated March 15, 2019, Kennie Lee Miller Gill, Trustee of the Amar and Kennie Gill Living Trust Dated March 15, 2019, Kenneth V. L. Miller and Anna M. Miller (“Appellants”), respectfully submit this Return to the Motion of Respondent, South Beach Village Lagoon Villas, II, Horizontal Property Regime LVII (“South Beach HPR”) to dismiss this appeal.

I. Introduction

S.C. Code Ann. § 27-31-60(a) provides,

An apartment owner shall have the exclusive ownership of his apartment and shall have a common right to share, with the other co-owners, in the common elements of the property, equivalent to the percentage representing the value of the individual apartment, with relation to the value of the whole property. This percentage shall be computed by taking as a basis the value of the individual apartment in relation to the value of the property as a whole. **The percentage shall be expressed at the time the horizontal property regime is constituted, shall have a permanent character, and shall not be altered without the acquiescence of the co-owners representing all the apartments of the property.**

Emphasis added.

The 1973 Master Deed constituting the South Beach HPR, under which Appellants purchased their South Beach HPR unit, and under § 27-31-60(a), established each unit owner's percentage of their "common right to share ... in the common elements" of the South Beach HPR and provides that the percentages "shall not be changed except with the unanimous consent of all the co-owners expressed in amendment to [the Master Deed] duly recorded."

The order under appeal ("February 3, 2022 Order¹"), purports to override the clear and unambiguous unanimity language of § 27-31-60(a) and the 1973 Master Deed and directs the 1973 Master Deed be amended by a simple majority.

The February 3, 2022 Order affects the substantial property rights of Appellants and determines the outcome of and ends the separate petition filed by South Beach HPR under S.C. Code Ann. § 33-31-160, the filing of which led to the February 3, 2022 Order.

¹ Following the issuance of the February 3, 2022 Order, Appellants filed a motion to alter or amend that order under Rule 59(e), SCRPC. Appellants' Rule 59(e) Motion was denied by order entered March 10, 2022. For simplicity, Appellants cite only the February 3, 2022 Order in this return. Attached as **Exhibit "A,"** are the February 3, 2022 Order and the order denying Appellants' Rule 59(e) motion.

The February 3, 2022 Order is immediately appealable under S.C. Code Ann. § 14-3-330(2), and South Beach HPR's Motion to Dismiss Appellants' appeal should be denied.

II. Facts Pertinent to Motion to Dismiss Appeal

The South Beach HPR was constituted by the Master Deed of Sea Pines Plantation Company dated October 17, 1973, recorded in the then Beaufort County RMC on November 2, 1973, in book 215, page 1092 ("1973 Master Deed," **Exhibit "B"**).

The South Beach HPR consists of six units, two units each in three buildings. Two units have three bedrooms, and the other four units have two bedrooms. The 1973 Master Deed defines the general common elements as all the South Beach HPR property except the interiors of the individual units and the limited common elements. The limited common elements are defined as the rear and front yards, service areas and like areas, and structures immediately adjacent to the individual units.

The 1973 Master Deed sets the value of the South Beach HPR property at \$458,000.00 and assigns values of \$73,000.00 to the two-bedroom units and \$83,000.00 to the three-bedroom units. Based on the relationship of the assigned value of the South Beach HPR property and the value of the individual units, the Master Deed calculates the proportionate share of the unit owners' interest in the general and limited common elements and their proportionate representation for voting in the Council of HPR Co-Owners at 15.939% for the two-bedroom unit owners and 18.122% for the three-bedroom unit owners.

Over many years, the owners of Units 1591, 1594, and 1595, expanded their units into the limited common elements of their respective units. Over the years, the unit owners discussed the need to amend the 1973 Master Deed to appropriately calculate the maintenance expenses

attributable to the expanded units. No unanimous agreement on any amendment, however, has ever been reached.

On March 1, 2018, the South Beach HPR unit, the nonprofit corporation known as South Beach Village Lagoon Villas, Horizontal Property Regime LVII, was formed.

This lawsuit was filed July 31, 2020. (Taylor Complaint, **Exhibit “C”**). Plaintiff, Todd E. Taylor, owns Unit 1596. Taylor’s complaint alleges causes of action sounding in breach of contract, trespass, conversion, unjust enrichment, and requests certain declaratory relief, all based on the expansion of Appellants’ unit into its associated limited common elements. Appellants, owners of Unit 1595, after filing an initial answer, filed an amended answer and third-party complaint joining South Beach HPR. (Appellants’ Amended Answer and Third-Party Complaint, **Exhibit “D”**). Appellants’ Third-Party Complaint seeks a declaratory judgment to the effect there exists an encroachment agreement between them and South Beach HPR regarding the limited common element area adjacent to Unit 1596. On March 5, 2021, South Beach HPR filed an answer to Appellants’ Third-Party Complaint generally denying its material allegations. (South Beach HPR Answer, **Exhibit “E”**).

The owners of units 1591, 1592, 1593, and 1594 are not parties to this lawsuit.

On August 25, 2021, South Beach HPR filed a separate petition in this case under S.C. Code Ann. § 33-31-160, seeking an “order to affect the necessary amendment to the Master Deed....” (South Beach HPR Petition, **Exhibit “F”**). The South Beach HPR petition asked the court, under § 33-31-160, to order the “Regime” hold a special meeting to approve an amendment to the 1973 Master Deed and requested the court alter the voting requirements of the 1973 Master Deed so the affirmative vote of a simple majority of the co-owners, based on the voting percentages established by the 1973 Master Deed, was all that was necessary to approve an amendment.

Following a hearing on South Beach HPR’s petition, the Master-in-Equity for Beaufort County, to whom the issues raised by South Beach HPR’s petition, and all other equitable claims of the parties, had been referred,² issued the February 3, 2022 Order. In his Order, the Master directs the “Regime” hold a special meeting, ordered that based on the voting percentages of the 1973 Master Deed, any amendment of the Master Deed proposed at the ordered special meeting would win approval by a simple majority of the votes cast by the co-owners, and directed that any Master Deed amendment so approved “shall ... constitute a valid and lawful amendment....” as directed by subsequent order.

Appellants filed their notice of appeal of the February 3, 2022 Order on March 15, 2022.

On March 17, 2022, the “Regime” held the directed special meeting. At that meeting, proposed amendments to the Master Deed received 52.183% of the participating co-owners’ votes.³ (2022 Amendments to 1973 Master Deed, **Exhibit “H”**).

On March 31, 2022, and under the February 3, 2022 Order, South Beach HPR moved the Master for a ruling “ordering the [majority approved Master Deed amendments] to constitute a valid and lawful amendment to the Master Deed, with the same force and effect as if it complied with all otherwise applicable legal requirements....” and directing that the majority approved Master Deed amendment “be filed in the public records of Beaufort County. (South Beach HPR March 31, 2022 Motion, **Exhibit “I”**).

² The consent order of reference refers South Beach HPR’s petition under § 33-31-160, “all summary judgment motions filed by the parties including those relating to legal claims,” and “all equitable claims alleged, and equitable remedies sought by all parties...” to the Beaufort County Master-in-Equity. (Consent Order of Reference, **Exhibit “G”**).

³ At the March 17, 2022 “Special Meeting” ordered by the February 3, 2022 Order, Units 1593, 1594 and 1596 voted in favor of the proposed amendments to the 1973 Master Deed, Appellants (Unit 1595) voted against the proposed amendments, and Units 1591 and 1592 were absent and did not vote. See South Beach HPR March 31, 2022 Motion, **Exhibit “I.”**

The majority approved Master Deed amendments amend numerous provisions of the 1973 Master Deed, including the property description and the total square footage of individual units and the common elements. Most significantly, the majority approved Master Deed amendments, while retaining the original property value of the South Beach HPR property provided in the 1973 Master Deed, recalculates the co-owners proportionate share of the general and limited common areas and their proportionate representation for voting based on the relation of the newly calculated square footage of each unit to the newly calculated total square footage of all the units. The result changes the values assigned to the units from 1973 Master Deed's two values, one for the two-bedroom units, the other for the three-bedroom units, to different values for each unit, and establishes different ownership and voting percentages for each unit based on the square-footage formula adopted by the Master Deed amendments. This creates one "super unit" having a proportionate common element and voting share of 22.801%, a "junior unit" having a proportionate common element and voting share of 13.549%, with remaining units' proportionate common element and voting shares falling between these two extremes, none of the units having the same proportionate common element or voting share.

III. Argument.

S. C. Code Ann. § 14-3-330(2)(a), governs the immediate appealability of the February 3, 2022 Order and provides that an interlocutory ruling may be appealed if it resulted in an "order affecting a substantial right made in an action when such order (a) in effect determines the action or ... discontinues the action."

A. The February 3, 2022 Order affects Appellants' substantial rights.

South Carolina's Horizontal Property Act S.C. Code Ann. § 27-31-10, *et seq.* (HPA) governs the creation of horizontal property regimes.

By a master deed, a South Carolina fee or leasehold property owner may declare their property subject to a horizontal property regime (HPR). S.C. Code Ann. § 27-31-30. A horizontal property regime unit purchaser obtains title to their individual condominium unit and acquires a common right to share, with the other co-owners, in the common areas of the condominium property. S.C. Code Ann. § 27-31-20(c). The percentage to which one co-owner's common right to share with their other HPR co-owners the HPR's common elements is computed based on the relationship between the values established the HPR's master deed of the individual units as compared to the HPR property as a whole. Under S.C. Code Ann. § 27-31-60(a), the percentages thus established "shall have a permanent character and shall not be altered without the acquiescence of the co-owners representing all the apartments of the property."

Under the HPA, the 1973 Master Deed provides for all the above and says that no amendment may be made to the 1973 Master Deed's percentage of ownership calculations, without the unanimous consent of all the unit co-owners.⁴ Appellants purchased their unit in reliance on the HPA and the 1973 Master Deed, and the rights, property and otherwise, acquired by Appellants upon their purchase of their unit are substantial.

⁴ The 1973 Master Deed, paragraph 14, page 5, requires unanimous consent of all the co-owners and the mortgagees of all the mortgages encumbering any HPR individual unit, to any amendment of the Master Deed, revocation of the dedication of the property to the HPR, or removal of the property from the HPR. Based on the available public records of Horry County, it appears Unit 1596 is encumbered by a mortgage, and no mortgagee has consented to the 2022 Amendments to 1973 Master Deed.

The February 3, 2022 Order dictates the reduction to a simple majority the unanimity required to amend the 1973 Master Deed by the HPA and the 1973 Master Deed. The February 3, 2022 Order thus deprives Appellants of their bargained for and relied upon contractual rights as well as their HPA statutory right to require any amendment to the 1973 Master Deed be adopted only with their consent. The deprivation of Appellants' substantial rights by the February 3, 2022 Order makes that Order immediately appealable under S.C. Code § 14-3-330(2)(a).

B. The February 3, 2022 Order in effect determines and discontinues South Beach HPR's separate action under its August 25, 2021 Petition .

South Beach HPR's motion to dismiss Appellant's appeal argues that the February 3, 2022 Order is intermediary and "on its face and by [its] terms contemplates multiple future contingencies and a future ruling before even the matters addressed..." in the February 3, 2022 Order are appealable.

This is incorrect.

The ordered special owners meeting occurred on March 17, 2022, two days after this appeal was filed. The outcome of that meeting was a majority of the unit owners voted in favor of amendments to the 1973 Master Deed, which fundamentally change the relationship between the unit owners, their interest in the common elements and their voting rights.⁵ All the March 31, 2022, motion of South Beach HPR (**Exhibit "I"**) requests be done is what a provision of the February 3, 2022 Order requires, i.e., "[s]hould a majority of the co-owners approve an amendment to the [1973] Master Deed at the Special Meeting, the Court **shall** issue a subsequent Order, ordering the Amendment to constitute a lawful and valid amendment to the Master Deed, with the

⁵ Appellants voted no. See South Beach HPR March 31, 2022 Motion, **Exhibit I**.

same force and effect as if it complied with all otherwise applicable legal requirements, and the Court will order the same to be filed in the public record of Beaufort County.”

Whatever “multiple future contingencies and a future ruling” to which South Beach HPR is referring in its Motion to Dismiss have occurred, except for the purely ministerial entry by the Master of an order declaring the amendment to be lawful, in full force and effect, and directing the amendment to be filed in the Beaufort County ROD.

Section 14-3-330(2)(a), provides that an interlocutory ruling may be appealed if it resulted in an order which, “in effect,” determines the action. The term “in effect” means “for all practical purposes.” <https://www.dictionary.com/browse/in--effect>.

The South Beach HPR petition requested the Master order a special meeting of the unit owners and directed that any amendment proposed at the meeting which received majority approval be declared a lawful amendment of the 1973 Master Deed. The directed meeting was held and proposed amendments to the 1973 Master Deed received unit owner majority approval. For all practical purposes, therefore, the 1973 Master Deed has been amended in conformity not with the HPA or the 1973 Master Deed provisions regarding amendment, but under the February 3, 2022 Order.

The action initiated by the South Beach HPR petition has been determined, and that action, under the February 3, 2022 Order, is ended. Therefore, the February 3, 2022 Order is appealable.

IV. Conclusion.

The February 3, 2022 Order deprives Appellants of substantial contractual, property and statutory rights including the requirement that any amendment to the 1973 Master Deed be adopted only with their consent.

The February 3, 2022 Order in effect determines and ends the separate and distinct “action” pleaded in the South Beach HPR petition under § 33-31-160 and is immediately appealable.

South Beach HPR’s motion to dismiss this appeal should be denied.

CALLISON TIGHE & ROBINSON, LLC

/s/ Louis H. Lang

Louis H. Lang, SC Bar # 3127

LouisLang@CallisonTighe.com

Post Office Box 1390

Columbia, South Carolina 29202-1390

Telephone: 803-404-6900

Facsimile: 803-404-6902

May 9, 2022
Columbia, South Carolina