

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	CASE NO.: 2021-CP-10-01734
)	
Timothy Hazel et al.,)	
)	
Plaintiffs,)	ORDER ON CROSS-MOTIONS
vs.)	FOR SUMMARY JUDGMENT
)	
Kiawah Island Community Association, Inc.;)	
)	
Defendant.)	
_____)	

Now before the Court are the cross-motions for summary judgment of the Plaintiffs, Timothy Hazel (individually) and two trusts represented by their respective trustees, and the Defendant, Kiawah Island Community Association, Inc. (“KICA”). Pursuant to an agreement of the Parties, the two disputed issues now before the Court for summary judgment were narrowed from the issues raised in the parties’ respective pleadings. Those two issues were subsequently briefed and argued before the Court at a hearing on December 16, 2021. For the reasons more fully discussed below, the Court finds (1) that KICA’s Board of Directors (the “Board”) did not have the authority to appoint Directors to two newly created seats and (2) that KICA’s Members do not have a right to the email addresses of fellow Members under South Carolina’s Non-Profit Corporation Act, S.C. Code Ann. §§ 33-31-101 *et seq.* (the “Act”).

PROCEDURAL HISTORY AND UNDISPUTED FACTS

Plaintiffs, who are property owners on Kiawah Island, South Carolina, and Members of KICA, initiated this lawsuit against KICA for a declaratory judgment. To narrow the issues for the Court, resolve a disagreement as to the appropriateness of the derivative claims, and dismiss the individual Board Directors as defendants, the parties entered into an agreement wherein they agreed to have this Court decide only the following two issues:

- a. Whether KICA is required to disclose email addresses of all KICA members that KICA maintains under Section 33-31-1601(c) (Corporate Records) of the South Carolina Nonprofit Corporation Act of 1994 (the “Act”), in response to a Member’s request to inspect KICA’s corporate records pursuant to Section 33-31-1602(b)(3) of the Act, provided the requesting Member meets the requirements of subsection (c) of Section 33-31-1602 and is bound by the limitations set forth in Section 33-31-1605.
- b. Whether the KICA Board has the power under the governing documents and South Carolina law to appoint members of the Board to fill seats newly created by the Board itself.

At the December 16, 2021 hearing on the cross-motions, counsel for the parties agreed that there were no disputes about the material facts, that the issues presented to the Court were matters of law, appropriate for summary judgment, and dispositive of the action. The undisputed facts follow.

KICA, is a non-profit corporation formed in 1976 for the purpose of maintaining common facilities and administering and enforcing covenants and restrictions governing certain properties on Kiawah Island. KICA is subject to the Act, and has promulgated its own Covenants, By-Laws, and Rules and Regulations (collectively, the “Governing Documents”). The Covenants provide that “[i]n the event of a conflict between the Covenants and the Articles of Incorporation or the By-Laws, the Covenant shall control” state that KICA “shall be governed by a Board of Directors consisting of Three (3), Five (5), Seven (7), Nine (9), or Eleven (11) Members, with the number in subsequent years to be determined by the members of the Board of Directors as provided for in the Bylaws of the Association.” The Covenants further provide that “[a]ll [of KICA]’s Directors but one shall be elected by the Members of the Association.”

Prior to March 2021, KICA was governed by a seven-member Board. One of the Directors is appointed by the developer of the island, referred to in the Covenants as “the Company.” The

remaining six Director positions are elected by the KICA membership on staggering three-year terms, with two of those seats typically coming up for election every year. KICA Board terms begin at its annual meeting in March of every year, but the members begin casting votes for those seats in January.

For the year 2021, voting for two of the seven Director positions for was held between January 6, 2021, and February 5, 2021, and members were allowed to vote online, with paper ballots, or by phone. A total of 2,011 members voted, who represented 5,443 of the available 9,385 votes, or 58%. The results were certified on February 8, 2021, and the two individuals who received the most votes became Directors—Alex Fernandez and Beth Zampino. The new Directors assumed their roles at the annual meeting on March 12, 2021.

In early February 2021, prior to the certification of the election, Board Chair Dave Morley notified the Board he believed they should expand the number of Directors. The Board discussed the issue internally, obtained an outside legal opinion, and discussed the issue at an open, informal Board meeting on February 8, which 147 members attended by Zoom. During the February 8, 2021 meeting, in addition to discussing the possible increase in the number of Directors, they also discussed appointing as Directors the members who received the third and fourth most votes, as the election had just been certified. The Board also discussed the issue in executive session following the open meeting. The Board held a meeting and their annual retreat on March 1, 2021. Every Director of the Board as of that date was present at the meeting and retreat. The newly elected Directors, who would take office on March 12, did not participate and vote in the March 1 meeting. Among other topics at the meeting, the Board discussed whether and how the Board should increase its numbers. The By-Laws directly address the mechanism for enlarging the Board and filling vacancies. They provide:

Initially the number of directors shall be three (3) with the number of directors in subsequent years to be set by the Board of Directors at three (3), five (5), seven (7), nine (9) or eleven (11) Members as the directors deem appropriate. . . . At each annual meeting [after the first], the Members shall elect directors for a term of three (3) years. Any vacancy occurring in the initial or subsequent Board of Directors may be filled at any meeting of the Board of Directors by the affirmative vote of a majority of the remaining directors, though less than a quorum of the Board of Directors, or by a sole remaining director and, if not previously filled, shall be filled at the next succeeding meeting of the Members of the Corporation. Any director elected to fill a vacancy shall serve as such until the expiration of the term of the directors whose position he was elected to fill. Election of directors may be conducted by mail ballot if the Board of Directors so determines.

The Board held a vote on expanding the number of directors to nine and appointing to the two the newly created seats the candidates who received the third and fourth most votes in the recently held election. The measure passed and the Board appointed Gaye Stathis and Sandy Devine to fill the seats created by this expansion of the Board. The newly appointed Directors also assumed their roles by the annual meeting on March 12, 2021.

After the Board expanded its size and appointed two Directors to fill the newly created seats, certain KICA members initiated a petition to require a referendum to overturn the Board's decision. Members requested the Board circulate the petition and permit electronic voting. There was also a request that KICA provide email addresses so that the petition could be sent by the objecting Members directly to the Members as a whole. The proponents of the petition posted it on an electronic forum available to KICA's Members but not run by KICA. The Board declined to provide Member email addresses, giving rise to this action.

At the December 16, 2021 hearing on the parties' cross-motions, this Court announced that it intended to rule in favor of the Plaintiffs on the question of the power of KICA to seat Directors in newly created board seats and in favor of KICA on the question of its obligation to turn over

the email addresses of the KICA membership. The Court directed the parties to confer on drafting an order conforming to these rulings.

Since the December 16, 2021 hearing, but prior to the entry of this Order, the KICA Board voted to reduce the size of its Board of Directors from nine members to seven members.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC; *Baird v. Charleston Cty.*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. S.C. Dep't of Corr.*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999). The purpose of summary judgment is to expedite disposition of cases that do not require the services of a fact finder. In that way, “[a] motion for summary judgment is akin to a motion for directed verdict” because “[i]n each instance, one party must lose as a matter of law.” *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001); *Main v. Corley*, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984); *see also Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (stating the standard for summary judgment “mirrors” standard for directed verdict).

ANALYSIS

The Plaintiffs argue that the KICA Board acted beyond its authority when it appointed Directors to fill two seats created by the Board’s vote to expand the number of Directors. They further argue that KICA was obligated under the Act to provide Members objecting to the Board’s action with the email addresses of KICA’s Members to circulate the petition. KICA disagrees. After a review of the KICA’s Covenants, Bylaws, and applicable law, the Court finds that the Board did not have the authority under the Governing Documents to appoint Directors to the

positions created at the March 1 meeting and that KICA's Members do not have a statutory right to the email addresses of fellow Members under these circumstances.

I. The KICA Board does not have the authority to appoint Directors to fill the newly created seats by the Board's vote to expand the number of Directors.

The Court's determination of this issue turns on its interpretation of the Governing Documents that create KICA and govern the selection of KICA's Directors. Restrictive covenants are contractual in nature and subject to the rules of contractual interpretation. *See Hoffman v. Cohen*, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). Restrictive covenants are voluntary contracts between parties and a court shall enforce covenants unless they are indefinite or contravene public policy. *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 269, 363 S.E.2d 891, 894 (1987). A restrictive covenant is ambiguous when its terms are reasonably susceptible of more than one interpretation. *Hardy v. Aiken*, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006). Ambiguities in restrictive covenants are to be strictly construed against the grantor with doubts resolved in favor of the free use of property. *Id.* at 166, 631 S.E.2d at 542. Strict construction, however, will not be applied to defeat the plain and obvious purpose of the restriction. *Id.* If a term in a covenant is undefined, the term's usual and customary meaning applies under the plain meaning rule. *See Hanold v. Watson's Orchard Prop. Owners Ass'n, Inc.*, 412 S.C. 387, 397, 772 S.E.2d 528, 534 (Ct. App. 2015), *aff'd*, 419 S.C. 162, 797 S.E.2d 47 (2017).

The Parties both argue the use of the phrase "[a]ny vacancy" in the By-Laws gives rise to some ambiguity; however, they disagree about how the ambiguity is resolved. Plaintiffs argue that, while the term "vacancy" is not defined in the By-Laws, any ambiguity is resolved by looking to the language in and logic of the Governing Documents, specifically the Covenants, which "shall control" and that provide that all Directors (except the Company's selection) "shall be elected" by

the Members. Defendant, on the other hand, points to the Act, which states that “[u]nless the articles or bylaws provide otherwise . . . if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors . . . the board of directors may fill the vacancy.” S.C. Code Ann § 33-31-811(a). Defendant’s argument, of course, hinges on the finding there is an ambiguity in the Governing Documents as a whole, necessitating reference to the Act.

The Court finds that, in these circumstances, the controlling Covenants resolve any ambiguity in the By-Laws. An interpretation that the By-Laws allow the Board to only fill vacancies of *pre-existing* Board seats reasonably harmonizes the By-Laws with the clear (and controlling) expression in the Covenants that “[a]ll the Association’s Directors . . . shall be elected by the *Members*.” (emphasis added). Simply, there cannot be “remaining” Directors unless an *existing* Board seat is vacated in the middle of a term, and while the By-Laws allow for the Board to expand itself by creating new seats and for the “remaining” Directors to fill a “vacancy” on the Board, there is no language in the By-Laws expressly permitting the Board to create new seats and to fill them for entire terms at the same time. This omission is significant against the Act’s express provision, cited by Defendant, because the Governing Documents could have been written in such a way to allow the Board to do so, but they were not. Instead, they were written to empower the Members to elect KICA’s Directors, providing a clear expression of democratic principles violated when the Board effectively elected new Directors and short-circuited the lengthy process in place for the election of new Directors. Accordingly, the Court finds the KICA Board did not have the authority to appoint the two Directors for seats created by the Board’s decision to expand the number of Directors.

II. KICA is not required to disclose the email addresses of its Members in response to a Member's request to inspect KICA's corporate records pursuant to Section 33-31-1601(c) of the Act.

South Carolina law allows members of a nonprofit corporation, upon a proper demand, to inspect and copy certain records of the corporation, including the membership list. S.C. Code Ann. § 33-31-1602(b)(3). Section 1601(c) defines the content of the “membership list” to which members may inspect and copy pursuant to section 1602(b)(3). Nonprofit corporations are required to “maintain a record of its members in a form that permits preparation of a list of the name and address of all members, in alphabetical order by class, showing the number of votes each member is entitled to cast.” 1601(c).

Section 1601(c) imposes two requirements: (1) that an entity maintain a record of its members, and (2) the record be in a form allowing it to prepare a list of specific information (each member's name, address, and number of votes). The statute differentiates between an entity's record of its members and what information from the record must be distilled into a “membership list.” The statute envisions the scenario when an entity maintains more information on each member than it must disclose on its membership list. To fulfill its obligations under the statute, the entity must maintain a record of at least each member's name, address, and number of votes. But, if the entity maintains information in addition to those three categories, the additional information is not required to be placed on the membership list.

Therefore, Plaintiffs' argument that KICA should have produced members' emails addresses because it possessed them and because it would have assisted Plaintiffs and other members in their effort to promote a referendum, is unavailing. The Court finds that South Carolina law does not include email addresses in the information required for a membership list,

and therefore, KICA was not required to produce members' email addresses upon Plaintiffs' request, absent a change in state law or the KICA Bylaws.

Plaintiffs also argue the term "address" in the Act includes email addresses, relying on *WorldMark, The Club v. Wyndham Resort Dev. Corp.*, 114 Cal. Rptr. 3d 546, 556 (Cal. App. 4th 2010). The Court finds that the specific entity's bylaws in *WorldMark*, and the statutes analyzed in *WorldMark* are different from the South Carolina statute and KICA Bylaws, and therefore, *WorldMark* is not controlling, and KICA was not required to produce email addresses.

CONCLUSION

For the forgoing reasons:

IT IS THEREFORE ORDERED that the KICA Board is not authorized, under its Governing Documents and South Carolina law, to appoint Directors to fill newly created seats by the Board.

IT IS FURTHER ORDERED that South Carolina law and KICA's Governing Documents do not require KICA to disclose Members' email addresses in response to a request for the email addresses by another Member.

IT IS SO ORDERED.

The Honorable Mikell R. Scarborough
Master-in-Equity
Charleston County

_____, 2022
Charleston, South Carolina



Charleston Common Pleas

Case Caption: Timothy Hazel , plaintiff, et al VS Kiawah Island Community Association Inc , defendant, et al
Case Number: 2021CP1001734
Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062