

RENDERED: OCTOBER 23, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000016-MR

HAROLD E. BAKER AND
MARTHA BAKER

APPELLANTS

v. APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 06-CI-00296

WAYNE AND PAT ANDERSON AND
TZRA HOMES OF KENTUCKY, LLC.

APPELLEES

OPINION
AFFIRMING IN PART AND
REVERSING IN PART

** ** * * * * *

BEFORE: CLAYTON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

CLAYTON, JUDGE: This is an appeal of the granting of summary judgment by the Lincoln Circuit Court. Based upon the following, we reverse in part and affirm in part.

BACKGROUND INFORMATION

Appellants Harold and Martha Baker (the Bakers), owned property known as Arcadia Heights Subdivision (Arcadia). The Bakers developed Arcadia and created certain conditions, reservations and restrictions for Lots 1-18. In March of 2006, the Bakers entered into negotiations with TZRA Homes of Kentucky, LLC (TZRA) regarding the purchase of one of the lots within Arcadia. During negotiations, TZRA questioned the Bakers regarding a deed restriction on the lot. Specifically, the restriction set forth that, “[t]he construction of a prefabricated house is prohibited.” There was also a restriction upon the placement of mobile homes or trailers upon the lots.

TZRA asked the Bakers whether a modular home would be permitted upon the lot. The Bakers, by way of a release to TZRA, set forth in writing that the construction of a modular home upon the lot would not be prohibited by the aforementioned deed restrictions. TZRA thereafter purchased the lot and began the construction thereon of a modular home. The plaintiffs (other homeowners with the subdivision) then brought an action in Lincoln Circuit Court seeking enforcement of the deed restriction and alleging misrepresentation on the part of the Bakers in signing the release/authorization mentioned above upon which

TZRA based its decision to purchase the property. TZRA filed a cross-claim against the Bakers based upon this release.

The trial court granted summary judgment to the homeowners finding that:

the issue before the Court is whether this structure, which Defendants refer to as a modular home, is prohibited by the restrictive covenant that proscribes the placement of prefabricated homes within the subdivision. The Court is satisfied that no genuine issue of material [f]act exists, thus rendering summary judgment appropriate.

The trial court found that while restrictive covenants should be broadly construed to allow free use of property, there was no ambiguity within this covenant and it was, therefore, a matter of law as to whether modular homes were restricted. It also found that a modular home was identical to a “prefabricated” home, and was prohibited on the lot due to the restrictive covenant. The trial court did not, however, rule on the cross-claim.

The Bakers then brought this appeal.

STANDARD OF REVIEW

In reviewing the granting of summary judgment by the trial court, an appellate court must determine whether the trial court correctly found “that there [were] no genuine issues as to any material fact and that the moving party [was] entitled to a judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03.

“[A] trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only [when] it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. [While] [t]he moving party bears the initial burden of [proving] that no genuine issue of material fact exists, . . . 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.’” *Community Trust Bancorp, Inc. v. Mussetter*, 242 S.W.3d 690, 692 (Ky. App. 2007).

Since summary judgment deals only with legal questions as there are no genuine issues of material fact, we need not defer to the trial court’s decision and must review the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

DISCUSSION

The trial judge’s order granting summary judgment provides that:

This matter arises from a dispute regarding the interpretation of a restrictive covenant. Plaintiffs argue that Defendants, Harold E. Baker and Martha Baker (Bakers) and Defendants TZRA Homes of Kentucky, LLC (TZRA), violated a restrictive covenant that prohibits the placement of prefabricated homes within a residential subdivision.

To begin, the Bakers were no longer the owners of the property and could not, therefore, have violated a restrictive covenant associated with the land. Kentucky courts have held that covenants restrictive of building rights “constitute

property rights which run with the land.” *McFarland v. Hanley*, 258 S.W.2d 3, 4 (Ky. 1953). Since it runs with the land and since TZRA is the property owner, any action for enforcement of the provision must be against TZRA. Thus, we find that the summary judgment entered against the Bakers was in error and that the action to enforce the restrictive covenant against the Bakers should be dismissed as a claim upon which no relief can be granted.

There remains, however, the summary judgment against TZRA. In his order granting summary judgment, the trial judge concluded that TZRA had violated the restrictive covenant set forth above. While the appellants argued that a modular home was not a “prefabricated” home for purposes of the covenant, the trial court found otherwise.

“It is a generally recognized rule of law that restrictions on the use of real property are to be strictly construed and given the effect which the language in which they are expressed authorizes when considered in connection with the circumstances surrounding the transaction and the objects which the parties had in view at the time of their creation.” *Vittitow v. Dodson*, 304 Ky. 418, 420, 194 S.W.2d 996, 997 (Ky. 1946) citing *Foos v. Engle*, 295 Ky. 114, 174 S.W.2d 5, 9 (Ky. App. 1943).

The trial court held the following:

the Court is guided by *dicta* found within *McCollum v. City of Berea*, 53 S.W.3d 106 (Ky. App. 2001), a case involving the application of a zoning ordinance. In that case, the plaintiffs sought permission from the local zoning commission to place a “manufactured home” in

an area which prohibited mobile homes. Quoting the trial court, the Court of Appeals used the terms “mobile home” and “manufactured home” interchangeably: “Even though mobile homes have a more pejorative connotation than manufactured housing, it is merely a rose by another name.” *Id* [sic] at 108 n.1. Like the *McCollum* rose, the difference between a prefabricated home and a modular home is a distinction without a difference.

While the term “prefabricated home” is not defined within the restrictive covenant at issue, nor that exact term defined by Kentucky statute, administrative regulation, or case law, the Court has no difficulty in determining that the term is interchangeable with the term “modular home.”

The trial court then cited KRS 198B.010(16) which provides that an “[i]ndustrialized building system [is] any structure or component thereof which is wholly or in substantial part fabricated in an off-site manufacturing facility for installation or assembly on a permanent foundation at the building site.” KRS 360.150(c) also was illustrative. It provides the definition of “manufactured home” as:

a moveable dwelling unit, designed and constructed for permanent occupancy by a single family, which dwelling contains permanent eating, cooking, sleeping, and sanitary facilities; or a prefabricated dwelling that is manufactured in two (2) or more modules at a location other than a homesite and which is designed to be used as a residence when the modules are transported to the homesite, and [when] the modules are joined together and installed on a permanent foundation system. . . .

We believe the trial court is correct. While the Bakers could have only included “mobile homes” in their restrictive covenant, they chose to expand it

and included “prefabricated” housing as well. In this instance, the home that TZRA was building was a “prefabricated” home. It was constructed at an off-site location and moved piece by piece to the property at issue. Having purchased the land with the restrictive covenant thereon, TZRA violated that restrictive covenant when it began construction of the home on the property. Thus, we will affirm the decision of the trial court enforcing the restrictive covenant against TZRA and reverse the decision of the trial court in granting summary judgment against the Bakers.

KNOPF, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

TAYLOR, JUDGE: I concur with the majority that summary judgment was properly entered for the Andersons and other lot owners against TZRA Homes of Kentucky, LLC. However, I also believe that summary judgment was properly entered against the Bakers.

The record reflects that the Bakers were the developers of Section 2 of Arcadia Heights Subdivision. In fact, the Bakers were responsible for placing specific use restrictions of record for the subdivision in conjunction with the proposed subdivision development. I agree that the mere transfer of a lot owned by the Bakers to TZRA subject to the restrictions did not create a cause of action against the Bakers for violation thereof. However, in this case, the Bakers went a step further as the developer and attempted to unilaterally circumvent the

restrictions, to allow TZRA to place a modular home on Lot 18 that was clearly in violation of the restrictions. This conduct by the Bakers was an intentional and deliberate attempt to circumvent the restrictions for which summary judgment in favor of the other lot owners against the Bakers was appropriate, in my opinion. Arguably, injunctive relief could also have been granted against the Bakers as concerns the execution of the notarized “release” of the restrictions for the lot sold to TZRA. For these reasons, I would affirm the summary judgment in its entirety.

BRIEF FOR APPELLANTS:

William R. Erwin
Danville, Kentucky

**BRIEF FOR APPELLEES WAYNE
AND PAT ANDERSON:**

Christopher K. Herron
Danville, Kentucky

**BRIEF FOR APPELLEE TZRA
HOMES OF KENTUCKY, LLC.:**

D. Bruce Orwin
Somerset, Kentucky