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via ELECTRONIC MAIL & CERTIFIED MAIL
Mary Lighthiser, Esq.
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Re: Russell McGonagil and Emma McGonagil v. Daniel F. Benner, Denise Benner and Ridenour Homeowners & Recreation Association, Inc. Cobb County Superior Court Civil Action File No. 17108318

Dear Mary and Scott:

As you know, your clients have filed suit against both the Benners and the Ridenour Homeowners & Recreation Association, Inc. ("Association") because of the Benners' alleged failure to keep their property in good repair. Based on the applicable facts and law, however, Plaintiffs cannot assert a viable claim against the Association. As a consequence, Defendant Association urges your clients to dismiss it from this action immediately.

A. The Declaration

The Declaration expressly states that it is subject to the Georgia Nonprofit Corporation Code. Article 3.01. Article 3 describes the Association's powers and duties as follows:

> The Association shall have no power or duty to do or perform any act or thing other than those acts and things which will promote in some way the common good and general welfare of the people of the Development. To the extent, and only to the extent, necessary to carry out such purpose, the Association (a) shall have all of the powers of a corporation organized under the Georgia Nonprofit Corporation Code and (b) shall have the power and duty to exercise all of the rights, powers and privileges and to perform all of the duties and obligations of the Association as set forth in this Declaration.

Article 3.01 (emphasis added).

The Declaration reiterates the Association's rights:

> The Association may exercise any other right or privilege given to it expressly by this Declaration or by law and any other right or privilege reasonably to be implied from the existence of any right or privilege given to it herein or reasonably necessary to effectuate any such right or privilege.

Article 3.08 (emphasis added). The Declaration does not impose any duty on the Association to take the action(s) that your clients claim the Association has failed to take. Furthermore, Georgia law does not require such action(s) by the Association, as will be discussed in more detail below.

B. The Bylaws

The Association promulgated Bylaws, which designated the Association's Board's powers and duties as follows:

> The Board shall exercise for the Association all powers, duties and authority vested therein by the Declaration or these Bylaws, except for such powers, duties and authority reserved thereby to the members of the Association or the Developer. The Board shall have the following powers and duties:
>
> . . .
>
> (b) to administer the affairs of the Association;
>
> . . .
>
> (v) in addition to, and in furtherance of, the powers referred to in these Bylaws, the Association shall (i) have all the powers permitted to be exercised by a nonprofit corporation under the Georgia Nonprofit Corporation Code, as now in force or hereafter amended, and (ii) have and exercise all powers necessary or convenient to effect any or all of the purposes for which the Association is organized, and to do every other act not inconsistent with law which may be appropriate to promote and attain the purposes set forth in the Declaration and these Bylaws.

Article 3.14. The Bylaws also allow the Board to impose fines, suspend member voting rights, or take other actions if it chooses to exercise such authority, but it is not required to do so. Articles 7.1. -7.2.

C. The Nonprofit Corporation Code

The Nonprofit Corporations Code expressly states:

> [u]nless its articles of incorporation provide otherwise, every corporation has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power:
>
> (1) To sue, be sued, complain, and defend in its corporate name;
>
> . . .
>
> (14) To impose dues, assessments, admission fees, and transfer fees upon its members;
>
> . . .
>
> (18) To do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.

O.C.G.A. § 14-3-302. The Nonprofit Corporations Code further states:

> (a) [e]xcept as provided in subsection (b) of this Code section, the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.
>
> (b) a corporation's power to act may be challenged:
>
> > (1) in a proceeding by a member against the corporation to enjoin the act;
> >
> > . . .
>
> (c) in a member's proceeding under paragraph (1) of subsection (b) of this Code section to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss, other than anticipated profits, suffered by the corporation or

another party because of enjoining the unauthorized act.

O.C.G.A. § 14-3-304 (emphasis added). In other words, a member may stop a non-profit corporation from acting, but a member cannot enjoin an alleged failure to act.

D. Association Acted Within Its Rights

Restrictive covenants constitute specialized contracts that inure to the benefit of all owners in a subdivision. Crawford v. Dammann, 277 Ga. App. 442, 626 S.E.2d 632 (2006). They are "valid and enforceable so long as they are not contrary to law or public policy." Turtle Cove Property Owners Ass'n v. Jasper Co., 255 Ga. App. 560, 561, 566 S.E.2d 368 (2002). By accepting a deed to property, the homeowner is bound by the covenants that run with said property. Interchange Drive, LLC v. Nusloch, 311 Ga. App. 552, 716 S.E.2d 603 (2011).

Restrictive covenants are enforceable even if the developer failed to comply with all formalities, so long as the landowner had knowledge of the existence of the restrictive covenants at the time the property was purchased. McLean v. Turtle Cove Property Association, Inc., 222 Ga. App. 709, 475 S.E.2d 718 (1996); The Waterfront, LLP v. River Oaks Condominium Ass'n, Inc., 287 Ga. App. 442, 651 S.E.2d 481 (2007). The McLean court held that this rule was especially true where a third party relies on the applicability on the covenants. The McLean court explained,

> [t]he developer's failure to do something he should have done to ensure notice does not render the covenants inapplicable as long as the purchaser had notice of the covenants at the time of purchase. And the need for such a rule is particularly compelling where third parties have relied on the applicability of the covenants.

222 Ga. App. at 720. As a consequence, the McLean court held that a homeowners association's failure to file a supplementary declaration of covenants did not make the original covenants inapplicable to subsequently added lots, so the association was entitled to collect dues from a landowner who bought with notice of the original covenants. Id.

In addition, legally insufficient covenants may be enforced through a theory of promissory estoppel where the landowners have abided by and enforced the covenants in reliance on their continued viability. Rice v. Lost Mountain Homeowners Ass'n, Inc., 269 Ga. App. 351, 604 S.E.2d 215 (2004). The Georgia Court of Appeals has also explained that such covenants apply under an implied covenant theory where an owner knew about the existence of the covenants at the time of the purchase of the property. Castle Point Homeowners Association, Inc. v. Simmons, 333 Ga. App. 501, 773 S.E.2d 806 (2015). Moreover, "the courts will give effect to the substantial compliance with covenant procedures and the clear intent and purpose of the covenants". Rice, 269, Ga. App. at 354 (citations omitted).

Furthermore, Georgia courts have held that no actionable claim exists against a homeowners association for allegedly negligent maintenance. Vernon Bowdish Builder v. Spalding Lake Homeowners Ass'n, 196 Ga. App. 370, 396 S.E.2d 24 (1990). In Vernon Bowdish, the association allegedly failed to maintain a lake within the subdivision at an acceptable water level. Affirming summary judgment in favor of the association, the Vernon Bowdish court explained:

> The controversy concerns a difference between the judgment and actions taken by the board of directors of the homeowners association and the judgment of plaintiff's president, who was at all times relevant to this lawsuit a member of the homeowners association. The decision of the majority of directors of a corporation is not actionable unless the facts show: "1. Some action or threatened action of the directors beyond the charter powers; or 2. Such a fraudulent transaction; . . . or, 3. That a majority of the officers and directors are acting in their own interest in a matter destructive of the [corporation], or of the rights of the other stockholders[.]" [cits]. Plaintiff's complaint does not allege any act or omission by the homeowners association which would be actionable. At most, plaintiff's complaint alleges and the evidence presented by plaintiff shows merely that the homeowners association acted negligently. "No principle of law is more firmly fixed in our jurisprudence than the one which declares that the courts will not interfere in matters involving merely the judgment of the majority in exercising control over corporate affairs." [cits]. Summary judgment is appropriate where, as here, the record reflects no genuine issue of material fact exists. [cits].

Id. at 371 (citations omitted) (emphasis added). Based on Vernon Bowdish, Plaintiffs have no viable claim against the Association even if the Association's alleged acts were negligent.

The Georgia Court of Appeals reached a similar conclusion when considering the impact of a Declaration's enforcement clause that mirrors the one at issue in the instant case. Rymer v. Polo Golf & Country Club Homeowners Ass'n, Inc., 335 Ga. App. 167, 780 S.E.2d 95 (2015). In Rymer, the plaintiffs sued the association to recover damages associated with water infiltration problems caused by deteriorating storm drains buried underneath a nearby homeowner's lot. The plaintiffs argued that the declaration of covenants, by establishing an Architectural Control Committee ("ACC") with rights of abatement and enforcement, created a requirement for the association "to force other homeowners to undertake necessary repairs." 335 Ga. App. at 172. Rejecting the homeowner's argument, the Rymer concluded that the association had a right to abate and enforce, but the declaration did "not impose on [the association] a mandatory duty to abate." Id. at 174. Relying on Vernon Bowdish, the Rymer explained:

> The essence of the Rymers' complaint is that [the association] should have exercised its right of abatement by forcing other homeowners to make repairs to the stormwater drainage facilities. Thus, the controversy turns on a difference in judgment between the Rymers and [the association] and does not create a cause of action in favor of the Rymers. See Vernon Bowdish Builder, supra, 196 Ga. App. at 371 (controversy between homeowner and homeowners association over whether association had done enough to maintain common area was not actionable). Accordingly, the trial court did not err in granting summary judgement to [the association] on the Rymers' claim that [the association] violated its duty, under the Covenants, to force other homeowners to undertake necessary repairs.

Id. at 175.

The Court of Appeals reached a similar conclusion with regard to claims against a condominium association. Headrick v. Stone Park of Dunwoody Unit Owners Ass'n, 331 Ga. App. 772, 771 S.E.2d 382 (2015) (affirming summary judgment in favor of the association with regard to the homeowner's claim that the association breached its duty to inspect common areas and perform maintenance or repairs). The Headrick court cited the trial court's conclusion that disputes regarding "a difference between the judgment and actions taken by the Board of Directors of the homeowners association and the judgment of plaintiff . . . member of the homeowners association" was not viable. 331 Ga. App. at 779 (*citing* Vernon Bowdish Builder v. Spalding Lake Homeowners Ass'n, 196 Ga. App. 370, 371, 396 S.E.2d 24 (1990)).

Based upon the applicable facts and law, the McGonagil Plaintiffs do not have a viable cause of action against the Association itself. As in Rymer, the Association's governing documents, including the applicable Declaration and Bylaws, provide the Association with the right of abatement and/or enforcement. However, and also as in Rymers, the Declaration does not impose a duty on the Association to force the Benners to make repairs. While the Enforcement Clause repeatedly outlines the Association's "rights", it is silent as to alleged "duties". Moreover, Vernon Bowdish establishes that Plaintiffs cannot prevail against the Association simply by showing that they disagree with the course of action the majority of the Association's Board took in order to address the matter. Even assuming, for the sake of argument, that Plaintiffs could show that the Association was negligent in its handling of the Brenner matter, such a showing is insufficient under Vernon Bowdish to state a viable cause of action against the Association.

Unlike Rymer, no issue exists as to whether the Association negligently performed a voluntary undertaking. Instead, this case is in line with the Rymer court's conclusion that the Association has a right, but not a duty, to abate violations and/or to exercise other remedies as set forth in the Declaration. As a consequence, Plaintiffs will not prevail in either of their claims against the Association. Both claims arise out of the Association's alleged failure to assert its

right of abatement. Georgia law is clear that an Association's mere exercise of its judgment is not actionable. Moreover, since the Declaration does not impose a duty to abate upon the Association, the McGonagil Plaintiffs to have no viable claim against the Association.

Please contact us after you have had an opportunity to review the information contained in this letter to confirm that Plaintiffs will dismiss their baseless claims against the Association immediately. If Plaintiffs refuse to do so, then the Association reserves the right to seek all remedies available to it, including but not limited to filing appropriate motions in this suit, and pursuing its claims to recoup its fees and costs associated with responding to Plaintiffs' frivolous claims against it. Thank you for your attention to this matter. We look forward to your prompt response.

Best regards,

SWIFT, CURRIE, McGHEE & HIERS, LLP

Melissa K. Kahren

MKK

cc: Mark T. Dietrichs
John A. Pape