IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DEBORA LIDDELL, BLAKE LIDDELL And VIRGINIA-HIGHLAND CIVIC ASSOCIATION, INC., **Plaintiffs,** **v.** **JASON KING and CHARLES B. COOK,** **Defendants,** **v.** **OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, JOSEPH TRACHTENBERG and WENDY SILVER** **Third-Party Defendants.**	**Civil Action File No. 2016CV279090**

DEFENDANTS' MOTION TO DISMISS

COME NOW, Defendants Jason King and Charles B. Cook ("Defendants"), and hereby file this, their Motion to Dismiss pursuant to O.C.G.A. § 9-11-12(b)(6), respectfully showing this honorable Court the following:

INTRODUCTION

On August 18, 2016, Plaintiffs filed their *Verified Complaint for Damages and Equitable Relief, Including Preliminary Injunction* (the "Complaint"). The Complaint sets forth six counts which include several claims for relief which simply cannot be granted under any set of facts which could be proven in support of such claims for relief. Defendants file this Motion to have such claims for relief dismissed from this action pursuant to O.C.G.A. § 9-11-12(b)(6).

STATEMENT OF FACTS

Defendants are the owners of that certain property located at 797 Ponce de Leon Terrace, Atlanta, Georgia 30306 (the "Property").[1] Defendants purchased the Property in 2014 from Third-Party Defendants Joseph Trachtenberg and Wendy Silver via that certain *Limited Warranty Deed* recorded in deed book 53984, page 302 of the real estate records of Fulton County, Georgia (the "2014 Deed").[2] The Deed incorporated, through its legal description, the subdivision plat for the Property recorded in plat book 166, page 95 of the real estate records of Fulton County (the "Plat").[3]

The Plat contains the notation "5' Ingress Egress Easement" located on a designated strip running along the eastern boundary of the Property.[4] The "5' Ingress Egress Easement" strip does not encompass the driveway of the Property, but rather is confined to the eastern edge of the Property.[5] The driveway begins on the western edge of the Property before turning southeast to connect to the parking pad located in the rear of the Property.[6]

The Plat contains the notation "Marker Easement" in the southeastern corner of the Property.[7] The Plat does not describe or set forth any improvements or fixtures contained within the area denoted with "Marker Easement," nor does it otherwise describe a purpose, scope of usage, or maintenance responsibilities for the "Marker Easement."[8]

Upon information and belief, a predecessor in title to Defendants installed a carved and inscribed monument stone and associated improvements on the Property in the area denoted

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[1] Complaint, par. 5.
[2] Id. at par. 34.
[3] Id. at par. 35 and Exhibit I attached thereto.
[4] Id. at Exhibit D attached thereto.
[5] *Answer, Affirmative Defenses, Counterclaims, and Third-Party Complaint of Defendants Jason King and Charles B. Cook*; par. 12 of Counterclaims and Third-Party Complaint.
[6] Id. at par. 13 of Counterclaims and Third-Party Complaint.
[7] Complaint, Exhibit D attached thereto.
[8] Id.

"Marker Easement" (the "Monument Stone").[9] The Monument Stone reflects that, at one time, portions of the Property were formerly used as a cemetery and burial area.[10] Plaintiffs did not purchase or install the Monument Stone on the Property.[11] The Plat and the "5' Ingress Egress Easement" and "Marker Easement" notations do not include any reference to or description of the Monument Stone.[12] Title to the Monument Stone passed to Defendants through the Deed.[13]

When Defendants purchased the Property, it included a picket fence surrounding a swimming pool on the Property.[14] The Plat and the "5' Ingress Egress Easement" and "Marker Easement" notations do not include any reference to or description of the fence surrounding the swimming pool or any fencing separating the "5' Ingress Egress Easement" and "Marker Easement" from the remainder of the Property.[15] Title to the fence surrounding the swimming pool passed to Defendants through the Deed.[16] Following their purchase of the Property, Defendants removed the fence surrounding the swimming pool.[17]

Following their purchase of the Property, Defendants installed a gate across the driveway (the "Driveway Gate").[18] The Driveway Gate is not located on the area denoted "5' Ingress Egress Easement" on the Plat.[19]

LEGAL ARGUMENT AND CITATION TO AUTHORITY

Under O.C.G.A. § 9-11-12(b)(6), a court may properly dismiss any and all counts in a complaint which fail to state a claim upon which relief may be granted. O.C.G.A. § 9-11-

[9] Complaint, par. 21.
[10] Id. at par. 11.
[11] Id. at pars. 13, 21.
[12] Id. at Exhibit D attached thereto.
[13] Id. at Exhibit I attached thereto.
[14] *Answer, Affirmative Defenses, Counterclaims, and Third-Party Complaint of Defendants Jason King and Charles B. Cook*; par. 15 of Counterclaims and Third-Party Complaint.
[15] Id. at par. 16 of Counterclaims and Third-Party Complaint.
[16] Complaint, Exhibit I attached thereto.
[17] *Answer, Affirmative Defenses Counterclaims, and Third-party Complaint of Defendants Jason King and Charles B. Cook*; par. 17 of Counterclaims and Third-Party Complaint.
[18] Id. at par. 18 of Counterclaims and Third-Party Complaint.
[19] Id. at par. 19 of Counterclaims and Third-Party Complaint.

12(b)(6). In addition, "a trial court may properly consider exhibits attached to and incorporated in the pleadings in considering a motion to dismiss for failure to state a claim for relief." Hendon Properties, LLC v. Cinema Dev., LLC, 275 Ga. App. 434, 435, 620 S.E.2d 644, 647 (2005). Based on the exhibits attached to the Complaint, the following counts of the Complaint fail to state a claim upon which the relief requested may be granted and should therefore be dismissed.

a. Plaintiffs' Request For the Removal of the Driveway Gate Must Be Dismissed.

In Paragraph 79 of the Complaint, Plaintiffs' request a permanent injunction compelling "the removal of . . . the gate blocking the driveway."[20] Because no set of facts can be offered to show that Plaintiffs' have a right to access and utilize the driveway, the claim for this relief must be dismissed.

Plaintiffs assert that a valid easement for ingress and egress to the Monument Stone was established through the Plat, and that Defendants are bound to the terms of such easements due to the proper recording of the Plat.[21] Plaintiffs therefore request permanent injunctive relief compelling "the removal of . . . the gate blocking the driveway."[22]

However, the copy of the Plat included as Exhibit D to the Complaint reveals that the "5' ingress-egress easement" is confined to a five (5) foot strip running along the eastern edge of the Property.[23] While this notation and designation provide the basis for Plaintiffs' claims of ingress and egress rights to access the rear portion of the Property, this designated strip of land does not include or encompass the driveway on the Property.[24] Upon information and belief, the strip of

[20] Complaint, par. 79.
[21] Id. at. par. 27, 71.
[22] Id. at par. 79.
[23] Id. at Exhibit D attached thereto.
[24] *Answer, Affirmative Defenses, Counterclaims, and Third-Party Complaint of Defendants Jason King and Charles B. Cook*; pars. 11 and 12 of Counterclaims and Third-Party Complaint.

land burdened by the "5' ingress-egress easement" on the Property has never been utilized for such purposes, has never been developed or maintained for such purposes, and reflects abandonment by those seeking to use it for ingress and egress.[25] The Plat simply does not provide Plaintiffs with any rights to utilize the driveway for ingress and egress to the Monument Stone, and Plaintiffs can point to no other instrument or other source which would provide such rights.

As shown through the Complaint, the Plat is the basis of Plaintiffs' claims for rights of ingress and egress over the Property, and the Plat clearly designates an area that is separate and apart from the driveway on the Property.[26] This leaves Plaintiffs with absolutely no basis for obtaining a mandatory injunction to compel "the removal of . . . the gate blocking the driveway." Because Plaintiffs cannot demonstrate any set of facts which would give them ingress and egress rights through the Plat to utilize the driveway, their request for relief compelling the removal of the Driveway Gate must be dismissed.

b. Plaintiffs' Request for the Restoration of the Fence Must be Dismissed.

In Paragraph 79 of the Complaint, Plaintiffs' request a permanent injunction compelling "the restoration of the fence that separated the monument from the swimming pool."[27] Because no set of facts can be offered to show that Plaintiffs have a right to compel the installation and maintenance of such a fence on the Property, the claim for this relief must be dismissed.

As set forth above, the Plat is the basis of Plaintiffs' claims for rights of ingress and egress over the Property and the establishment of the "Marker Easement". However, the Plat does not contain a notation for any fence on the Property, nor does it set forth or describe any

[25] *Answer, Affirmative Defenses, Counterclaims, and Third-Party Complaint of Defendants Jason King and Charles B. Cook*, par. 14.
[26] Id. at par. 11, 12.
[27] Complaint, par. 79.

obligation for Defendants to construct, retain, or maintain a fence on the Property.[28] The Plat does not in any way mention or address the pool fence for which Plaintiffs' seek this Court's injunctive relief.[29]

There is no set of facts which would give Plaintiffs' a right to compel Defendants to rebuild a poolside fence on the Property which was never referenced in the Plat and which was not even constructed until well after the Plat's recording. Accordingly, Plaintiffs' request for relief compelling the re-construction of the pool fence referenced in the Complaint must be dismissed.

c. Plaintiffs' Request for the Restoration of the Monument Stone Through Specific Performance Must be Dismissed.

In Paragraph 63 of the Complaint, Plaintiffs allege that Defendants breached a purported settlement agreement and seek an order compelling "the reconstruction of the monument" through specific performance.[30] Because no set of facts can be offered to show that Plaintiffs have a right to compel reconstruction of the Monument Stone through specific performance, the claim for this relief must be dismissed.

Through the Complaint, Plaintiffs allege that they entered into a binding and enforceable settlement agreement with Defendant King.[31] Plaintiffs allege that under the terms of this purported settlement agreement, Mr. King would: 1) post a sign on the Driveway Gate meeting certain criteria and designed by the VHCA, and 2) add the VHCA as additional insureds to the homeowners insurance policy for the Property.[32]

[28] Complaint, Exhibit D attached thereto.
[29] Id.
[30] Id. at par. 63.
[31] Id. at par. 47.
[32] Id. at par. 48.

Plaintiffs allege that this purported settlement agreement was breached when Defendants had the Monument Stone removed from the Property.[33] As damages for such alleged breach, Plaintiffs seek "damages and specific performance – the reconstruction of the monument on Defendants' property."[34]

Assuming arguendo that the purported settlement agreement is valid, it does not set forth a contractual obligation for either of Defendants to construct, reconstruct, or maintain the Monument Stone.[35] The purported settlement agreement merely describes obligations relating to the posting of a sign and the addition of the VHCA as an additional insured.[36] The relief Plaintiffs seek through specific performance – reconstruction of the monument – is simply not a term or condition of the purported settlement agreement.

"Before specific performance of a contract will be decreed it must appear that the contract is definite, certain and clear, and so precise in its terms *as to the thing or things to be done by the party whose performance is sought to be compelled* that neither party can reasonably misunderstand it. Martin v. Bohn, 227 Ga. 660, 661, 182 S.E.2d 428, 430 (1971), *emphasis added*. Here, while Plaintiffs seek to compel both Defendants to reconstruct the Monument Stone, it is clear that the purported settlement agreement does not include the term that such reconstruction is a "thing or things to be done" by Defendants. Plaintiffs cannot seek reconstruction of the Monument Stone through enforcement of the purported settlement agreement, since the purported settlement agreement does not set forth such reconstruction as an obligation of Defendants in its terms. See Bohn.

[33] Complaint, par. 62.
[34] Id. at par. 63.
[35] Id. at par. 48, exhibit K attached thereto.
[36] Id.

There is no set of facts which would give Plaintiffs' a right to compel Defendants to reconstruct the Memorial Stone through specific performance, as such reconstruction is not a term of the purported settlement agreement which Plaintiffs seek to enforce. Accordingly, Plaintiffs' request for relief compelling the reconstruction of the Monument Stone through specific performance must be dismissed.

d. Plaintiffs' Request for the Restoration of the Monument Stone Through Injunctive Relief Must be Dismissed.

In Paragraph 79 of the Complaint, Plaintiffs request a permanent injunction mandating "the restoration of the Todd Cemetery Memorial in the material form and location of the original monument."[37] Because no set of facts can be offered to show that Plaintiffs' have a right to such a mandatory injunction, the claim for this relief must be dismissed.

The mandatory nature of the relief sought by Plaintiffs is excessive and burdensome, and goes beyond what is contemplated by O.C.G.A. § 9-5-1 et seq. "A mandatory injunction is an extraordinary remedy, one of the most powerful a court can issue. No exercise of power is more delicate or requires 'greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing of an injunction.' Injunctions must be 'crafted in a manner that is the least oppressive to the defendant while still protecting the valuable rights of the plaintiff.' Rigby v. Boatright, 330 Ga. App. 181, 187, 767 S.E.2d 783, 789 (2014), *internal citations omitted.*

Here, Plaintiffs seek to have this Court issue an order compelling Defendants to undertake the substantial cost to reconstruct a new Monument Stone and then pay to have it installed on the Property.[38] In other words, Plaintiffs seek an Order from this Court commanding that Defendants spend a very large sum of money to construct and install something the way

[37] Complaint, par. 79.
[38] Id.

Plaintiffs want it. If so compelled, this would prove incredibly burdensome financially to Defendants. As opposed to inability to pay a judgment, inability to pay for the actions sought to be compelled by Plaintiffs would expose Defendants to the possibility of contempt for violating a court order.

Moreover, the re-construction of the Monument Stone and the associated cost are not obligations which Defendants affirmatively bargained for and assumed through a contract. As noted above, the Plat is the basis for Plaintiffs' claim to rights over the Property, yet the Plat has no indication or notation for the Monument Stone, and it does not describe construction, maintenance, or restoration responsibilities for the Monument Stone.[39] Certainly the Plat does not include a provision where Defendants obligated themselves to reconstruct or re-install the Monument Stone.[40]

In Rigby v. Boatright, the court noted that "where . . . a party is obligated to perform certain contractual duties, the trial court does not abuse its discretion in issuing a mandatory injunction." Boatright, 330 Ga. App. at 187. The court reasoned that compelling a party to perform a task which it had contractually obligated itself to do "cannot be considered oppressive." Id. at 188. Here however, there is no contract or other instrument between Defendants and Plaintiffs in which Defendants obligated themselves to reconstruct or reinstall the Monument Stone. Plaintiffs' request for a mandatory injunction seeks to compel Defendants to perform a task which Defendants never agreed to perform. While the reconstruction of the Monument Stone may be something that Plaintiffs sincerely want, it is simply inappropriate to compel Defendants to affirmatively undertake the expense of constructing and installing a new Monument Stone in the absence of an agreement by Defendants or their predecessors in title to

[39] Complaint, Exhibit D attached thereto.
[40] Id.

assume such an obligation. See, Boatright, 330 Ga. App. at 187.

There is no set of facts which would give Plaintiffs a right to compel Defendants to reconstruct the Monument Stone through the extraordinary remedy of a mandatory injunction. Accordingly, Plaintiffs' request for mandatory injunctive relief compelling the reconstruction of the Monument Stone must be dismissed.

CONCLUSION

Through the Complaint, Plaintiffs seek this Court's equitable powers to compel Defendants to remove the Driveway Gate, reconstruct the pool fence previously on the Property, and reconstruct and install the Monument Stone. However, the Plat which is the basis for Plaintiffs' claims does not set forth any easement burdening the driveway, does not give a right to a pool fence on the Property, and does not show the Monument Stone or address its construction, reconstruction or maintenance. Likewise, the purported settlement agreement which Plaintiffs seek to enforce through specific performance does not address any of these matters or otherwise include them as terms. Neither the Plat, nor the purported settlement agreement provide any basis for Plaintiffs' requested relief, therefore no set of facts are available which would support such claims for relief. Accordingly, Plaintiffs' claims for orders compelling the removal of the Driveway Gate, the reconstruction of the fence referenced in the Complaint, and the reconstruction and installation of the Monument Stone must be dismissed in accordance with O.C.G.A. § 9-11-12(b)(6).

This 21st day of September, 2016.

WILLIAMS TEUSINK, LLC

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel in the foregoing matter with a copy of the foregoing pleading through the Odyssey eFile service to:

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This 21st day of September, 2016.

WILLIAMS TEUSINK, LLC

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