

RENDERED: AUGUST 25, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000066-MR
AND
NO. 2005-CA-000242-MR

CLINTON S. OBERST AND
SUSAN J. OBERST

APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE STAN BILLINGSLY, SPECIAL JUDGE
ACTION NO. 02-CI-00623

TRIPLE CROWN SUBDIVISION
HOMEOWNERS' ASSOCIATION, INC.

APPELLEE/CROSS-APPELLANT

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: ABRAMSON AND BARBER, JUDGES; EMBERTON,¹ SENIOR JUDGE.

BARBER, JUDGE: This matter is before the court regarding a
December 3, 2004 summary judgment order by the Boone Circuit
Court. The order found a landminium owned by Appellants/Cross-
Appellees, Clinton S. Oberst and Susan J. Oberst² (Obersts),

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Mr. Oberst was single when he purchased his landminium in 1995. Susan J. Oberst was made a party in order to allow her to assert whatever interest she

subject to assessments (i.e., homeowners' association fees) by Appellee/Cross-Appellant, Triple Crown Subdivision Homeowners' Association, Inc. (Triple Crown).

The primary question for our court to answer is whether the Obersts' landminium is subject to the Declaration filed by Triple Crown in 1990 imposing homeowners' association fees.

Procedural History

During the late 1980s and early 1990s, Triple Crown Developers, Inc. (Developers), began purchasing property in Union, Kentucky, with the hopes of transforming it into a large upscale subdivision.³ In an effort to ensure the property maintained the upscale atmosphere, Developers recorded a Declaration of Covenants, Conditions and Restrictions for the Triple Crown Subdivision (Declaration) on October 4, 1990 in Miscellaneous Book 292, Page 1.⁴ Shortly thereafter, Developers began selling parcels of property to others so that the property could be developed. One of the purchasers was Fischer Development Company. Fischer Development Company purchased two parcels of property totaling 9.4944 acres from Group 2064 on

had in the subject real property by virtue of her marriage to Clinton S. Oberst.

³ All deeds referenced in this opinion are recorded in the Boone County Clerk's Office in Burlington, Kentucky.

⁴ The Declaration was prepared by Appellee's counsel, James G. Woltermann.

July 12, 1994.⁵ Fischer Development Company then transferred a portion of the 9.4944 acres⁶ to Henry Fischer Builder, Inc., on July 28, 1995.⁷ The portion transferred were lots located within Group 3473 of the Promenade section of the Triple Crown subdivision. Mr. Oberst purchased one of the Group 3473 lots⁸ from Henry Fischer Builder, Inc. on September 29, 1995.⁹

Following his purchase, Mr. Oberst noticed a fee on his sewage bill that he did not recognize. He called the sewage company and they informed Mr. Oberst it was his homeowners' association dues to Triple Crown. Mr. Oberst explained that he was a member of the Promenade Homeowners' Association, not Triple Crown. As such, he requested that the fee be removed from his bill. The company complied.

On March 22, 2001, Triple Crown filed an Assessment Lien against Mr. Oberst in the amount of \$530.62 for unpaid Triple Crown dues pursuant to the Declaration. Mr. Oberst still refused to pay the Triple Crown dues. Triple Crown responded by

⁵ The deed prepared by James G. Woltermann was recorded in Deed Book 551, Page 88 on August 8, 1994.

⁶ Also included in the transfer was property purchased by Henry Fischer Builder, Inc. from the Promenade Homeowners Association, Inc. recorded at Deed Book 574, Page 216. This parcel totaled .1090 acres and is not at issue in this appeal.

⁷ The deed was recorded in Deed Book 582, Page 43 on August 2, 1995.

⁸ Lot 24-3 was purchased by Mr. Oberst.

⁹ The deed was recorded in Deed Book 589, Page 178 on October 13, 1995.

filing a complaint to enforce its Assessment lien and foreclose on the property.

The matter was referred to the deputy Master Commissioner. The parties filed cross-motions for summary judgment arguing about the applicability of the Declaration to the Obersts' landminium. Following a hearing, the deputy Master Commissioner issued a recommended order granting summary judgment to the Obersts. Triple Crown filed exceptions to that recommended order.

Following a review of the exceptions, the trial court referred the matter to back to the Master Commissioner to conduct a trial and make recommendations. Triple Crown then filed another motion for summary judgment with the trial court which granted partial summary judgment to Triple Crown. It found that the Obersts were liable for the Triple Crown dues, but it did not award attorney fees to Triple Crown. It is from this order, which both parties appeal.

Scope of Review

The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Hallahan v. The Courier-Journal, 138 S.W.3d 699, 704 (Ky.App. 2004), (citing Palmer v. International Assoc. of

Machinists, 882 S.W.2d 117, 120 (Ky. 1994)). The movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Id. at 705, (citing Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 482 (Ky. 1991)). The party opposing summary judgment cannot rely on his own claims or arguments without significant evidence in order to prevent summary judgment. Hallahan, supra, 138 S.W.3d at 705. The court must view the record in the light most favorable to the nonmovant and resolve all doubts in his favor. Id., (citing Commonwealth v. Whitworth, 74 S.W.3d 695, 698 (Ky. 2002)).

In order for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. Motorists Mutual Insurance Co., supra 149 S.W.3d at 439, (citing Paintsville Hospital Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985)). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits,¹⁰ if any, show that there is no genuine issue as to

¹⁰ "Affidavits" in CR 56.03 includes any other pertinent materials which will assist the court in adjudicating the merits of the motion. Conley v. Hall, 395 S.W.2d 575, 583 (Ky. 1965).

any material fact and that the moving party is entitled to a judgment as a matter of law.” Motorists Mutual Insurance Co. v. Grange Mutual Casualty Co., 149 S.W.3d 437, 439 (Ky.App. 2004), (citing CR 56.03). The focus should be on what is of record rather than what might be presented at trial. Hallahan, supra, 138 S.W.3d at 705, (citing Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999)). Our court need not defer to the trial court’s decision on summary judgment and shall review the issue *de novo* because only legal questions are involved. Id.

DECLARATION APPLICABILITY

We first examine the pertinent recorded instruments related to this matter.

Deeds and Declaration

We review documents pertaining to the direct chain of title to the Obersts’ landominium to see if the Declaration is applicable. The deed from Henry Fischer Builder, Inc., to Mr. Oberst did not specifically refer to the Declaration,¹¹ but it did state, in relevant part:

This conveyance is made subject to and/or benefited by all easements, restrictions, zoning ordinances or regulations, and taxes and assessments both general and special, not yet due and payable.

¹¹ The deeds did state the transferred property was subject to provisions of a declaration recorded at Miscellaneous Book 326, Page 19. This referred to the Promenade Homeowners Association declaration.

The next deed from Fischer Development Company to Henry Fischer Builder, Inc., included the above language, but did not refer to the Declaration. The only time the Declaration is specifically referenced is in the deed from Triple Crown Developers, Inc. to Fischer Development Company which stated, in part:

Subject to Declaration of Covenants, Conditions, and Restrictions recorded in Miscellaneous Book 292, Page 1 of the Boone County Clerk's records at Burlington, Kentucky and subsequent amendments thereto.

This deed specifically references the Declaration at issue in this appeal. Although it appears that the Obersts' landownership is subject to the Declaration through the direct chain of title, we must ensure that the Declaration applies pursuant to its own terms. Thus, we must examine the Declaration. The Declaration stated, in pertinent part:

ARTICLE I:
Definitions:

The following terms as used in this Declaration shall have the following meanings:

. . . .

1.26 "Property" shall mean and refer to that real property described in Exhibit "A" attached hereto and made a part hereof and such additional property as may be submitted to this Declaration from time to time, pursuant to Article II of this Declaration. (Emphasis added.)

. . . .

ARTICLE II:
Property Subject to this Declaration:

2.1 Existing Property: The initial property which shall be subject to this Declaration upon the recordation with the County Clerk is **the Property**. (Emphasis added.)

2.2 Additional Property: **Developer**¹² may, at any time, and from time to time, **subject additional property to this Declaration by recording** in the County Clerk's office **an Amendment to this Declaration, describing such additional property**. (Emphasis added.)

. . . .

ARTICLE XIII
General Provisions

. . . .

13.2 Amendment: This Declaration may be amended upon the recordation of an appropriate instrument with the County Clerk; subject, however, to the following provisions:

. . . .

13.4 Covenants Running with the Property: The agreements, covenants, conditions, restrictions, Assessments, liens and other provisions contained herein shall constitute a servitude upon **the Property** and each portion thereof shall run with **the Property**, shall be binding upon the Owners of any portion thereof, and shall inure to the benefit of Developer, the Master Association, the Associations, and the Owners. (Emphasis added.)

. . . .

13.7 Notice: Any notice required or permitted to be given by this Declaration shall be given or made in writing by personal delivery or by certified mailed addressed as follows:

¹² The Declaration began with the following language: This Declaration of Covenants, Conditions and Restrictions is made and entered in this 16th day of August, 1990, by **Triple Crown Developers, Inc.**, a Kentucky Corporation, its successors and assigns (**hereinafter referred to as Developer**). (Emphasis added.)

. . . .

As additional property is subject to this Declaration by amendment to the Declaration, the address of the governing Association shall be set forth in such amendment. (Emphasis added.)

. . . .

EXHIBIT "A"

GROUP NUMBER: 3022

Being all of Triple Crown Subdivision, Section One, as shown on Plat Slide 141B of the Boone County Clerk's records at Burlington, Kentucky.

GROUP NUMBER: 3024

Being all of Triple Crown Subdivision, Section Four A (4/A), as shown on Plat Slide 142A of the Boone County Clerk's records at Burlington, Kentucky.

GROUP NUMBER: 3025

Being all of Triple Crown Subdivision, Section Four B (4/B), as shown on Plat Slide 142B of the Boone County Clerk's records at Burlington, Kentucky.

Legal Authority

In the absence of ambiguity, a written instrument will be enforced strictly according to its terms. Frear v. P.T.A. Industries, Inc., 103 S.W.3d 99, 106 (Ky. 2003), (citing O'Bryan v. Massey-Ferguson, Inc., 413 S.W.2d 891, 893 (Ky. 1966)). In such cases, a court will interpret the terms by assigning the language its ordinary meaning and without resort to extrinsic evidence. Id., (citing Hoheimer v. Hoheimer, 30 S.W.3d 176, 178 (Ky. 2000)).

In Black v. Birner, 179 S.W.3d 873, 881 (Ky.App.2005), our court held that a deed which stated "[t]his conveyance is subject to all restrictions and easements of record which affect the subject property" was not sufficient in and of itself to make a restriction contained in a document collateral to the chain of title applicable. "While conveyances 'subject to' restrictions give notice that such restrictions are of record, they are not an acknowledgement of the validity of such restrictions." Id., (quoting Stout v. Rhodes, 373 S.W.2d 94, 95 (Tex.Civ.App. 1963)). Reference to restrictions in a 'subject to' clause will not, without more, make such restrictions applicable to the deeded property if, as a matter of fact, they are otherwise inapplicable. Id., (citing Smith v. Second Church of Christ, Scientist, 351 P.2d 1104, 1109 (Ariz. 1960)).

Recording and notice do not of themselves render restrictions valid and enforceable. Id. The grantee is charged with notice of an encumbrance upon property created by an instrument which is of record, notwithstanding the fact that it may exist only collaterally in the chain of title. Id. However, such an encumbrance must be enforceable in order to bind the grantee. Id., (citing Oliver v. Schultz, 885 S.W.2d 699, 700 (Ky. 1994)). Moreover, "as a matter of judicial construction the court may not substitute what the grantor may have intended to say for the plain import of what he said."

Id., (quoting La Vielle v. Seay, 412 S.W.2d 587, 592 (Ky. 1966)).

Analysis

It is obvious that Triple Crown intended to add property to which the Declaration would apply. This intention is illustrated through Section II of the Declaration. Triple Crown was very specific as to what property was to be initially affected by the Declaration. It stated the initial property subject to the Declaration was "the Property."¹³ "The Property" was property described in Exhibit A.¹⁴ Exhibit A contained descriptions for three groups of property, Groups 3022, 3024, and 3025. As such, the Declaration originally applied to only those enumerated groups.

It is undisputed that Group 3473 (which encompasses the Obersts' landminium) was never added to the Declaration through an amendment. It is also undisputed that Group 2064, which is the larger group from which Group 3473 was created, was never added to the Declaration through an amendment. Upon a review of the record, we discovered twelve instances where Triple Crown filed an amendment to the Declaration wherein

¹³ § 2.1 of Declaration.

¹⁴ § 1.26 of Declaration.

additional property was added.¹⁵ Five of these amendments specifically state that the groups are being added pursuant to Section 2.2 of the Declaration to amend the definition of "the Property."

Triple Crown was aware of the procedure to add additional property to the Declaration. However, for some unknown reason, in this instance, it neglected to add the group containing the Obersts' landominium. The reference to the

¹⁵ 1. Second Amended Declaration recorded November 21, 1990 in Misc. Book 295, Page 28 added Groups 3023, 3048, 3049, and 3050.

2. Third Amended Declaration recorded January 22, 1991 in Misc. Book 299, Page 123 added Groups 3071-3075.

3. Fourth Amended Declaration recorded August 16, 1991 in Misc. Book 317, Page 296 added Groups 3113-3115.

4. Fifth Amended Declaration recorded August 7, 1992 in Misc. Book 355, Page 116 added Group 3182.

5. Sixth Amended Declaration recorded October 20, 1992 in Misc. Book 365, Page 59 added Group 3194.

6. Seventh Amended Declaration recorded December 15, 1992 in Misc. Book 373, Page 93 added Groups 3215-3217.

7. Ninth Amended Declaration recorded November 10, 1993 in Misc. Book 421, Page 48 added Groups 3282 and 3283.

8. Twenty-Sixth Amended Declaration recorded December 3, 2001 in Misc. Book 883, Page 24 added Groups 4299 and 4300.

9. Twenty-Seventh Amended Declaration dated November 30, 2001 in Misc. Book 883, Page 29 added Group 4301.

10. Twenty-Eighth Amended Declaration recorded December 5, 2001 in Misc. Book 883, Page 334 added Group 4302.

11. Thirtieth Amended Declaration recorded February 4, 2002 in Misc. Book 892, Page 83 added Group 4327.

12. Thirty-First Amended Declaration recorded February 4, 2002 in Misc. Book 892, Page 88 added Group 4328.

All of the above Amended Declarations were prepared by Mr. Woltermann.

Declaration in the direct chain of title (i.e., the deed from Developer to Henry Fischer Builder, Inc.) is insufficient to make the transferred property subject to the Declaration because Triple Crown failed to amend the Declaration accordingly. Specifically, it failed to expand the definition of "the Property" to include either Group 3473 or 2064. Thus, we believe the Declaration is not applicable to the Obersts' landominium and they are not liable to Triple Crown for homeowner association fees.¹⁶

DOCTRINE OF NEGATIVE RECIPROCAL EASEMENTS

Both parties also argue about the applicability of the doctrine of reciprocal negative easements. This doctrine or any other equitable argument was never raised by Triple Crown at any point prior to appeal. The first time this doctrine was addressed was by the trial court *sua sponte* in its Order granting summary judgment to Triple Crown. Because our review is *de novo* (i.e., without deference to the trial court's summary judgment order), it is unnecessary for us to examine this issue further. However, in the interest of judicial economy, we shall briefly review the doctrine.

The doctrine of reciprocal negative easements was created by courts of equity as a means of avoiding problems

¹⁶ Triple Crown may later include the group encompassing the Oberst's landominium through an amendment provided such an amendment is made in accordance with the Declaration.

associated with the statute of frauds and privity in applying restrictions on real property. If an owner of two or more lots, so situated as to bear the relation to a general scheme of development, sells one with an easement of benefit to the land retained, the servitude becomes mutual, and during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold. Reiger v. Wessel, 319 S.W.2d 855, 857-858 (Ky. 1958).

The doctrine of reciprocal negative easements should be applied with extreme caution. First Security National Bank & Trust Company of Lexington v. Peter, 456 S.W.2d 46, 50 (Ky. 1970), (citing McCurdy v. Standard Realty Corporation, 175 S.W.2d 28 (Ky. 1943)). We believe this doctrine should be applied in situations where a party is fighting to restrict the use of a parcel of land in order to maintain the physical integrity of a larger development, such as a subdivision. See, e.g., Reiger, supra, 319 S.W.2d 855 (Ky. 1958); A.M. Galbreath, et al. v. Miller, et al., 426 S.W.2d 126 (Ky. 1968); First Security National Bank, supra, 456 S.W.2d 46; and Elliott v. Jefferson County Fiscal Court, 657 S.W.2d 237 (Ky. 1983). Here, we are dealing with a second homeowners' association fee.¹⁷ We do not believe this type of situation warrants invocation of the doctrine of reciprocal negative easements.

¹⁷ Oberst was current on his homeowner association fees to Promenade, the subdivision he lived in.

ATTORNEY FEES

We examine Triple Crown's argument that they are entitled to attorney fees from Oberst. While this issue has now been rendered moot in light of our decision above, we will still examine the parties' arguments related to this issue.

"As a general rule, in the absence of contractual or statutory liability, attorney's fees are not recoverable as an item of damages." CSX Transportation, Inc. v. First National Bank of Grayson, 14 S.W.3d 563, 569 (Ky.App. 1999), (quoting Lyon V. Whitsell, 245 S.W.2d 926 (Ky. 1951)). However, Kentucky Revised Statute 411.195 states:

Any provisions in a writing which create a debt, or create a lien on real property, requiring the debtor, obligor, lienor or mortgagor to pay reasonable attorney fees incurred by the creditor, obligee or lienholder in the event of default, shall be enforceable, provided, however, such fees shall only be allowed to the extent actually paid or agreed to be paid, and shall not be allowed to a salaried employee of such creditor, obligor or lienholder.

While KRS 411.195 provides for the enforcement of agreements to pay attorney fees contained in an instrument that creates a debt, it applies only to those who are parties to the writing.

Farmers Bank & Trust Company v. Brazell, 902 S.W.2d 830, 833

(Ky.App. 1995). The Obersts were not a party to the

Declaration. Thus, they could not have been liable for attorney fees incurred pursuant to the Declaration.

Conclusion

Based on the foregoing, we vacate the Boone Circuit Court's order granting summary judgment to Triple Crown and remand with instructions for the circuit court to confirm the deputy Master Commissioner's recommended order granting summary judgment to the Obersts.

ABRAMSON, JUDGE, CONCURS IN RESULT ONLY.

EMBERTON, SENIOR JUDGE, CONCURS IN RESULT ONLY.

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