THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Hon. Charles B. Simmons, Jr., Master in Equity

Appellate Case No.: 2018-000340
Circuit Court Case No.: 2016-23-05898

Joseph Edward McMullen ..... Appellant,

v.

Terra Oaks Architectural Committee, Paola Rogers, Dwaine Cook, and John Simpson, as putative members of the Terra Oaks Architectural Committee, ... Respondents.

INITIAL BRIEF OF APPELLANT

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3. Did the trial court err by failing to find that the TOAC failed to timely respond to the Appellant's plan?

4. Did the trial court err by ruling that plans proposing the re-cutting of a lot are not subject to the fifteen day response rule?

STATEMENT OF THE CASE

This action was initiated by the Plaintiff/Appellant filing a summons and complaint on October 17, 2016. Respondent filed an answer and motion for summary judgment on January 30, 2017. A hearing was subsequently held before the Hon. William Seals, Jr., on the Respondent's motion for summary judgment. As a result of the hearing an order was entered on May 25, 2017, granting the Respondent summary judgment and dismissing the Plaintiff's Alienation of Property, Estoppel, Waiver, and Laches causes of action. No appeal was taken from that order.

On October 4, 2017 an Order of Reference was entered referring the case to the master with authority to enter final judgment. A hearing was subsequently held before the Hon. Charles B. Simmons on the Appellant's remaining issues. As a result of the hearing an Order of Judgment was entered on February 2, 2018, denying the Appellant relief and dismissing the complaint. The Appellant timely filed a notice of appeal on February 22, 2018.

Robert C. Childs, III, represented the Appellant at trial and was joined on appeal by J. Falkner Wilkes. Ralph Gleaton represented the Respondent at trial and continues on appeal.

STATEMENT OF FACTS

Appellant owns property in the Terra Oaks subdivision, located in Greenville County. The Terra Oaks subdivision is subject to restrictive covenants. T. 16. P-1. Pursuant to the covenants, the re-cutting of a lot requires prior approval by the Terra Oaks Architectural Committee (TOAC). P. Ex. 1. The provision relating to the re-cutting of lots refers to the enabling Article for the TOAC.[1] P. Ex. 1. Paragraph 2 of the enabling provisions of the TOAC provides that all building plans shall be submitted to the TOAC. P. Ex. 1. Paragraph 4 of the enabling provision provides that in the event the Committee fails to approve or disapprove such designs and plans within fifteen (15) days after the plans have been submitted to it, that such plans shall be deemed to have been approved. P-1.

On January 7, 2016, the Appellant submitted a plan to the other members of the TOAC. 38; P-10; P-11. The plan proposed to re-cut a Terra Oaks lot owned by the Appellant. 38; 114, 167. At that time the Committee was comprised of three members, Simpson, Rogers and the Appellant. R. 69. Pursuant to the covenants: "All members shall constitute a quorum and a majority vote shall be required for the transaction of any business of the Committee." R. 96; P-1. In submitting the plan the Appellant expected that a committee meeting would be held to discuss and vote on the plan. 38. Although no proper committee meeting was called or held the Appellant received an email from Simpson's wife stating that other members of the TOAC had considered and rejected the Appellant's plan. 38-43; P. 12. The decision reflected in the email, as well as the email itself was not the product of a meeting wherein a quorum was present or voted.

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[1]The reference to Article III is a typographical error in the covenants. Article IV enables the TOAC.

R. 62; 175-176. As to the Appellant's plan there was no formal meeting or vote of the TOAC when a quorum existed. 62; 175-176.

After receiving the email purporting to be an official act of the TOAC the Appellant, as chairman of the TOAC, called a meeting. 44-45. None of the other members showed up at the called meeting. 45-46. Despite having less than a quorum for any meeting or conversation concerning the Appellant's request, under the purported authority of the TOAC the other members continued to deny the Appellant permission to cut the lot. 46-50. Prior to the expiration of fifteen days from his initial request, the Appellant was never provided notice of a decision that was the result of a vote where a quorum was present. 51-52; 128-129; 154.

In response to the submission of his plan, members Simpson and Rogers met at Roger's house on January 11th to discuss the request. The Appellant was not informed and therefore was not in attendance. 149. Simpson admitted that he intentionally did not include Appellant in any meeting or discussion regarding the Appellant's plan. 149. Simpson admitted that he *refused* to give the Appellant a meeting on the issue of re-cutting his lot. 120-121. Prior to the expiration of the fifteen day period, and for many months thereafter, there was no formal meeting or vote where a quorum was present. 151. Subsequently, the other members of the Committee went on to purportedly remove the Appellant from the TOAC, still without a proper meeting or quorum. 53; 154. When the Appellant submitted a second proposal on October 7, 2016 there was another rejection by members of the committee without the Appellant's participation. 53.

ARGUMENT

Standard of Review

An action to enforce restrictive covenants by injunction is in equity. Taylor v. Lindsey, 332 S.C. 1, 3, n. 2, 498 S.E.2d 862, 864, n. 2 (1998). On appeal of an equitable action tried by a Master, the Court can find facts in accordance with its own view of the evidence. *Id.*; Townes Assoc. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976); S.C. Dep't of Nat. Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001).

Discussion

I. THE COURT ERRED IN FAILING TO HOLD THAT THE APPELLANT'S PLAN TO RE-CUT LOT WAS DEEMED APPROVED WHEN THE TOAC FAILED TO PROPERLY ACCEPT OR REJECT PLAN WITHIN FIFTEEN DAY PERIOD.

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. Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). Contrary to the rule, the court here construed the covenants *against* the free use of the Appellant's property.

In the present case the master expressly found the covenants at issue to be in-artfully drawn, and a lack of clarity is evident given that the provision allowing the TOAC to approve plans to re-cut a lot provides no procedure by which the Committee may do so. The covenants in this regard are ambiguous. A restrictive covenant is ambiguous when its terms are reasonably susceptible of more than one interpretation. South Carolina Dep't of Natural Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299 (2001). While the provision as to the re-cutting of lots fails to speak as to how such a plan is submitted, considered, and decided, the provision

does make reference to the enabling article for the TOAC, and that article sets forth a very specific procedure for plans submitted to the Committee. Given the absence of a procedure being stated in the one provision, its reference to the article containing a procedure for other plans indicates an intent that the stated procedure be applied to all plans to the Committee.

While the master interpreted the provisions pertaining to plans proposing the re-cutting of lots as independent from all other provisions of the covenants, it is entirely reasonable to interpret the referral back to the TOAC empowering article as requiring the same procedure be applied to a plan for re-cutting a lot as would apply for any other plan submitted to the TOAC for approval. To do otherwise leaves a plan for the re-cutting of a lot without any defined procedure as to it's submission, consideration, or decision process. The court therefore erred in failing to consider the intent of the drafters in light of the whole document.

> Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. 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 may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written. 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 so as 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. 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.

S.C. Dep't of Nat. Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) *citing* Taylor, 332 S.C. at 4–5, 498 S.E.2d at 863–64 (*emphasis added*)

(*internal quotations and citations omitted*).

Similar to the provisions pertaining to the re-cutting of lots, the enabling article for the TOAC requires that plans for the erection of buildings or improvements be approved by the Committee. In a separate paragraph the enabling article further provides for a procedure for such plans. Under that provision, once a plan has been submitted, the TOAC must take action within fifteen days to either accept or reject the plan. The plans are deemed accepted if the TOAC fails to approve or disapprove the plan within the fifteen days. The re-cutting provision on the other hand provides no procedure for the submission, consideration and decision on a plan. The drafters of the covenants could not have intended to have provided no procedure to have a lot re-cut where they clearly intended that it be possible to do so. The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). When read as a whole, the lack of any other procedure, combined with the referral to the enabling article, the covenants must be read as intending to engage the same procedure applicable to other plans, which require the TOAC to approve or reject a plan within fifteen days.

Because the covenants are unclear as to the procedure relating to a request to re-cut a lot, the master erred in failing to interpret them against the TOAC and in favor of the Appellant. Restrictive covenants are to be construed most strictly against the grantor and persons seeking to enforce them. Sprouse v. Winston, 212 S.C. 176, 46 S.E.2d 874 (1948). "[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." *See* Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). Although the requirement for Committee approval for re-cutting a lot is defined, the related process for submission and procedures thereafter are not. The court must therefore interpret the covenants in a way that is least restrictive to the free use of property, which in this case would require applying the fifteen day requirement and automatic approval if the TOAC fails to either approve or disapprove the plan. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). Here, reading the covenants as a whole, the provision pertaining to plans proposing the re-cutting of a lot should be subjected to the same procedure as any other plan submitted to the TOAC for approval.

Lack of Action by TOAC Constitutes Approval

At the time the Appellant submitted his plan for review on January 7, 2016, the TOAC was comprised of three members, Rogers, Simpson, and the Appellant. The covenants provide that "All members shall constitute a quorum and a majority vote shall be required for the transaction of any business of the Committee." P-1, p. 4. Here, because any meeting, decision, and purported rejection of the Appellant's plan by Rogers and Simpson failed to constitute a quorum, they can not constitute a valid act of the TOAC. Here, the record shows that Rogers and Simpson intentionally excluded the Appellant from any meeting, discussion, or decision concerning the Appellant's plan. Despite Simpson and Rogers constituting a majority of the TOAC members, there was never a quorum, and without a quorum the TOAC can not conduct business. Any meeting, discussion, decision or action is therefore ineffective. The email therefore failed to constitute an action of the TOAC. As a result, the TOAC failed to accept or reject the Appellant's plan within fifteen days. The Appellant's plan

must therefore be deemed to have been accepted.

CONCLUSION

As a result of the foregoing the decision of the master should be reversed.

Respectfully submitted,

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October 1, 2018.

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CERTIFICATE OF SERVICE

I certify that on the 2nd day of October, 2018, I served a copy of the Appellant's Initial Brief on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record as follows:

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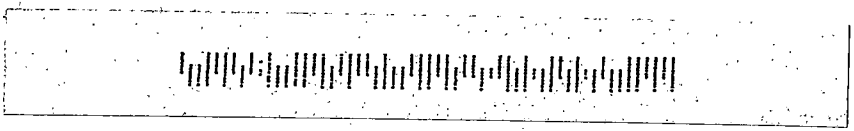

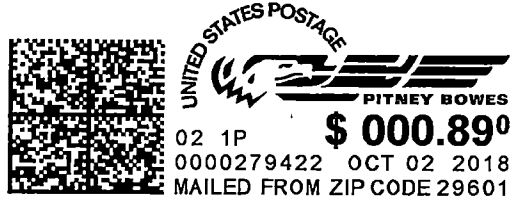

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