THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FOR AIKEN COUNTY
Court of Common Pleas

M. Anderson Griffith, Master-in-Equity for Aiken County

Case Number 2011-CP-02-00548

Three Runs Plantation Homeowners Association, Inc.,

Respondent,

vs.

Jay J. Jacobs and Judith B. Jacobs,

Appellants,

vs.

T.R. Sales Plantation, LLC and J. Wayne Raiford,

Respondents.

FINAL BRIEF OF APPELLANTS

Clarke W. McCants, III
Nance, McCants & Massey
Post Office Box 2881
Aiken, South Carolina 29802
(803) 649-6200 x21

RECEIVED
JUL 1 4 2014
SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN FINDING AS A FACT AND IN CONCLUDING AS A MATTER OF LAW THAT ARTICLE III, PARAGRAPH 12 OF THE PROTECTIVE COVENANTS IS ENFORCEABLE AND THE JACOBS VIOLATED THAT PROVISION?

II. DID THE COURT ERR BY NOT ENTERING JUDGMENT AGAINST THE HOMEOWNERS ASSOCIATION FOR ITS FAILURE TO ABIDE BY AND EVENLY ENFORCE THE PROTECTIVE COVENANTS?

STATEMENT OF THE CASE

This matter involves the interpretation and enforcement of the Protective Covenants of Three Runs Plantation located in Aiken County, South Carolina. The Respondent Three Runs Plantation Homeowners Association brought this civil action against the Appellants Jay and Judy Jacobs alleging that they violated those covenants, and the Homeowners Association is entitled to certain relief. (R. p. 32 - 35). Mr. and Mrs. Jacobs deny that they have violated the covenants and also seek affirmative relief. (R. p. 36 - 40). The Homeowners Association denies that the Jacobs are entitled to that relief. (R. p. 41 - 43).

A trial of the issues presented by the parties was held before M. Anderson Griffith, Master-in-Equity for Aiken County. Following that trial Judge Griffith issued his Order setting forth certain findings of fact and conclusions of law, and judgment accordingly. (R. p. 3 - 27). The Jacobs subsequently filed a Notice of Motion and Motion of Alter or Amend Judge Griffith's Order. (R. p. 44 - 45). Following a hearing on the Jacobs' Motion Judge Griffith issued his Order granting the Motion in part and denying it in part. (R. p. 28 - 31).

The Jacobs then filed a Notice of Appeal of Judge Griffith's Orders.

Arguments

I. THE TRIAL COURT ERRED IN FINDING AS A FACT AND IN CONCLUDING AS A MATTER OF LAW THAT THE JACOBS VIOLATED ARTICLE III, PARAGRAPH 12 OF THE PROTECTIVE COVENANTS BECAUSE THIS PROVISION IS AMBIGUOUS AND UNENFORCEABLE.

In its Complaint for this case the Homeowners Association seeks equitable relief "in ordering the Jacobs to maintain their lots in a clean and first class condition as the other homeowners do in Three Runs Plantation, and that it recover reasonable attorney's fees and all costs of this action." As part of their Counterclaims the Jacobs seek a declaration that the Homeowners Association fails to abide by and comply with the covenants, and fails to evenly enforce them.[1] The parties in this case, therefore, seek orders requiring the enforcement of the covenants.

Declaratory judgments in and of themselves are neither legal nor equitable. Campbell v. Marion Cnty. Hosp. Dist., 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2013). The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue. Id. As the Parties in this case seek the enforcement of the covenants, the causes of action in this case sound in equity. Kinard v. Richardson, 407 S.C.247, 754 S.E.2d 888 (Ct. App. 2014). In an equitable action this Court may make findings according to its own view of the preponderance of the evidence. S.C. Department of Natural Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299 (2001).

The Jacobs purchased two adjoining lots in Three Runs Plantation in December 2007. (R. p. 4). In 2009 they built a home on one of those lots. (R. p. 5). The central issues in this case deal with the Homeowners Association's application and enforcement of the Protective Covenants, and how the Jacobs maintain their property.

[1] As part of their counterclaims the Jacobs also set forth causes of action for damages for breach of contract, which are not the subject of this appeal.

In the Summer of 2010 a dispute arose between the parties as to the manner in which the Jacobs maintained their property. (R. p. 620 - 623; p. 440, line 6 - p. 441, line 14; p. 442, line 11 - p. 443, line 2). Wayne Raiford, the developer of Three Runs Plantation and the sole-controlling member of the Homeowners Association, informed the Jacobs that they were not maintaining their property in accordance with the Protective Covenants. (R. p. 620 -623; Record of Trial, testimony of Jay Jacobs and Judy Jacobs). The Jacobs responded that they were, in fact, maintaining their property in accordance with the Covenants. (R. p. 620 - 623; p. 460, line 11 - p. 461, line 22; p. 464, lines 1 - 3; p. 465, lines 4 - 19; p. 495, lines 15 - 19).

After much discussion between the Jacobs, Mr. Raiford and their attorneys an agreement was reached in early 2011 whereby the Jacobs agreed to "promptly mow and/or weed eat his property". (R. p. 625). After this agreement was made Mr. Raiford demanded that the Jacobs pay the attorney's fees he incurred in conjunction with resolving the issue between them. (R. p . 578 - 581). The Jacobs refused to pay those fees and Mr. Raiford filed the present lawsuit seeking the relief outlined above. (R. p. 32 - 35).

The Protective Covenants of Three Runs Plantation were enacted and recorded in the Register of Mesne Conveyance for Aiken County in November 2005. (R. p. 518 - 535). The Jacobs do not dispute that they are subject to and bound by the provisions of those covenants.

Article III, Paragraph 12 of the Protective Covenants is titled "Maintenance of Lots" and provides:

> All lots, including vacant lots, must be maintained in a clean and first class condition, including mowing all grass, controlling the weeds and keeping the same free from any trash, debris or accumulation of other items on said lot. In the event an owner does not maintain said owner's lot(s) in such first class condition, the Association shall be entitled to perform the necessary work to said lot to bring it up to an acceptable condition in the Association's sole discretion and any costs so incurred by the Association shall be treated as assessments

in accordance with Article VI.

(R. p. 526).

In his initial Order for this case Judge Griffith set forth a number of findings and conclusions. With respect to the issue of the Jacobs' compliance with Article III, Paragraph 12 his findings and conclusions are summarized as follows:

> 1. Article III, Paragraph 12 of the Protective Covenants is not ambiguous (R. p. 18);
>
> 2. Mr. Raiford possesses sole discretion to define "clean and first class condition", and whether the Jacobs are maintaining their property in accordance with the Protective Covenants (Id.);
>
> 3. Mr. Raiford must exercise that discretion in a reasonable and good faith manner, and he has done so (R. p. 20);
>
> 4. The Jacobs are required to maintain their lots in a manner consistent with other property owners who are in compliance with the Protective Covenants. (Id.).

Thus, Judge Griffith found that while Mr. Raiford possesses sole discretion to determine "clean and first class condition" he must apply that standard in a reasonable and good faith manner. (Id.). He further concluded that "reasonable and in good faith" is defined by how other property owners maintain their lots. The problem in this case, however, is that there is a great deal of inconsistency and unevenness with respect to how the Protective Covenants are interpreted and applied by property owners living within Three Runs Plantation.

Judge Griffith recognized this problem. The parties introduced numerous photographs of lots in Three Runs Plantation, and depicting their condition during different times of the year. (R. p. 584 - 609). In his Order Judge Griffith noted that Mr. Raiford reviewed many of these photographs, "testifying that some met the standard of clean and first class condition while others did not." (R. p. 11; pp. 345 - 365; pp. 586 - 605). Judge Griffith also noted that "due to the nature

of this claim, it is difficult to determine when there is noncompliance with the protective covenant since the photographs show the grass at different stages of growth and height". (R. p. 17). Finally, he noted that "many of the photographs support the (Jacobs') position that they have cut their grass and do appear to be, at certain times, in compliance with the protective covenants." (R. p. 19).

Besides Mr. and Mrs. Jacobs a total of ten other residents of Three Runs Plantation testified at the trial of this case before Judge Griffith. (R. pp. 62 - 82; pp. 82 - 93; pp. 93 - 110; pp. 110 - 123; pp. 123 - 140; pp. 140 -161; pp. 161 - 191; pp. 191 - 218; pp. 398 - 407; pp. 407 - 418.). These witnesses were sequestered during the trial. The Jacobs would respectfully submit that none of these witnesses were able to clearly outline a definite standard which would guide Three Runs Plantation property owners in attempting to comply with Article III, Paragraph 12 of the Protective Covenants. While most of the witnesses tendered by Mr. Raiford testified that the Jacobs maintained their property in a fashion different from their own, they were unable to state just how that violated the written Protective Covenants.

A common theme of the testimony of Mr. Raiford, as well as his witnesses, is that the Jacobs fail to maintain their property, and in particular their unimproved lot, in a "pasture-like setting". From the Jacob's perspective this testimony strikes at the core issue in this case.

Three Runs Plantation was marketed, constructed and developed as an "Equestrian and Non-Equestrian Development". (R. p. 610 - 612, 618; p. 59, line 12 - p. 61, line 5; p. 274, line 19 - p. 275, line 6). While Mrs. Jacobs enjoys equestrian activities, she and her husband invested and built their home in Three Runs, and never expected to board horses on their property. (R. p. 440, line 6 - p. 441, line 14). For example, they did not plan to build fences or paddocks for this purpose. (Id.). They planned to keep and maintain their property, and specifically the unimproved lot, in a wooded and natural state. (R. p 502, lines 1 - 8).

It is very clear that Mr. Raiford expects the Jacobs to maintain all of their property with an equestrian theme in mind, and expects them to keep their unimproved lot in a "pasture-like setting." (R. p. 327, line 8 - p. 331, line 3). At trial John Garner, Mr. Raiford's marketing director, reviewed photographs of a number of properties in Three Runs Plantation and testified that the Jacobs' property does not conform because it lacks pastures and paddocks. (Supplemental R. p. 1, lines 16 -25). Two witnesses called to testify by Mr. Raiford stated that the Jacobs did not conform with the Protective Covenants because they did not maintain their property in a "pastured setting". (R. p. 84, line 1 - p. 86, line 21; p.115, line 19 - p.119, line 7).

Judge Griffith himself noted that "the issue concerns the areas that would normally be the pasture area of the (Jacobs') lots". (R. p. 16). The Jacobs respectfully contend that he misinterpreted the requirements set forth in the Protective Covenants.

The term "pasture" is generally defined as land maintained for the grazing of livestock. Merriam-Webster Dictionary, 11th Edition. Nothing in the Protective Covenants for Three Runs remotely suggests that property owners are required to maintain their property in a pastured setting. It can hardly be suggested that the lot maintenance guidelines found in Article III, Paragraph 12 of the Protective Covenants establish such a standard. In fact, the Covenants encourage the growth of "living trees, shrubs and other vegetation", and imposes restrictions upon the removal of such growth. (Protective Covenants, Article II, Paragraph 2).[2]

As noted by Judge Griffith protective covenants are contractual in nature and bind the parties thereto in the same manner as any other contract. Palmetto Dunes Resort v. Brown, 287 S.C. 1, 336 S.E.2d 15 (Ct. App. 1985); Seabrook Island Property Owner's Association v. Berger, 365

[2] Interestingly, Judge Griffith concluded that Mr. Raiford failed to establish a basis to require the Jacobs to remove small trees from their unimproved lot, citing Article II, Paragraph 2. (R. p. 20).

S.C. 234, 616 S.E.2d 431 (Ct. App. 2005). Courts do not favor protective covenants based on the belief that society's best interest encourage unrestricted use of land. Edwards v. Surratt, 228 S.C. 894, 90 S.E. 2d 906 (1956); Sea Pines Plantation Company v. Wells, 294 S.C. 266, 363 S.E.2d 891 (1987). The South Carolina Supreme Court has held that to be valid and enforceable a restrictive covenant must, among other things, "not be too indefinite." Vickery v. Powell, 267 S.C. 23, 225 S.E.2d 856 (1976). The paramount rule of construction with respect to restrictive covenants is to ascertain and give effect to the intent of the parties as determined from the whole document. Hoffman v. Cohen, 262 S.C. 71, 202 S.E.2d 363 (1974); Easterby v. Heilbron, 26 S.C.L. (1 McMul.) 462 (1840).

Judge Griffith relied on the case of Palmetto Dunes Resort v. Brown to support his conclusion that Mr. Raiford is entitled to unfettered discretion when determining whether the Jacobs are maintaining their property in "clean and first class condition." In Brown a property owner sought to construct a home which, according to a nine-member Architectural Review Board, failed to meet certain "aesthetic considerations" established by that Board. Id. That particular Board was guided by a document titled "Policy, Procedures and Building Guidelines" which specifically describes an approval process and operation of the Board. Id.

The property owner in Brown complained that those guidelines were vague and ambiguous, thereby enabling the Board to be arbitrary in its decisions. Id. at 336 S.E.2d 17. He argued further that the phrase "aesthetic considerations" is so ambiguous that the Court must apply rule of construction that requires ambiguities in a restrictive covenant must be strictly construed again the party seeking to enforce it. *See* Donald E. Baltz, Inc. v. R.V. Chandler and Co., 248 S.C. 484, 151 S.E.2d 441 (1966).

The Court in Brown rejected the property owner's argument. Noting that the rule of

strict construction should not be applied so as to defeat the "plain and obvious purpose of the instrument", the Court found that the nine-member Board had ample experience and written guidance to fairly determine whether proposed construction plans meet the "aesthetic considerations" of Palmetto Dunes Resorts. *See* Davey v. Artistic Builders, Inc., 263 S.C. 431, 211 S.E. 2d 235 (1975).

Granted, Article III, Paragraph 2, provides that in the event a property owner fails to maintain their lot in a "clean and first class condition" Mr. Raiford is allowed to "bring it up to an acceptable condition" in his sole discretion. That sentence, however, must be read in the context of the preceding definition of "clean and first class condition".

As noted by Judge Griffith's Order Mr. Raiford wrote a letter to the homeowners in Three Runs in August 2010, stating that "further explanation is needed to clearly state the required level of maintenance for all property owners." (R. p. 8 and 624). These additional guidelines purport to impose stricter requirements with respect to the allowable height of grass on lots in Three Runs Plantation, and are not enforceable under Article IX of the Protective Covenants. (R. p. 532 - 533).

More importantly, had Mr. Raiford truly believed he possesses "sole discretion" to decide whether a lot is maintained in "clean and first class condition", and feels confident that Article III, Paragraph 12 of the Covenants clearly outlines requirements for lot maintenance in Three Runs Plantation, there would be no need to offer further explanation of those requirements.

In fact, if Mr. Raiford is entitled to sole discretion, then there is no need for him to include the phrase "clean and first class condition" in Article III, Paragraph 12 of the Protective Covenants. In other words, the Covenants need simply state that Mr. Raiford, alone, is entitled to decide whether a property owner properly maintains his property.

Clearly, Article III, Paragraph 12 of the Protective Covenants is ambiguous and

subject to any number of definitions and interpretations, and cannot be enforced fairly. Given its vagaries the Jacobs cannot be held to have violated its provisions. At a minimum they have maintained their property in a "clean and first class" condition, as that term is commonly understood.

II. THE TRIAL COURT ERRED BY NOT ENTERING JUDGMENT AGAINST THE HOMEOWNERS ASSOCIATION FOR ITS FAILURE TO ABIDE BY AND EVENLY ENFORCE THE PROTECTIVE COVENANTS.

In his initial Order for this matter Judge Griffith concluded that the Homeowners Association failed to abide by and enforce certain provisions of the Protective Covenants applicable to Three Runs Plantation. In particular he concluded that the Association had not enforced rules pertaining to the dumping of horse manure on riding trails and provisions restricting the parking of horse and utility trailers. (R. p. 23). Judge Griffith, however, failed to enter judgment against the Homeowners Association as prayed for by the Jacobs.

In their Seventh Defense and By Way of Counterclaim the Jacobs sought a declaration from the Court and to the effect that "The Plaintiff has failed to abide by, comply with and enforce evenly and/or otherwise, certain terms and provisions of the Protective Covenants governing Three Runs Plantation." (R. p. 38).

At trial Mr. Jacobs testified that Mr. Raiford, on behalf of the Homeowners' Association, had not enforced a number of provisions of the Protective Covenants. (R.p. 433, line 18 - p. 470, line 24). Granted, many of these issues may seem not highly significant, both Mr. and Mrs. Jacobs believe that it is important to uphold the integrity of the Covenants.

Such is especially true given the investment the Jacobs made in Three Runs Plantation, and the fact that they have found themselves as defendants in a lawsuit and accused of violating the Covenants which Mr. Raiford appears to selectively enforce.

In particular Mr. Jacobs testified that rules regarding the use, size and placement of

signs are ignored. Such rule violations occur by both commercial entities operating within Three Runs, as well as other property owners. The Protective Covenants provide that construction of homes must be completed in one year from the date of the beginning of such construction. Mr. Jacobs pointed to one example where clearly a violation of the Protective Covenants had occurred resulting in ongoing and lengthy construction activity. During that time the property owner failed to maintain their lot in any fashion, yet no action was taken by Mr. Raiford. (R. p. 433, line 18 - p. 470, line 24).

Mr. Jacobs testified that the proper and adequate maintenance, painting and setbacks of wood-fencing in Three Runs is disregarded by Mr. Raiford. He also reviewed photographs of lots in Three Runs which are clearly not being maintained in accordance with the Protective Covenants. He further contend that one property owner is allowed to maintain a radio antenna tower on his property in violation of the Protective Covenants, and a private individual is allowed to use certain common elements for a private business. (R. p. 433, line 18 - p. 470, line 24).

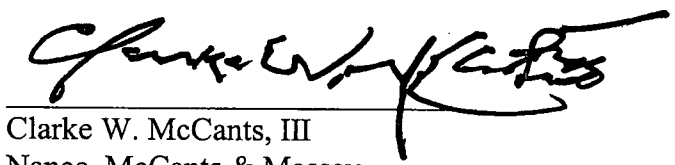
As noted Judge Griffith concluded that Mr. Raiford had failed to enforce at least two portions of the Protective Covenants. (R. p. 23). However, he stated in his Order that he could not determine the extent of such violations and, therefore, declined to award money damages to the Jacobs. (R. p. 23 and 29). The Jacobs respectfully contend that Judge Griffith, at a minimum, should have entered judgment against the Homeowners Association declaring that it had failed to enforce certain provisions of the Covenants.

Such a declaration is certainly allowable under applicable law and without regard to whether or not the Jacobs have sustained any specific damages. Kinard v. Richardson, supra.; Cullen v. McNeal, 390 S.C. 470, 702 S.E. 2d 378 (Ct. App. 2010). As such the Jacobs respectfully submit that the Court should enter judgment in their favor and with respect to this issue.

CONCLUSION

For the reasons stated above the Jacobs respectfully submit that the Trial Judge's Orders should be reversed to the extent that he found and concluded that Article III, Paragraph 12 of the Protective Covenants is enforceable and should be interpreted to give Mr. Raiford sole discretion to determine whether a violation of that provision has occurred. The Trial Judge's Order should further be reversed to the extent he found and concluded that the Jacobs have not complied with Article III, Paragraph 12 of the Protective Covenants. Finally, the Jacobs submit that the Trial Judge's Orders should be modified and judgment in their favor should be entered, in that the Trial Judge found and concluded that the Homeowners Association failed to comply with and enforce the Protective Covenants of Three Runs Plantation.

Respectfully Submitted,



July 10, 2014

Clarke W. McCants, III
Nance, McCants & Massey
PO Box 2881
Aiken, SC 29802
(803) 649-6200 Ext. 21
Attorney for Jay J. Jacobs and
Judith B. Jacobs

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FOR AIKEN COUNTY
Court of Common Pleas

M. Anderson Griffith, Master-in-Equity for Aiken County

Case Number 2011-CP-02-00548

Three Runs Plantation Homeowners Association, Inc.,

Respondent,

vs.

Jay J. Jacobs and Judith B. Jacobs,

Appellants,

vs.

T.R. Sales Plantation, LLC and J. Wayne Raiford,

Respondents.

CERTIFICATE OF COUNSEL

I hereby certify that the Final Brief of the Appellant and Final Reply Brief of the Appellant comply with Rule 211(b) SCRAP.

NANCE, MCCANTS & MASSEY

By: _____

Clarke W. McCants, III
Post Office Box 2881
Aiken, South Carolina 29802
(803) 649-6200 x21
Counsel for Jay J. Jacobs and
Judy B. Jacobs

RECEIVED
JUL 14 2014
SC Court of Appeals

July 10, 2014

RECEIVED
JUL 14 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable M. Anderson Griffith, Master-in-Equity for Aiken County

---

Case Number 2011-CP-02-00548

Three Runs Plantation Homeowners Association, Inc.,

Respondent,

vs.

Jay J. Jacobs and Judith B. Jacobs,

Appellants,

vs.

T.R. Sales Plantation, LLC and J. Wayne Raiford,

Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the Appellants' Final Brief and Final Reply Brief on counsel for the Respondents, Wm. Byrd Warlick, Esquire and James S. Murray, Esquire by depositing a copy of the documents in the United States Mail, postage prepaid, on July 14, 2014 addressed to Wm. Byrd Warlick, Esquire and James S. Murray, Esquire, Warlick Tritt Stebbins & Murray, LLP, P. O. Box 1495, Augusta, GA 30903.

July 14, 2014

Clarke W. McCants, III
P. O. Box 2881
Aiken, SC 29802-2881
(803) 649-6200
Attorney for Appellants