

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Todd E. Taylor,

Plaintiff,

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,

Defendants.

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,

Third-Party Plaintiffs,

v.

South Beach Village Lagoon Villas, II,
Horizontal Property Regime, LVII,

Third-Party Defendant.

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2020-CP-07-01547

) **RECEIVED**

) **May 09 2022**

) **SC Court of Appeals**

) **THIRD-PARTY DEFENDANT SOUTH
) BEACH VILLAGE LAGOON VILLAS, II,
) HORIZONTAL PROPERTY REGIME,
) LVII'S PETITION FOR RELIEF
) PURSUANT TO S.C. CODE § 33-31-160**

COMES NOW, Third-Party Defendant *South Beach Village Lagoon Villas, II, Horizontal Property Regime, LVII* (the "Regime") by and through its President William Tatum, Jr., and undersigned counsel, and files this Petition for Relief Pursuant to S.C. Code § 33-31-160. As set forth herein, following renovation and expansion of certain dwelling units forming part of the Regime property into the common elements of the Regime, the Master Deed identifying, describing and governing the Regime requires an amendment in order to lawfully and properly describe the property and rights of the co-owners. The Master Deed requires the approval and

consent of 100% of the co-owners of the Regime in order to effect such an amendment. Per Regime Meeting Minutes, the Regime membership has acknowledged the necessity of an amendment to the Master Deed as far back as 2003. Since 2018, the Regime has incurred approximately \$25,000.00 in expenses representing attorney's fees, surveying fees and other costs in pursuing an amendment to the Master Deed. Despite these efforts, the Regime has been unable to effect the necessary amendment to the Master Deed due to the 100% co-owner approval requirement. The Regime seeks relief from the Court pursuant to S.C. Code § 33-31-160 in order to effect the necessary amendment to the Master Deed, showing the Court as follows:

1. This action concerns property within the South Beach Village Lagoon Villas II Horizontal Property Regime LVII, established pursuant to the Master Deed filed in the Office of the Register of Deeds for Beaufort County, South Carolina in Deed Book 215 at Page 1092 (the "Master Deed"). The Master Deed and Bylaws are attached hereto as **Exhibit A**.

2. The Regime and Regime property are subject to and governed by and in accordance with the Master Deed, Bylaws, amendments thereto, and various rules and regulations ("Governing Documents"). *See* Exhibit A.

3. The Regime is subject to the provisions of the Horizontal Property Act, S.C. Code Ann. § 27-31-10, et. seq. (the "Act").

4. The Regime is a non-profit corporation formed and existing under the laws of the State of South Carolina, and subject to the provisions of the South Carolina Non-Profit Code, S.C. Code Ann. § 33-31-101, et seq.

5. The Regime property is located on Hilton Head Island, in Beaufort County, South Carolina, and includes three (3) buildings, containing six (6) individual dwelling units.

6. The six (6) dwelling units are owned by co-owners, each of whom has a particular and exclusive property right to their dwelling unit, as well as an undivided interest in the general and limited common elements of the Regime.

7. Pursuant to the Governing Documents, the co-owners of the dwelling units constitute the Council of Co-Owners, who have the responsibility of administering the Regime property. The affairs of the Council of Co-Owners are governed by a Board of Administration comprised of five persons, all of whom must be co-owners of dwelling units.

8. The Plaintiff in this action is the owner of residential real property in the Regime located at 226 Sea Pines Drive, Apt. 1596, Hilton Head Island, South Carolina.

9. Defendants are the owners of residential real property in the Regime which adjoins Plaintiff's property, located at 226 Sea Pines Drive, Apt. 1595, Hilton Head Island, South Carolina.

10. The Act sets out various requirements as to the contents of a Master Deed establishing and governing a Horizontal Property Regime, including:

- (a) The description of the land...and the building or buildings in existence or to be constructed, if applicable, expressing their respective areas;
- (b) The general description and number of each apartment, expressing its area, location...;
- (c) The description of the general common elements of the property, and in proper cases, of the limited common elements restricted to a given number of apartments...

See S.C. Code Ann. § 27-31-100. Additionally, The Master Deed must include:

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

See S.C. Code Ann. § 27-31-110.

11. The Master Deed incorporates and/or includes a plat and plans showing and describing the Regime property, including individual dwelling units and common elements.

12. Pursuant to the Master Deed, the Regime property is defined and specified as having “a total area of 0.77 acres of which 8,071.21 square feet will constitute Dwelling Units, and 25,469.99 square feet will constitute common elements.” See Master Deed at Fourth Paragraph.

13. Further, the dwelling units making up Regime property are described and the measurements of the various units are identified.

1. Building 1: This buildings contains two (2) Dwelling Units (hereinafter referred to as “Villas”) and commonly referred to as Villas 1591 and 1592.
2. Building 2: This building contains two (2) Dwelling Units commonly referred to as Villas 1593 and 1594.
3. Building 3: This building contains two (2) Dwelling Units commonly referred to as Villas 1595 and 1596.

...[T]he Villas, as shown on the plans of the Property, are composed of four (4) 2 bedroom Type A Villas, and two (2) three bedroom Type B Villas.

1. Two-bedroom Type A Villas: (Units 1591, 1592, 1595, and 1596). These Villas measure 39.83 feet wide and 36.66 feet deep in their maximum interior dimensions and contain a net interior area of 1,086 square feet.
2. Three-bedroom Type B Villas: (Units 1593 and 1594) These Villas measure 44.83 feet wide and 44 feet deep in their maximum interior dimensions and contain a net interior area of 1,400 square feet.

See Master Deed at Fifth Paragraph.

14. As defined in the Master Deed, the general common elements and the limited common elements together comprise the “Common Elements” of the Regime. The general common elements include all Regime property, excluding the limited common elements and the

dwelling units. *See* Master Deed at Third Paragraph, Fifth Paragraph. The limited common elements include pertinently, “the rear and front yards and service areas...adjacent to each dwelling unit...” *See* Master Deed at Fifth Paragraph.

15. Pursuant to the Act, the owner of a dwelling unit,

shall have the exclusive ownership of his apartment and shall have a common right to a 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 basic value, which shall be fixed for the sole purpose of this chapter and irrespectively of the actual value, shall not prevent each co-owner from fixing a different circumstantial value to his apartment in all types of acts and contracts.

See S.C. Code Ann. § 27-31-60.

16. Thus, in accordance with the Act, the Master Deed provides:

The title and interest of each co-owner of a Dwelling Unit in the common elements...and their proportionate share in the profits and common elements (both general and limited), as well as the proportionate representation for voting purposes ...is based on the proportionate value of each Dwelling Unit to the total value of the Property. The total value of the Property is Four Hundred Fifty-Eight Thousand Dollars (\$458,000). The value of each Dwelling Unit and its proportionate percentage interest is set forth below. Such values shall not be deemed to limit the price for which the Property of any Dwelling Unit may be sold or exchanged are as follows:

- A. Dwelling Units 1591, 1592, 1595 and 1596: 15.939 percent each based on a value of \$73,000 for each of said Dwelling Units.
- B. Dwelling Units 1593 and 1594: 18.122 percent each based on a value of \$93,000 for each of said Dwelling Units.

See Master Deed at Sixth Paragraph.

17. Pursuant to the Master Deed, “the common elements shall remain undivided.” *See* Master Deed at Tenth Paragraph; *see also* S.C. Code Ann. § 27-31-70.

18. Pursuant to S.C. Code Ann. § 27-31-80, “Each co-owner may use the elements held in common in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the other co-owners.”

19. Pursuant to the Master Deed, “the percentage of the undivided interest in the common elements (both general and limited) established herein shall not be changed except with the unanimous consent of all of the co-owners expressed in an amendment to this Deed duly recorded.” *See* Master Deed at Eleventh Paragraph; *see also* S.C. Code Ann. § 27-31-60.

20. Additionally, the Master Deed requires unanimous consent of all co-owners of the Regime to amend any provisions thereof. *See* Master Deed at Fourteenth Paragraph.

Expansion of Encroaching Units and Discussion of Attempts to Amend the Master Deed to Reflect Changes to Regime Property

21. Over the past many years, owners of Dwelling Unit 1591, Dwelling Unit 1594 and Dwelling Unit 1595 (the “Encroaching Units”) were expanded such that they encroach into common elements of the Regime. Thus three (3) of the six (6) dwelling units that make up the Regime now encroach into the Common Elements of the Regime.

22. The expansion of the Encroaching Units into the common elements is prohibited under the Master Deed and the Act, regardless of whether the expansions were done with the consent of the Regime’s Board of Administration.¹

23. As a result, the description and depiction of the Regime property and the Encroaching Units as set forth in the Master Deed no longer conform to the physical layout of Regime property as it currently exists. Additionally, the Encroaching Units have in effect subdivided the Common Elements of the Regime.

¹ Upon information and belief the Regime and owners approved the expansion projects. Due to the passage of time, however, it is unclear if documents exist showing that written requests for all units were submitted for approval and that such requests were formally approved.

24. Upon information and belief, the expansion to Defendant's Unit (1595) was completed in approximately 1998; the expansion to unit 1594 was completed in approximately 2002; the expansion to Unit 1591 was completed in approximately 2004.

25. At various points and as the expansions of the Encroaching Units were completed, the Regime co-owners agreed among themselves to change the ownership percentages of the various units, such that the owners of the Encroaching Units would be re-assessed and would pay an increased share of common expenses reflecting the larger portion of the total Regime property the Encroaching Units now comprised. At various times, the Regime operated by mutual agreement using these informally adopted ownership percentages, rather the ownership percentages set forth in the Master Deed.

26. As far back as 2003, Regime Meeting Minutes reflect a discussion among the co-owners of the need to amend the Master Deed in order to reflect additions to the various Encroaching Units, and attempts to retain professionals to prepare the necessary amendments for the Regime.

27. On October 16, 2003, the co-owners requested that Unit 1594 be re-assessed in light of its expansion, and that there be an amendment to the Master Deed reflecting this change.

28. On October 14, 2004, meeting minutes reflect counsel was retained to prepare an amendment:

[R]egarding additions to the units such as those at 1594 and 1595, when those additions are recorded as changes to the Master Deed, they will also be included under the regime's master policy. [A co-owner] noted that when [counsel] was contracted to file an amendment to the deed for unit 1594 he discovered that there had never been one file for the addition to unit 1595. As there is a request before the owners for an addition to 1591, [property management] suggested that the deed be amended one time, inclusive of all 3 unit renovations, which will keep the cost down. All members were in agreement with this plan.”...

...The...owners of unit [1591] presented a plan for an addition to their unit for approval. They explained that the integrity of the footprint of the unit

would not change, but that they would partially enclose the rear and extend the deck area...

29. Despite attempts to retain counsel and move forward with the necessary amendments in 2004, no such amendment was filed. In 2012, the issue re-surfaced, and the co-owners again discussed the Master Deed discrepancies, in the context of concern about whether the expansions of the 3 Encroaching Units were covered under the Regime's insurance policies.

30. On October 20, 2017, the co-owners again discussed the need to amend the Master Deed. Meeting Minutes reflect the following:

Unfinished Business

[Defendant] Kennie Gill updated the ownership with stating she did some more research on the Master Deed and By-laws. She explained they were out of date, and they would eventually need to be updated. In addition, the percentage of ownership was not current, with the patio additions and improvements, and suggested to have them included for the insurance coverage...[property management] advised most Regimes pay around \$5,000 for legal assistance pertaining to Master Deeds and By-Law changes. After some discussion, it suggested to have the Master Deed and Bylaws updated when the funds were available.

31. Following the October 20, 2017 Regime meeting, Defendant Kennie Miller Gill contacted Novit & Scarminach, P.A. for a legal opinion "regarding the title issues resulting from enlargements to certain Dwelling Units located within the [Regime] and the legal requirements for bringing the Regime into compliance with the Master Deed and applicable South Carolina law."

32. Throughout 2017, 2018, and 2019, and Regime was advised by Counsel that an amendment to the Master Deed is required to reflect the expansion of the Encroaching Units and the changes to the Regime property².

² The advice provided by counsel to the Regime has been shared and discussed among the Regime ownership, in order to discuss the basis and need for an amendment to the Master Deed. However, the Regime does not broadly waive the attorney-client privilege as to the advice rendered by Novit & Scarminach, P.A.

33. In May 2018, Defendant Kennie Miller Gill raised concerns via email that immediate corrective action was required to address the problems regarding the Encroaching Units and the Master Deed.

34. Throughout 2018 and 2019, the Regime continued to work with counsel to prepare proposed amendment documents to satisfy the ownership and address the issues created by the Encroaching Units.

35. The Regime engaged Survey Consultants to provide a revised survey of the Regime Property reflecting the current property, including the Encroaching Units, for use in the amendment process.

36. On May 9, 2019, Regime Meeting Minutes reflect continued discussion of the proposed Master Deed amendments, and the necessity of the same:

Master Deed and By Laws Status – [President/Plaintiff Taylor] reported the Association has been working on Master Deed and By Law amendments for a little over a year. Attorney Novit & Scarminach and Survey Consultants have both been retained during this process. Attorney Charles Scarminach advised that 100% agreement by the owners must be obtained to approve Master Deed amendments. [President] read 2 letters and an email from Attorney Charles Scarminach. [President/Plaintiff] referenced plat “Exhibit A” originally filed with the Master Deed. He reported the original dwelling descriptions are no longer accurate due to villa remodeling and adding on to the square footage. [President/Plaintiff] then went on to reference an “Interior/Exterior Measurements” excel spreadsheet as measured by Survey Consultants....There are (2) options to reallocate and define values proportionately; 1.) use interior dimensions as measured by Survey Consultants. 2.) use exterior dimensions as measured by Survey Consultants. Discussion ensued regarding the (2) options. A special meeting will be called to officially vote on the proposed amendments. [President/Plaintiff] thanked Kennie Gill for her work on this project.

37. By letter dated August 2, 2019, the Regime was contacted by attorney John A. Elder, IV, representing owner Bill Tatum. Mr. Elder asserted that the Regime’s Master Deed was in violation of the South Carolina Horizontal property Act, and that the Regime has a duty to

correct the issues with the Master Deed. Mr. Elder further advised he intended to explore judicial alternatives to effectuating a correction and amendment to the Master Deed.

38. Following this correspondence, then-Regime President corresponded with the co-owners about the continuing need to correct the Master Deed, and available options for doing so.

39. Via letter dated October 9, 2019, in an attempt to secure an amendment to the Master Deed, Regime counsel Charles Scarminach sent the co-owners a proposed Consent Resolution, proposed Amendment to Master Deed, and Boundary and As-Built survey showing the correct interior area of each Dwelling Unit (“October 9, 2019 Proposed Amendment”). A true and correct copy of the October 9, 2019 Proposed Amendment is attached hereto as **Exhibit B**.

40. All co-owners signed the October 9, 2019 Proposed Amendment prepared by Mr. Scarminach, except for Defendants Kennie Lee Miller Gill and Mr. Amar Singh Gill. True and correct copies of the co-owner signatures consenting to the October 9, 2019 are attached to the October 9, 2019 Proposed Amendment attached hereto as **Exhibit C**.

41. At the Annual Meeting held October 17, 2019, the co-owners discussed the continuing need to amend the Master Deed and the difficulties created by the delay.

42. The Regime held a special meeting on January 29, 2020, and discussed the continuing need to amend the Master Deed and the challenges posed in continuing to conduct the business and necessary maintenance of the Regime in light of the issues created by the Encroaching Units.

43. Throughout 2020, the co-owners continued to discuss the need to amend the Master Deed, and disputes regarding the content of the amendment.

44. All owners have not attended the meetings of the Association, preventing the ability to hold a vote at which 100% approval could be obtained per the requirements of the Governing Documents.

45. To date, the Regime has incurred the following expenses in its attempt to effectuate an amendment to the Master Deed, in a total amount not less than \$24,855.00:

- a. Attorney's fees paid to Novit & Scarminach, P.A.: \$7,825.00;
- b. Fees paid to Surveying Consultants, Inc.: \$16,030.00; and
- c. Insurance Deductible following being named as party to instant action: \$1,000.

Development of Dispute and Filing of Instant Lawsuit

46. On July 31, 2020, following the inability of the Regime to effectuate an amendment to the Master Deed, Plaintiff Taylor filed the instant lawsuit against the Defendant, asserting, *inter alia*, that Defendant illegally expanded Unit 1595 into the Common Area of the Regime, and the encroaching structure must be removed.

47. On December 3, 2020, Defendant filed an Amended Answer and Third Party Complaint against the Regime, seeking, *inter alia*, a Declaratory Judgment that the Regime approved Defendant's addition, and that a valid and enforceable encroachment agreement exists between Defendant and the Regime.

48. Following the filing of the instant action, some of the co-owners who previously consented to the October 9, 2019 Proposed Amendment withdrew their consent.

Relief Requested by Regime

49. The South Carolina Non-Profit Code, S.C. Code § 33-31-160, entitled "Judicial Relief" provides in its entirety:

- (a) If for any reason it is impractical or impossible for a corporation to call or conduct a meeting of its members, delegates, or directors, or **otherwise obtain their consent**, in the manner prescribed by its articles, bylaws, or this chapter, then upon petition of a director, officer, delegate, member, or the Attorney General, the court of common pleas... may order that such a meeting be called or that a written ballot or other form of obtaining the vote of members, delegates, or directors be authored, in such a manner as the court finds fair and equitable under the circumstances.

(b) The court, in an order issued pursuant to this section, shall provide for a method of notice reasonably designed to give actual notice to all persons who would be entitled to notice of a meeting held pursuant to the articles, bylaws, and this chapter, whether or not the method results in actual notice to all such persons or conforms to the notice requirements that would otherwise apply. In a proceeding under this section, the court may determine who the members or directors are.

(c) The order issued pursuant to this section may dispense with any requirement relating to the holding of or voting at meetings or obtaining votes, including any requirement as to quorums or as to the number or percentage of votes needed for approval, that would otherwise be imposed by the articles, bylaws, or this chapter.

(d) Whenever practical, any order issued pursuant to this section shall limit the subject matter of meetings or other forms of consent authorized to items, including amendments to the articles or bylaws, the resolution of which will or may enable the corporation to continue managing its affairs without further resort to this section. However, an order under this section may also authorize the obtaining of whatever votes and approvals are necessary for the dissolution, merger, or sale of assets.

(e) Any meeting or other method of obtaining the vote of members, delegates, or directors conducted pursuant to an order issued under this section and that complies with all the provisions of such order, is a valid meeting or vote, as the case may be, and has the same force and effect as if it complied with every requirement imposed by the articles, bylaws, and this chapter.

(emphasis added).

50. The Master Deed requires an amendment in order to lawfully and properly describe the Regime property, dwelling units, common elements, and the rights of the co-owners.

51. The Regime shows, based on the lengthy history of attempts to amend the Master Deed, the expenses incurred, the protracted discussion and efforts which have taken place since 2018, and the instant lawsuit, that it is impossible and impractical for the Regime to call or conduct a meeting of its members or otherwise obtain their consent in order to vote on a valid amendment to the Master Deed.

52. The Regime submits this Petition, praying that this Court order that such a meeting be called or that a written ballot of other form of obtaining the vote of the members be authored,

in such a manner as the Court finds fair and equitable under the circumstances. The Regime further requests that the Court dispense with requirements relating to the holding of or voting at meetings or obtaining votes, including the requirements relating to quorums and percentage of votes needed for approval.

53. Specifically, the Regime requests the following relief:

- a. That the Court order the Regime to hold a special meeting for the purpose of approving an amendment to the Master Deed;
- b. That the Court order proper notice be provided to the co-owners of the Special Meeting;
- c. That the October 9, 2019 Proposed Amendment will be provided to the co-owners for a vote at the Special Meeting.
- d. That all co-owners be required to attend the Special Meeting, which may be held via video-conferencing platform or other means to allow for remote attendance;
- e. That the Court will alter the voting requirement, and order that should the amendment receive a majority approval of the co-owners based on voting percentages expressed in the Sixth paragraph of the current Master Deed, the amendment will be ordered by the Court 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 the Court will order the same to be filed in the public records of Beaufort County.

54. The Regime further requests such other relief as the Court may deem appropriate, under S.C. Code § 33-31-160 and otherwise.

[SIGNATURE PAGE TO FOLLOW]

This 25th day of August, 2021.

Respectfully submitted,

COPELAND, STAIR, KINGMA & LOVELL, LLP

40 Calhoun Street, Suite 400
Charleston, South Carolina 29401-3531
dmackelcan@cskl.law
lhoughton@cskl.law
Ph: 843-727-0307

By: *s/Douglas W. MacKelcan*
DOUGLAS W. MACKELCAN
State Bar No.: 76332
LACEY L. HOUGHTON
State Bar No.: 102968
Attorneys for Third-Party Defendant