ELECTRONICALLY FILED - 2023 Jan 19 1:49 PM - NEWBERRY - COMMON PLEAS - CASE#2020CP3600479

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
COUNTY OF NEWBERRY	)	EIGHTH JUDICIAL CIRCUIT
David C. Bennett and Kristen L. Bennett, Plaintiff,	)	C.A. No.: 2020-CP-36-0479
v.	)	**ORDER (Invalidating a 2019 Amendment to Harbor View Subdivision Restrictive Covenants)**
Harbor View Homeowners Association, Inc., Defendant.	)	

RECEIVED
Apr 18 2023
SC Court of Appeals

This declaratory judgment action was before the Court for a non-jury trial on January 10, 2023. Plaintiffs David C. Bennett and Kristen L. Bennett were represented by Paul S. Landis, Esq., and Defendant Harbor View Homeowners Association, Inc. was represented by Eugene C. Fulton, Jr., Esq. For the reasons set forth herein, the Court finds that an Amendment to the Covenants, Conditions, and Restrictions of Harbor View Subdivision dated April 2, 2019 which prohibited short-term rental, time sharing, and fractional ownership of properties within the subdivision is invalid and unenforceable.

Stipulated Facts

Prior to trial, counsel for the parties stipulated to the material facts in this matter and entered the same into the record.[1] The stipulated facts are as follows:

1. Harbor View Subdivision was formed in or around 1996 in Newberry County.

2. At or around the time of formation of the development, Harbor View Subdivision was made subject to a Declaration of Covenants, Conditions, and Restrictions of Harbor View Subdivision recorded October 31, 1996 in Deed Book 446, Page 208 in the Newberry County

[1] At the outset of the hearing, Plaintiff's counsel withdrew Plaintiffs' claim concerning alleged procedural defects in the passage of the 2019 Amendment.

ELECTRONICALLY FILED - 2023 Jan 19 1:49 PM - NEWBERRY - COMMON PLEAS - CASE#2020CP3600479

Register of Deeds Office. At the same time, a Declaration of Restrictive Covenants of Harbor View Subdivision was recorded October 31, 1996 in Deed Book 446, Page 218 in the Newberry County Register of Deeds Office.

3. David and Kristen Bennett own a single-family residence at 603 Harbor View Drive, Prosperity, South Carolina, which constitutes Lot 20 within Harbor View Subdivision. Said property was initially titled in the name of Kristen Bennett f/k/a Kristen Hartman when it was purchased by Mr. and Mrs. Bennett by deed recorded on July 24, 2017 at Deed Book 1986, Page 211 in the Newberry County Register of Deeds Office. Subsequently, it was titled in the names of David Bennett and Kristen Bennett as joint tenants with right of survivorship.

4. In 2019, certain members of the Harbor View Homeowners Association became concerned that short-term rentals occurring in the neighborhood were inconsistent with the residential nature of the subdivision. The Harbor View Homeowners Association passed an amendment to Article II, Section 1 of the Declaration of Covenants, Conditions, and Restrictions at Deed Book 446, Page 210 which is entitled "Owner's Easements of Enjoyment" to include the following:

> "There shall be no time sharing or interval ownership. No lot or dwelling thereon, or any portion thereof, shall be let, rented, or leased for a period of less than ninety (90) days without specific written permission from the Association."
>
> (said amendment was recorded on April 5, 2019 in Deed Book 2114, Page 0163 in the Newberry County Register of Deeds office and is hereinafter referred to as the "2019 Amendment")

5. Prior to the passage of the 2019 Amendment, Mr. and Mrs. Bennett periodically offered the Subject Property for short-term rental, and they desire the right to do so in the future. One of the reasons the Bennetts purchased the Subject Property is that the Harbor View Restrictive Covenants did not prohibit rental of property within the subdivision, which they

ELECTRONICALLY FILED - 2023 Jan 19 1:49 PM - NEWBERRY - COMMON PLEAS - CASE#2020CP3600479

desire to do to defray the costs of ownership. The Bennetts divide their time between the subject property and another property, and the property that is the subject of this matter is classified as the Bennetts' primary residence.

6. Mr. and Mrs. Bennett filed this declaratory judgment action for the purpose of challenging the validity of the 2019 Amendment.

Discussion

The issue in this case is whether Harbor View Homeowners Association, Inc. had the authority to institute a rental restriction on homeowners within its community when no rental restriction previously existed and when the restrictive covenants do not permit the addition of new restrictions.

Plaintiffs argue that the 2019 Amendment is a new restriction rather than an amendment to an existing restriction and is therefore not permitted under South Carolina law. Plaintiffs cite Erkes v. Kasparek, 303 S.C. 70, 399 S.E.2d 6 (Ct. App. 1990) in support of their argument. In Erkes, residents within a community passed an amendment to their restrictive covenants for the purpose of establishing a minimum lot size for a portion of the community that had not yet been subdivided. There were existing restrictions that required a minimum cost for dwellings and minimum set back lines. However, there was no existing restriction that mentioned any minimum lot size.

The Court in Erkes held that "the residents may not impose additional restrictions on the [portion of the community that had not yet been subdivided], but may only amend those restrictions contained within the restrictive covenants. The residents' purported amendments do not amend the restrictive covenants, but improperly add to them. The restrictive covenants state that 'any of the conditions, restrictions, and covenants contained herein may be changed or

ELECTRONICALLY FILED - 2023 Jan 19 1:49 PM - NEWBERRY - COMMON PLEAS - CASE#2020CP3600479

amended . . . .' The residents cannot place new restrictions on the land under the guise of an amendment. Restrictions on the use of property are strictly construed, with all doubts resolved in favor of the free use of the property." Erkes v. Kasparek, 303 S.C. at 73, 399 S.E.2d at 8 (Ct. App. 1990) (citation omitted).

Plaintiffs also cited a case from Washington State that was decided on facts substantially similar to those present in this case. Wilkinson v. Chiwawa Cmtys. Ass'n, 180 Wn.2d 241, 327 P.3d 614 (2014). In Wilkinson, certain homeowners within a planned residential community sought to invalidate an amendment to the restrictive covenants which prohibited short-term rentals. Like the Harbor View restrictive covenants, the covenants at issue in Wilkinson granted homeowners within the development the power "to change [the] protective restrictions and covenants in whole or in part" by a vote of the members. Furthermore, like the Harbor View covenants, the restrictive covenants in Wilkinson limited use of lots to single-family residential use and prohibited nuisance activities, etc.

In Wilkinson, the Community Association argued that short-term rental is inconsistent with residential use. The Court rejected the argument and instead held that "[i]f a vacation renter uses a home for the purposes of eating, sleeping, and other residential purposes, this use is residential, not commercial, no matter how short the rental duration. The owner's receipt of rental income either from short- or long-term rentals in no way detracts or changes the residential characteristics of the use by the tenant. Nor does the payment of business and occupation taxes or lodging taxes detract from the residential character of such use to make the use commercial in character." Id., 180 Wn.2d at 252-253, 327 P.3d at 620 (citations and quotations omitted).

The Chiwawa Community Association further argued that the restrictive covenants permitted the homeowners to change the covenants in whole or in part by majority vote, and

ELECTRONICALLY FILED - 2023 Jan 19 1:49 PM - NEWBERRY - COMMON PLEAS - CASE#2020CP3600479

therefore they had the ability to amend the restrictions to prohibit short-term rentals. The Court also rejected that argument and found that the authority to amend existing covenants did not confer authority to add a restriction that had no relation to an existing restriction. Like the Chiwawa restrictions, the Harbor View Restrictions in this case permit amendment but do not permit the addition of new restrictions.

The Washington Supreme Court's analysis is consistent with South Carolina law, and this Court finds it persuasive. Furthermore, S.C. Code Ann. § 12-43-220 provides that a residence is eligible for 4% taxation as a primary residence if the residence that is the subject of the application is not rented for more than seventy-two days in a calendar year. In other words, South Carolina law recognizes that a primary residence may be offered for short-term rental without stripping the property of its primary residence classification. If property is used for residential purposes, rental of the same on a short-term or long-term basis does not convert it to non-residential use.

Plaintiffs in this case purchased the subject property within Harbor View at a time when there was no rental restriction of any kind, and prior to the 2019 Amendment they rented their property in order to defray costs of ownership when they were not occupying the same. This Court is concerned that instituting new restrictions within Harbor View at the whim of a majority or super-majority of residents, at any time, could effectively cause certain homeowners to face unanticipated financial hardship or even be forced to sell their property. This is particularly problematic when the property owners did not have notice at the time they purchased their property that such additional restrictions could be imposed at some later time.[2]

[2] In addition to the holdings of *Erkes* and *Wilkinson*, this practical concern regarding Plaintiffs' ability to service the debt they incurred when they financed the purchase is also integral to the Court's ruling. The Court expresses no opinion as to whether a similar restriction could potentially be adopted with solely prospective application.

In summary, a provision in restrictive covenants which permits the homeowners association to change or amend the same in whole or in part by a vote of its members does not permit the addition of a new restriction under the guise of an amendment. The 2019 Amendment does not amend any existing restrictions but instead adds an additional restriction, which is not authorized by the Harbor View restrictive covenants or South Carolina law.

Conclusion

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the 2019 Amendment which was recorded on April 5, 2019 in Deed Book 2114, Page 0163 in the Newberry County Register of Deeds is invalid and shall be cancelled of record in the Register of Deeds office. Furthermore, this Order shall be recorded in the Register of Deeds office.

IT IS SO ORDERED.

Frank R. Addy, Jr.
Circuit Court Judge

January 19, 2023
Greenwood, South Carolina

ELECTRONICALLY FILED - 2023 Jan 19 1:49 PM - NEWBERRY - COMMON PLEAS - CASE#2020CP3600479