THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Master-in-Equity

Cynthia Graham Howe, Master-in-Equity

Appellate Case No. 2022-000708

Oak Forest Homeowners Association, Inc., Appellant,

v.

Paul M. Dennison, Mortgage Electronic Registration Systems, Inc., solely as nominee for Branch Banking and Trust Company, LLC and South Carolina State Housing Finance and Development Authority, Defendants,

Of Whom Paul M. Dennison is the Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in finding that Respondent's property was not subject to, and bound by, the Covenants, Conditions, and Restrictions of Oak Forest Homeowners Association, Inc., and thus ruling Respondent was not a member of the Association?

STATEMENT OF THE CASE

This Appeal originates from a master-in-equity trial, in which the Appellant filed a homeowners' association lien foreclosure action against Respondent Dennison (hereinafter, "Respondent"). At this trial, Appellant argued that Respondent was a member of the Oak Forest Homeowners Association (the "Association") and had failed to pay assessments as required by the Covenants, Conditions, and Restrictions of the Association, and as such, was entitled to have its lien foreclosed upon for this breach. Upon hearing from the Parties at trial, the trial court took the matter under consideration for the better part of five (5) years before finding for the Respondent, stating that Appellant failed to prove that the Respondent was a member of the Association and, therefore, owed assessments. After the Order was entered, Appellant filed a Motion to Reconsider, which the trial court denied, stating that it was not timely made. Appellant now appeals the ruling of the trial court.

STANDARD OF REVIEW

In an action in equity, tried first by the master or a special referee, the findings of fact will not be disturbed by this Court unless found to be without evidentiary support or against the clear preponderance of the evidence. *See generally* Williams v. Wilson, 349 S.C. 336, 563 S.E.2d 320 (2002), *see also* Buffington v. T.O.E. Enterprises, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009). The appellant bears the burden of convincing an appellate court that the trial judge committed an error in its findings. Pinckney v. Warren, 344 S.C. 382, 387–88, 544 S.E.2d 620, 623 (2001).

FACTS

Appellant is a homeowners' association, which is empowered to manage the Oak Forest subdivision off Highway 17 in Myrtle Beach, South Carolina. This Association was created in 1994 and is a non-profit corporation currently in good standing with the South Carolina Secretary of State. (R. p. 500). The Declarant/Developer created and recorded the Association's governing documents, or the Covenants, Conditions, and Restrictions (hereinafter, the "Covenants"), with the Horry County Register of Deeds on August 30, 1993 in Deed Book 1661, Page 178. (R. pp. 328–371). The Respondent is a property owner in the Oak Forest subdivision, who failed to pay the quarterly assessments as required by the Covenants. (R. pp. 29–32). Based on this failure to pay, Appellant filed the underlying homeowners' association lien foreclosure action on August 16, 2016 in the Court of Common Pleas for Horry County. Id. At the time of the initial filing in 2016, Respondent owed $2,743.92 to Appellant. (R. p. 36).

Previously, and leading to the underlying dispute, a portion of the land (approximately 5.48 acres) which later became Phase III of the Oak Forest subdivision, was quitclaimed to L.W. Paul Construction Company on March 27, 2009.[1] (R. pp. 408–412; R. p. 63, line 25–R. p. 64, line 4). This acreage was then purchased by Steeltown Development, LLC on May 1, 2009. (R. pp. 417–422; R. p. 64, lines 5–8). Thereafter, Steeltown Development, filed a Supplementary Declaration of the Covenants with the Register of Deeds for Horry County on April 6, 2010. (R. pp. 452–455; R. p. 64, lines 9–11). This Supplementary Declaration laid out the language under the Creation of Oak Forest Homeowners Association; specifically, Article V, Section 5(b) whereby "additions to the subdivision may be made by the Declarant without consent of the members," and in the event

[1] L.W. Paul Construction Company originally intended to convey only the streets, drainage easements and detention ponds to the Association, but additional language was inadvertently added, which they believed could have been misinterpreted as conveying more of its interest in Phase III than just those items. (R. pp. 408–412).

this occurs, a supplemental set of restrictions is to filed in the Office of the Register of Deeds for Horry County. (R. pp. 452–455). When this Supplemental Declaration was recorded, Phase III of Oak Forest, containing Lots 1–27, was incorporated into the prior restrictions, designating that "all present and future owners of all lots of the Property shall be subject to the terms and conditions of the aforesaid Restrictions and Creation of Oak Forest Homeowners Association and shall have the rights and privileges therein set out." Id.

In September 2013, Respondent purchased his home, noted as Lot 26, on Morlynn Drive in Phase III of the Oak Forest subdivision. (R. pp. 398–402). At the time of his closing, Respondent executed a Planned Unit Development Rider ("PUD") to supplement his mortgage instrument, which advised him as to the existence of the Association. (R. p. 403–405).

On January 1, 2014, the first quarterly assessment of $60.00 came due to Appellant. (R. p. 506). Shortly thereafter, on January 13, 2014, Respondent paid the assessment. Id. In March 2014, Respondent was assessed a fine by Appellant for a fence violation. Id. On April 2, 2014, he personally reached out to the Appellant regarding this fine and resolved the issue. (R. p. 561). Nevertheless, in June 2014 Respondent came to believe that the Association had previously been dissolved and thus, he no longer needed to pay the quarterly assessments. (R. p. 65, lines 22-25). Respondent alleges that Articles of Dissolution were filed with the Secretary of State in September 2010 (R. p. 64, lines 12–17), and despite Articles of Correction later being filed (R. p. 501), the effective date did not reach back to the original effective date of Incorporation. (R. p. 62, line 20 –R. p. 63, line 14). In fact, Respondent alleged that the effective date could not reach back to that of the Incorporation because it would have an adverse effect on him.[2] (R. p. 68, lines 1–5; R. p. 253, lines 18–21). Based on this, Respondent denied that he was a member of the HOA, denied

[2] This allegation is just that—a generalized assertion without any substantive evidence to support the same. Id.

that he owed the HOA any money and/or assessments, denied that Appellant held a lien on his property, and denied that his property was subject to covenants which would obligate him to be a member of the HOA or to pay the HOA any monies. (R. pp. 39 –54).

However, an administrative mistake was made, whereby an individual named Steve Peck, in an attempt to dissolve the Oak Forest Village Homeowners Association, dissolved the Oak Forest Homeowners Association instead. (R. pp. 501–503; R. p. 123, line 18–R. p. 124, line 5). Once this issue was flagged, a correction was filed on July 1, 2015 to reinstate Oak Forest Homeowners Association. (R. pp. 501–503; R. p. 123, lines 9–12).

Several years after the trial was held before the master-in-equity, the trial judge issued her Order finding for Respondent Dennison—specifically, that Appellant "failed to prove that Dennison is a member of the HOA and therefore owes assessments." (R. p. 15; *see generally* R. pp. 14–21). Going further, the trial judge found that the evidence did not establish that the Respondent ever became part of the HOA, was bound by its covenants, or even consented to being a member of same. Id. After the Order was entered, Appellant filed a Motion to Reconsider, which was denied for not being timely made. (R. pp. 22–27). Appellant served a Notice of Appeal on May 23, 2022. (R. p. 57). This Brief of Appellant follows.

ARGUMENTS

I. The trial court erred in its finding that the Respondent's property was not subject to the Covenants, Conditions, and Restrictions of the Oak Forest Homeowners Association because a preponderance of evidence heard at trial supports Respondent having both actual and constructive knowledge of the restriction, meaning these Declarations would run with the land.

Covenants requiring property owners to pay fees for improvements, maintenance or other services to a homeowners' association run with the land. First Fed. Sav. & Loan Ass'n v. Bailey, 316 S.C. 350, 450 S.E.2d 77 (Ct. App. 1994). For a covenant to run with the land, there must also be an indication that the parties intended for the covenant to run with the land. Charping v. J.P.

Scurry & Co., 296 S.C. 312, 372 S.E.2d 120 (Ct. App. 1988). Furthermore, even if the covenant is not in a grantee's deed, it is enforceable against a subsequent grantee if that person has actual or constructive knowledge of the covenant. Harbison Community Ass'n, Inc. v. Mueller, 319 S.C. 99, 103, 459 S.E.2d 860, 863 (Ct. App. 1995) (citing 20 Am. Jur. 2d Covenants, Conditions, and Restrictions § 26 (1965)). A person is said to have actual knowledge "where the person ... either knows of the existence of the particular facts in question or is conscious of having the means of knowing it, even though such means may not be employed by him." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 64 n. 6, 504 S.E.2d 117, 122 n. 6 (1998) (citing 58 Am. Jur. 2d Notice § 5). Constructive knowledge, on the other hand, "is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts." Id. (citing Multimedia Publishing of South Carolina, Inc. v. Mullins, 314 S.C. 551, 431 S.E.2d 569 (1993)). A homeowner is charged with constructive notice of any restriction that has been properly recorded within the chain of title. Harbison at 103. *See also* Carolina Land Co. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975).

In Harbison Community Association, this Court was faced with a similar situation as the one faced by Respondent here. *See generally* Harbison Community Ass'n, Inc. v. Mueller, 319 S.C. 99, 459 S.E.2d 860 (Ct. App. 1995). In that case, the Muellers purchased a single-family residence in the Harbison Subdivision, but the deed did not reference the Declaration or any annual assessments; however, it did contain language that it was subject "to easements and restrictions of record and otherwise affecting the property." Id. at 101, S.E.2d at 862. A Declaration for the Harbison Subdivision had previously been recorded prior to the Mueller's purchase. Id. The Muellers failed to pay their annual assessments and in due time, the Association obtained a judgment against the homeowners in magistrate court. Id. This Court determined that a homeowner

is deemed to have constructive knowledge of a restriction when it is properly recorded within the chain of title. Id. at 103, S.E.2d at 863.

In the current case, the Respondent's Deed specifically states "[this conveyance] is made subject to easements and restrictions of record." (R. p. 398). Respondent stated under penalty of perjury that his closing attorney as to the purchase of his home in the Oak Forest subdivision charged him for a Title examination. (R. p. 295, line 24–R. p. 296, line 8). In the chain of title for the Property are the documents which create the Oak Forest Homeowners Association, its Bylaws, and the Declaration. (R. p. 87, line 22–R. p. 88, line 14). These documents, recorded with Horry County, which create the Oak Forest Homeowners Association, state in relevant part:

> The Declarant, for each lot owned within the properties, hereby covenants, and each owner of any lot by acceptance of a deed therefore, including owners of undeveloped lots, whether or not it shall be so expressed in such deed, is deemed to covenant and agree to pay the Association: (1) annual or monthly assessments or charges, and (2) special assessments for capital improvements, such assessments to be established and collected as hereinafter provided. (R. pp. 331–332).

Further, the introduction to the Declaration and Establishment of Conditions, Reservations, Covenants and Restrictions for Oak Forest, which is addressed to all property owners, states:

> Each and every one of these covenants, conditions, reservations, and restrictions is and all are for the benefit of each owner of land in the above-mentioned Oak Forest, or any interest therein, and shall inure to and pass with each and every parcel of said property, and shall bind the respective successors in any interest of the present owner thereof. These covenants, conditions, reservations and restrictions are and each thereof is imposed upon such lots all of which are to be construed as restrictive covenants running with the title to such lots with each and every parcel thereof to wit. (R. pp. 315–316).

Finally, and in further support of this argument, Respondent lived in the Oak Forest subdivision (Phase II) prior to buying the home at the center of this case and had previously paid assessments to the Association during that time. (R. p. 296, lines 9-17). At one point after purchasing the subject Property in Phase III, he paid the Association assessments. (R. p. 303, lines

14-17). Following the reasoning of this Court in Harbison Community, the Respondent had both actual and constructive knowledge that the restriction existed, as it was properly recorded within the chain of title and he paid assessments to Appellant, both at his previous property and for at least one quarter at the subject Property. Regardless of whether the Deed specifically referenced the Declaration, Respondent's chain of title includes documents that put him on notice that the Property is included in the Association and thereby subject to its restrictions. For these reasons, the restrictions run with the land and Respondent is bound by them as a property owner (i.e., bound to pay assessments to Appellant).

II. The trial court erred in its finding that Respondent's property was not part of the Oak Forest Homeowners Association, as his property was bound by the restrictions, thus making him a member of the Association.

Restrictive covenants often authorize the creation of a homeowners' association, usually in the form of a not-for-profit corporation, and grant it authority to manage common areas, make regulations, levy assessments, and other similar privileges. 17 S.C. Jur. Covenants § 88 (citing Lovering v. Seabrook Island Property Owners' Ass'n, 289 S.C. 77, 344 S.E.2d 862 (Ct. App. 1986), *modified*, 291 S.C. 201, 352 S.E.2d 707 (1987)). These restrictive covenants run with the land, and are "thus enforceable by a successor-in-interest, if (1) the covenanting parties intended that the covenant run with the land, and (2) the covenant touches and concerns the land." West v. Newberry Elec. Co-op., 357 S.C. 537, 542, 593 S.E.2d 500, 503 (Ct. App. 2003). The parties' intent that the covenant run with the land may be expressly stated in the document or it may be inferred from the circumstances surrounding the agreement. *See* Charping v. J.P. Scurry & Co., Inc., 296 S.C. 312, 318, 372 S.E.2d 120, 122 (Ct. App. 1988). Additionally,

> [I]f a covenant is such that its performance or nonperformance must affect the nature, quality, value, or mode of enjoyment of the demised premises, it is not a mere personal covenant, but one that runs with the land and binds assignees of the covenantor as well as the covenantee and his personal representative. Epting v. Lexington Water Power Co., 177 S.C. 308, 181 S.E.2d 66, 70 (1935).

Following the above discussion of Harbison County Association in Section I of this Brief, covenants which require property owners to pay fees for improvements or other services to a homeowners' association run with the land. 319 S.C. at 102, 459 S.E.2d at 862.

As to the second prong of the analysis, whether the covenant touches and concerns the land, South Carolina has not directly addressed the situation before this Court,[3] though a number of other jurisdictions have. In Boyle v. Lake Forest Prop. Owners Ass'n, Inc., the court held that property owners "obtained not only title to the particular lot but also a right of common enjoyment with other property owners in the common facilities and the improvements located on the same. 538 F. Supp. 795, 770 (S.D. Ala. 1982). Consequently, said covenant touches or concerns the land and constitutes an affirmative covenant running with the land. Id. The New York Court of Appeals has similarly held that where a property owner obtains a right of enjoyment over recreational facilities and common areas within a community, they are liable for paying for the costs of such improvements as required by the covenants. Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 278 N.Y. 248 (N.Y. 1938). In contrast, the Oregon Court of Appeals struck down a covenant which required an initiation fee for a golf club because there was "no mandatory membership requirement for subsequent purchases, and no right was acquired by their ownership to enjoy the golf course." Ebbe v. Senior Estates Golf & Country Club, 657 P.2d 696, 701, 61 Or. App. 398 (1983). Thus, in this scenario, the initiation fee would not enhance lot values within the subdivision because prospective purchasers have "no right of enjoyment of the golf course unless he becomes a member." Id.

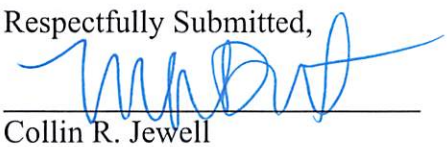
[3] However, there is an opinion out of Richland County with similar facts, where the trial court found that where assessments are used to maintain common areas and the maintenance of those common areas within the community enhances the value of the properties in a community, the covenant is said to touch and concern the land. *See* LRA UC Golf, LLC v. Schimmoeller, No. 2012-CP-40-00397, 2012 WL 8465790 (S.C. Com. Pl., Nov. 20, 2012).

From the language included in the governing documents for Appellant, it is clear the intention was for the covenant to run with the land. The wording of these documents was specific and the construction was clear: "[t]hese covenants, conditions, reservations and restrictions are and each thereof is imposed upon such lots all of which *are to be construed as restrictive covenants running with the title* to such lots with each and every parcel thereof to wit" (emphasis added). Further, the assessments collected by the Association are used for "road upkeep, for general maintenance, which would be cutting of the common property, management fees that we are charged to collect the dues, electricity for streetlights." (R. p. 144, lines 18-22). These are all things that enhance the community value; thus, these covenants would be said to touch and concern the land, following the logic set forth in the case law. As both prongs of the analysis have been met, the covenants run with the land and would bind successors like the Respondent.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that this Court reverse the judgment of the trial court and remand this case.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

The undersigned certify that this Final Brief complies with Rule 211(b), SCACR.

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