THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM PICKENS COUNTY

Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No.: 2013-CP-39-1414

Carol P. Marsh, Harold S. Buie and Agnes K. Buie, Respondents

v.

Robert Pierson, ABC Care, Inc., and Lake Wood Lane Properties, Inc. Appellants

v.

Paul E. Hill and Vera Hill Third Party Defendants

FINAL BRIEF OF APPLELLANTS

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INITIAL BRIEF OF APPELLANTS

STATEMENT OF THE CASE

This action was commenced by the filing of a summons and complaint by the Respondent on November 7, 2013 seeking a temporary and permanent injunction against the Defendants constructing, erecting or placing more than one residence on former Lot Number 3. Appellants timely filed their answer, counterclaim and third party complaint on January 3, 2014. Respondents

timely replied on January 22, 2014 and answered the third party complaint.

On or around April 11, 2014 the Honorable D. Garrison Hill granted Respondents' motion for a temporary injunction, with conditions, which conditions were never complied with by Respondents.

The matter came up for trial before the Honorable Perry H. Gravely on December 2, 2015. The Court requested counsel for Appellants and Respondents file post trial briefs.

On or around April 6, 2016 Judge Gravely entered an order granting relief requested by Respondents and a portion of the relief requested by Appellants. Appellants thereafter timely filed a Rule 59 and 60, SCRCP, motion to reconsider which was denied by order dated April 27, 2016.

This appeal timely followed.

EXCEPTIONS

I. The trial court erred in granting a permanent injunction the error being the Respondents as a matter of law had unclean hands.

II. The trial court erred in determining that the Plaintiffs were entitled to a permanent injunction as there was not a scintilla of evidence that the Plaintiffs would suffer irreparable harm absent the issuance of the injunction.

III. The trial court erred in making no finding or determination balancing the equities between the Plaintiff and the Defendant in the issuance of the permanent injunction.

IV. The trial judge abused his discretion in granting a permanent injunction that is unsupported by the evidence and controlled by an error of law.

ARGUMENTS

I. The trial court erred in granting a permanent injunction the error being the Respondents as a matter of law had unclean hands.

BACKGROUND

On or around 1977 the owner of a tract of land in Pickens County subdivided it into four parcels. Subsequently the lots were sold and each deed contained seven identical restrictions. The restrictions at issue here are number 2, which states, "There shall not exist on said lot at any time more than one residence." And number 5, which states, "No trailer, tent, shack, barn, temporary building, outbuilding, shanty, or mobile home of any description shall be placed or erected on said lot of land."

The Appellant acquired the premises from a subsequent grantee of the original subdivider of the property. Prior to purchasing the property the Appellant applied for and received permission to subdivide the property into three separate building lots from the Pickens County Planning and Zoning Commission (R. Pg. 75). The properties, so subdivided, were acquired one by Appellant, ABC Care, Inc., and two by Appellant Lakewood Lane Properties, LLC (R. Pg. 87). Shortly thereafter a home was constructed on the premises owned by Appellant, ABC Care, Inc. (R. Pg. 58)

An action to enforce a restrictive covenant is in equity. South Carolina Department of Natural Resources v. Town of McClellanville, 345 SC 617, 622, 550 SC 2nd 299, 302 (2001). As such the Court may view the facts in accordance with its own view of the preponderance of the evidence.

The Appellants second defense to the Complaint of Respondent alleged that the Respondents should be estopped from enforcing the covenants due to their own disregard of the

restrictive covenants and that they had "unclean hands". A Court sitting in equity must consider the equities of both sides, balancing the two to determine what, if any, relief to give. Foreman v. Foreman, 280 SC 461, 464-65, 313 SC 2nd 312, 314 (Ct. App. 1984). When a party has unclean hands, the party is precluded from recovering in equity and a party will have unclean hands where the party behaves "unfairly in a matter that is the subject of the litigation to the prejudice of the Defendant". Ingram v. Kasey's Associates, 340 SC 98, 107, 531 SC 2nd 287, 292 (2000).

The law of the case, given that the Respondents did not appeal the underlying order, is that they did, in fact, violate the restrictive covenants. Here the Court found the Respondents in violation of the covenants and ordered one to remove one of their buildings. Indeed, two of the Plaintiffs have previously litigated amongst themselves violations of the very same restrictive covenant. It is therefore an uncontradicted and adjudicated fact that these parties seeking to enforce a portion of the restrictive covenants have themselves previously and continuously violated those very same restrictive covenants. Accordingly, the Respondents were precluded as a matter of law from obtaining a permanent injunction.

II. The trial court erred in determining that the Plaintiffs were entitled to a permanent injunction as there was not a scintilla of evidence that the Plaintiffs would suffer irreparable harm absent the issuance of the injunction.

The Respondents original complaint raised but one issue under the covenants and restrictions. The applicable provision relied upon by the Respondents states, "There shall not exist on said lot at any time more than one residence".

It is hornbook law in the state of South Carolina that "the Cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intention as determined by the contract language". Schulmeyer v. State Farm Fire Cas. Co., 353 SC 491, 495, 579 SE 2nd 132, 134 (2003). It is equally hornbook that where a restriction on land is capable of two different constructions, the construction which least restricts the property is favored. Hamilton v. CCM, Inc. 274 SC 152, 157, 263 SC 2nd 378, 380 (1980). ("A restriction on the use of the property must be created in express terms or by plain and unmistakable implication and all such restrictions are to be strictly construed with all doubts resolved in favor of the free use of property.")

"The remedy of injunction is a drastic one and should be cautiously applied only when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected". LeFurgy v. Long Club Owners Association, Inc., 313 SC 555, 558, 443 SC 2nd 577, 578 (Ct. App. 1994). "The issuance of an injunction depends upon the equities between the parties and if great injury will be done to the [parties sought to be enjoined] with little benefit to the other property owners, it is proper for the trial court to deny equitable relief. Kneale, 317 SC 268, 452 SC 2nd 843.

In the instant case the record is devoid of any testimony by the Respondents that they will or would suffer irreparable harm or an injury in fact. The record contains no testimony concerning

the current value of their properties or any loss in value of their properties in the event that the Appellant's lots are subdivided as was approved by the county. They offered no testimony of any depreciation to their properties as a result of the subdivision of the lots as approved by the county. No one offered any testimony that the subdivision of the lots would adversely impact the value of their property and thus they have offered no testimony which would establish irreparable harm to their properties.

The only testimony that could even remotely constitute a claim of injury was the statement of Ms. Marsh that it would cause increased traffic. (R. Pg. 40) However, notwithstanding that there was no testimony that this would impact the value of her property, it is impossible. The plat of the four lots includes a road easement running from a county road through the properties (R. Pg. 104) Ms. Marsh lives on lot 2. The property purchased by the Appellants was the former lot 3. Ms. Marsh has to drive through Appellant's lot to get to her home. No one from Appellant's lot would ever have to, or need to, or be able to drive through Appellant Marsh's lot 2 to get to the subdivided lot 3. It is likewise impossible because the zoning ordinance in Pickens County limits the number of homes that can be constructed on a private roadway. (R. Pg. 44-46) The actual result of the subdividing of lot 3 would be the reduction to zero of any and all further traffic through Ms. Marsh's lot.

Without any testimony or evidence of damage or harm the Court had no basis to grant an injunction.

III. The trial court erred in making no finding or determination balancing the equities between the Plaintiff and the Defendant in the issuance of the permanent injunction.

The testimony and the evidence are uncontradicted that when the Appellant first saw the property it was 3 houses out in the country on a gravel road adjoining the lake covered with numerous outbuildings, garages, sheds and boathouses (R. Pg. 80). Indeed, covered with outbuildings to the extent that the order under appeal is the second time that one of the Respondents was ordered to remove a building, Marsh v. Hill, Opinion number 2006-UP-001 (Ct. App. 2005)

Nothing about these four lots, which were each individually deed restricted, gives the appearance that it is even in a subdivision. It is four acreage size lots on a dead end unpaved road. "A party will have unclean hands where the party behaves unfairly in a matter that is the subject of the litigation to the prejudice of the Defendant." Ingram v. Kasey's Associates, 340 S.C. 98, 107; 531 S.C. 2nd 287, 292 (2000). Here both Plaintiffs unabashedly admitted completely ignoring restriction number 5 contained within their respective deeds. Both testified that they had 3 outbuildings on their property because "they needed them". (R. Pg. 48) While the Defendant was candid in his admission that he was aware of the restrictions contained within the chain of title, the actions of the Plaintiffs in totally ignoring the restrictive covenants in an obvious visual fashion would lead any reasonable person to believe these over 35 year old restrictions were either inactive or not being enforced (in another two years they would not even be found during a standard forty year residential title search). Combine that with the fact that the Defendant went through the complete application process with the County of Pickens, which includes notice and opportunity to appear, to subdivide the lots prior to the actual purchase thereof. Clearly, the Defendant was led to

believe by the actions of these two Plaintiffs and the lack of a covenant expressly prohibiting subdivision that there was no impediment to his subdivision of the property until well after the purchase had occurred.

Inexplicably, despite discussing in great detail the balancing of the equities on the Appellant's counterclaim against Respondents and despite a motion to reconsider to that effect, the order of the trial court makes no effort, nor makes any findings, to balance the equities in the granting of the permanent injunction. Even assuming that the Respondents approached the litigation with clean hands, the equities clearly demonstrate a loss of over $190,000.00 to the Appellant and, at best, a claim of increased traffic by two additional houses being constructed as the total damages incurred by Respondents (R. Pg. 77-79).

Even were the Court to find all of the above in favor of the Plaintiffs it is still required to balance the equities of the parties. As stated above the Plaintiffs had unrepentably paid no attention to the restrictive covenants that they found to be inconvenient. The Plaintiffs made no effort to contest the subdividing of the property by the County of Pickens prior to its subdivision and subsequent purchase by the Defendants. The Plaintiffs testified to no harm and certainly no economic harm while the Defendants purchased the property and paid the price agreed upon solely on the condition that it had been subdivided, and it was in fact subdivided, prior to closing. The Defendants stand to lose a minimum of $190,000.00 and the Plaintiffs stand to gain nothing should the Court impose a permanent injunction. Clearly the equities favor the Defendants.

IV. The trial judge abused his discretion in granting a permanent injunction that is unsupported by the evidence and controlled by an error of law.

There is no reported case in South Carolina where the restrictive covenant prohibiting more than one home on a lot was interpreted as also prohibiting that a lot could not be subdivided. To the contrary, South Carolina has always held that, "a restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property" Buffington v. T.O.E. Enterprises, 383 S.C. 388, 392; 680 S.C. 2nd 289, 291 (209), citing Hardy v. Aiken, 369 S.C. 160, 166; 631 S.C. 2nd 539, 542 (2006). South Carolina's approach has logical and necessary implications for both purchasers and attorneys in order that they may rely completely upon the language, or the lack thereof, contained within any types of restrictive covenants without concern that a prohibition will be implied.

"The Court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it maybe thought the parties would have desired had a situation which later developed and foreseen by them at the time when the restriction was written." Forest Land Company v. Black, 216 S.C. 255, 57 S.C. 2nd 420, 424 (1950).

"It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property, subject, however, to the provision that this rule of strict construction should not be applied to defeat the plain and obvious purpose of the instrument. It follows, of course, that where the language of the restrictions is equally capable of two or more different constructions that construction will be

adopted which least restricts the use of the property." McDonald v. Wellborne, 220 S.C. 10, 66 S.C. 2nd 327 (1951).

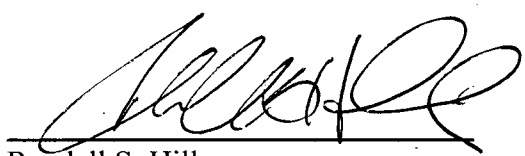
Indeed, any real estate attorney who has practiced in that area for a reasonable length of time is well aware that it is common practice in the state of South Carolina to clearly and specifically designate each and every prohibited activity within the covenants. That would include the requirement in South Carolina that a covenant restricting property to only one residential unit per lot must also have a covenant prohibiting the re-subdivision of the lots in order to accomplish the latter. That practice was easily demonstrated by resort to the Pickens County ROD website to search documents by characteristic back to 1986 (R. Pg. 119-136). In a sample of five randomly selected restrictive covenants on the first page of a search in Pickens County results in all five containing a prohibition of more than one residence per lot, four containing separate prohibition on subdividing any restricted lots and one providing that lots could be subdivided subject to certain minimum standards (R. Pg. 119-136).

In issuing the permanent injunction the trial court completely ignored all of the standards set forth above for interpretation of restrictive covenants. The Court took a covenant and enlarged and extended by construction and implication it beyond the clear meaning of its terms, did not strictly construe it and did not resolve all doubts in favor of the free use of the property. If the declarant had intended that the lots never be subdivided he could have said that and, under South Carolina law, was required to say that. Like the example restrictive covenants submitted with Appellant's post trial brief, it is a simple enough matter to say what you mean and the other declarants in Pickens County consider it necessary to say both, so that property owners, attorneys and title insurers may reasonably rely on what is written rather than what could have been written.

CONCLUSION

The Respondents offered essentially no evidence of harm let alone anything approaching the level of irreparable harm in support of their request for a permanent injunction. The very same trial judge who granted the permanent injunction convicted them of having unclean hands. The Order granting the injunction implies a further restriction than was stated in the deed which further restricts the free use of property. A balance of the equities between Appellant and Respondent weighs almost completely in favor of Appellants. For any or all of the above reasons this court should exercise its equitable powers and view the facts to reverse the order of the trial court and enter an order denying Respondents' request for permanent injunctive relief.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF COUNSEL

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

January 19, 2017

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