THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2016-CP-23-05898
Appellate Case No. 2018-000340

Joseph Edward McMullen, ... Appellant,

v.

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

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

Respondents believe this appeal presents two issues:

I. Whether this Court should affirm the judgment below based on the un-appealed finding that the Terra Oaks Architectural Committee lacked the power to grant appellant's request to subdivide his property.

II. Whether the master in equity correctly held the 15-day "automatic approval" provision of the restrictive covenant governing Terra Oaks did not apply to requests to subdivide but was instead limited to requests that involved building or modifying improvements on lots.

STATEMENT OF THE CASE

A. Abbreviated Summary

This appeal involves a restrictive covenant requiring written approval before property in a neighborhood can be subdivided. See (Pl's Ex.1, p.3, ¶4) (the covenant).

The appellant was denied permission to subdivide his property on multiple occasions. After that, he brought this lawsuit claiming the committee tasked with reviewing his application did not follow the proper procedures. He claimed this failure resulted in his application's automatic approval. He makes these same arguments on appeal.

The master in equity rejected appellant's argument for two reasons. First, the master held the covenant's 15-day "automatic approval" provision did not apply to requests to subdivide property. (2/2/18 Or.p.4). Instead, the master found automatic approval applied to applications involving plans to build on lots or to alter improvements built on lots. *Id.*

The master also found that the committee tasked with reviewing the application did not have the power to grant this particular request. (Id.pp.4-5). This appeal followed.

B. Factual Background

The Terra Oaks neighborhood has 20 lots and is located in Greenville. A plat of the neighborhood was attached to the neighborhood's restrictive covenants when they were executed in 1980. (Pl's Ex.1, p.9). The plat is not the best quality, but it is still readable.

This litigation concerns Lots 3 and 4 on the top of that plat.

The appellant owns Lot 3. Through a series of transactions in 2009, he purchased part of Lot 4 and then traded some of that land with a neighboring landowner whose property was outside Terra Oaks.

This was done in stages. Appellant purchased the relevant part of Lot 4—Tract A on the plat attached to that deed—in January of 2009. (Pl's Ex.3, pp.2-3). The swap with the neighbor outside Terra Oaks happened a few months later, in May 2009. There, appellant released Tract C in exchange for Tract B. (Pl's Ex.4, p.5) (the plat for the land swap).

This hodgepodge eventually culminated in appellant's request to subdivide his property into three lots. These are designated as Lots A, B, and C on the plat submitted with the request to subdivide. (Pl's Ex.11). Importantly, proposed Lots B and C contain some land inside Terra Oaks and other land outside the subdivision.

The restrictive covenants for Terra Oaks explain "No lot shall be recut without first obtaining the written permission of the Architectural Committee created under Article III thereof." (Pls' Ex. 1, p.3, ¶4). The Architectural Committee is actually created under article IV of the covenants. (Id.p.4).

The parties dispute several things surrounding the Architectural Committee's composition and operation, but nobody disputes that in May of 2015, the Architectural

Committee consisted of appellant and two of the respondents; John Simpson and Paola Rogers. Nobody disputes that the first time appellant mentioned subdividing his property was after a committee meeting in May of 2015 that had been convened for the purpose of addressing a neighbor's request to build a fence. (Tr.p.106, line 19 - p.110, line 14).

Nobody appears to dispute that appellant and Simpson spent at least an hour walking appellant's property discussing the proposal that same day. (Id.p.110, line 5-14). At trial, appellant introduced an e-mail to him dated a few days later, May 13, 2015 to be precise, explaining Simpson and Rogers would not vote in favor of appellant's request to subdivide his lot. (Pl's Ex.7).

Appellant did not pursue this request or any other with the committee until several months had passed. Then, in December of 2015, appellant signed a contract to sell part of his lot. The closing date was to be no later than January 14, 2016. (Pl's Ex.8, p.2, ¶8).

Appellant made a verbal request to the committee on January 7th, seven days before the closing, for his lot to be subdivided into three lots. (Pl's Ex.12, p.1). He supplemented this with a formal request sent by e-mail the following day. (Pl's Exs.10 &11).

The request is notable in two respects. First, it explains Lots B and C consist of property inside Terra Oaks as well as property outside the subdivision. (Pl's Ex.10, p.2). Second, the request purported to decree that Lot B was "perpetually" part of the Terra Oaks subdivision, that Lot C was not part of the Terra Oaks subdivision, and that appellant would attach covenants to Lot C prohibiting mobile homes or commercial activity. *Id.*

Simpson testified he met appellant at appellant's house after receiving this request and that the meeting lasted for at least an hour and a half. (Tr.p.115, line 10 - p.118, line 22).

Simpson explained he marked-up documents to take to Rogers (the other committee member) and then met with Rogers for another hour and a half concerning the request. *Id.*

On January 21, 2016, fourteen days after appellant's verbal request, Simpson and Rogers sent appellant an e-mail informing him that his subdivision request had been denied. (Pl's Ex.13). Appellant responded with an e-mail the following day claiming it was inappropriate for the committee to meet without him being present and rejecting the denial. (Pl's Ex.14). Appellant then claimed that he, as "chair" of the committee, was calling a meeting for January 24th, two days later. *Id.* Rogers responded to this e-mail by contending appellant had a direct financial stake in the matter and disputing appellant's authority to participate in or call a meeting regarding his request to subdivide his own property. *Id.*

In March of 2016, the subdivision request came up again at a neighborhood meeting at appellant's house. Simpson explained he took this opportunity to propose another person serve as the third member of the Architectural Committee and that the committee add an alternate member who could serve in the event of a conflict. (Tr.p.124, line 11 - p.125, line 21). Appellant said he agreed to this, but on the conditions that he was ensured a fair hearing and that the committee would not have any more meetings without him being present. (Tr.p.49, line 9 - p.50, line 12).

Shortly thereafter, Simpson notified appellant by text message that the newly constituted committee met and concluded no further review of appellant's subdivision proposal was needed. (Pl's Ex.15). Months later, in October of 2016, appellant sent Simpson and Rogers letters purporting to "remove" them from the Architectural Committee. (Pl's Exs. 17 & 18).

Though not directly relevant to the arguments in this appeal, certain disputes surrounding the Architectural Committee's composition and operation are important to understanding the complete background of this case.

First, appellant became a member of the Architectural Committee in December of 2008. (Pl's Ex.2). This was a month before he purchased the back of Lot 4 from a member of the original Architectural Committee. (Pl's Ex.3, pp.1-2). There is no record of any written approval by the Architectural Committee for appellant's purchase of part of Lot 4. No sensible explanation for this was offered at trial. See (Tr.p.69, line 2 - p.70, line 9).

Second, even though a document in evidence purports to appoint Simpson and Rogers to the Architectural Committee in 2008, both Simpson and Rogers testified the first time appellant approached them about serving on the committee was in 2011. (Tr.p.101, line 18 - p.102, line 13; p.177, lines 1-2).

Third and finally, the parties disputed the authenticity of a document purporting to be written approval from the committee in 2009 for appellant to further divide his part of Terra Oaks Lot 4 and sell it to a neighbor outside the subdivision. (Pl's Ex.5). Simpson and Rogers denied signing this document. (Tr.p.129, pp.9-25; p.177, lines 14-20). The document says the committee met and approved the division on May 7, 2009, but even appellant acknowledges no such meeting occurred. (Tr.p.75, lines 1-12). Again, Simpson and Rogers say they knew nothing about the committee until appellant approached them two years later.

C. Brief Summary of Litigation

Appellant filed this suit in October of 2016. (Complaint). This was days after he sent Simpson and Rogers letters purporting to remove them from the committee. (Exs. 17 & 18).

The case was referred to the master in equity who conducted the trial on January 10, 2018. Four witnesses testified: appellant, Simpson, Rogers, and the individual who contracted to purchase part of appellant's property back in 2015. (Tr.p.2).

The master issued his judgment on February 2, 2018. (2/2/18 Or.pp.1-7). The master found the covenant's 15-day "automatic approval" provision did not apply to requests to subdivide property. (2/2/18 Or.p.4). The master also found the committee tasked with reviewing the application did not have the power to grant this particular request. (Id.pp.4-5). The basis for this alternative holding was that the committee lacked the power to release property from the covenants or to attach new covenants to appellant's property. *Id.* Recall that appellant's request purported to decree that Lot B was "perpetually" part of the Terra Oaks subdivision, that Lot C was not part of the Terra Oaks subdivision, and that appellant would attach different covenants to Lot C. (Pl's Ex.10, p.2).

There was no motion for the master to alter or amend his decision. Appellant served notice of this appeal February 22, 2018.

STANDARD OF REVIEW

The standard of review is de novo. Appellant filed this case seeking alternative rulings that the restrictive covenant was invalid or had been followed. This is similar to an action to enforce a restrictive covenant, which sounds in equity. *Taylor v. Lindsey*, 332 S.C. 1, 3 n.2, 498 S.E.2d 862, 863 n.2 (1998). The same standard applies if the case is viewed as an action to interpret the covenant's 15-day "automatic approval" section. Whether a contract is ambiguous is a question of law which an appellate court reviews de novo. *Callawassie Island Members Club v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018).

ARGUMENT

There are two reasons this Court should affirm.

First, the master found the Terra Oaks Architectural Committee lacked the power to grant appellant's request to subdivide his property. This finding has not been appealed. Thus, the law of this case is that the Court does not have the power to approve appellant's request to bring some property inside Terra Oaks and take other property out of Terra Oaks.

Second, the master correctly held the 15-day time limit for the Architectural Committee to act did not apply to requests for permission to subdivide but was instead limited to the committee's review of plans and improvements. This is supported by the covenant's language and by the parties' conduct.

I. This Court should affirm master's judgment based on the un-appealed finding that the committee lacked the power to grant appellant's request.

The master noted in his judgment that appellant was asking the court to grant the subdivision proposal appellant submitted by e-mail in January of 2016. (2/2/18 Or.pp.4-5). This was consistent with appellant's testimony explaining he believed it would do no good to go back to the Architectural Committee—he wanted a ruling his proposal had been approved because of the committee's "failure to act." (Tr.p.54, line 21 - p.55, line 9).

The master also noted in his judgment that appellant's written proposal purported to declare that one plot of appellant's land inside Terra Oaks was not subject to the covenants for Terra Oaks. (2/2/18 Or.p.5). The master then held that changing the covenants required a majority vote of owners in the neighborhood and that the committee accordingly lacked the authority to grant appellant's proposal. *Id.* At trial, appellant agreed the committee lacked

the power to change the covenants and that the covenants could not be changed absent a majority vote of owners in Terra Oaks. (Tr.p.85, line 15 - p.86, line 8).

Appellant has not challenged this holding and does not argue it is incorrect. This unappealed ruling is the law of the case. *ML-Lee Acquisition Fund v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997).

This ruling controls the outcome. It does not matter whether the request to subdivide was deemed approved. The law of this case is that both the committee and the court lack the power to grant appellant's request. Thus, the court need not review the covenants or interpret their 15-day "automatic approval" provision. The denial of relief should be affirmed.

II. The master correctly held the covenant's 15-day "automatic approval" section did not apply to requests to subdivide but was instead limited to requests that involved building or modifying improvements.

The master found the covenants were not artfully drafted. (2/2/18 Or.p.4). To take an obvious example, the paragraph requiring written permission to subdivide wrongly states the Architectural Committee is created in section III of the covenants, not section IV. (Pl's Ex.1, p.3, ¶4). Still, the master found that when reading the covenants as a whole the covenants treated requests to subdivide differently than requests that involved building or modifying improvements on lots. (2/2/18 Or.p.4). That finding is right and should be affirmed.

The master's finding makes sense textually. The paragraph requiring written permission to subdivide appears in section III of the covenants which is titled "setbacks, locations, and size of improvements and lots." (Pl's Ex.1, pp.2-4). This section gives a

general description of the permissible locations for structures on lots, prohibits certain fences, and contains broad requirements for the size and type of structures permitted. *Id.* There is no "automatic approval" provision anywhere in section III.

A different section of the covenants, section IV, creates the Architectural Committee and deals exclusively with buildings and improvements. This section explains improvements and buildings may not be constructed without first submitting plans, specifications, and plot plans to the committee. (Pl's Ex.1, p.4, ¶2). This section empowers the committee with full authority to approve or disapprove plans if the plans appear to duplicate another residence in the neighborhood. (Pl's Ex.1, p.5, ¶3). It also provides "[i]n the event said Committee fails to approve or disapprove such designs and plans within fifteen (15) days" the covenant's approval requirement will be deemed satisfied. (Pl's Ex.1, p.5, ¶4).

Again, the 15-day "automatic approval" provision is located under a different section of the covenants. Section IV deals exclusively with the committee's responsibility to approve building plans. Written permission to subdivide is in a different section.

The master's finding is also consistent with the construction of the covenants the parties adopted before this dispute began. The record does not suggest the committee followed rigid procedures or that any of the parties believed the committee needed to act within 15 days or else the request would be deemed approved. Take the disputed 2009 "approval" of appellant's land swap with the neighbor whose land was outside Terra Oaks. Appellant agreed there was no committee meeting about this request and claimed he left the approval form at a neighbor's house for Simpson and Rogers to sign at their convenience. (Tr.p.23, line 7 - p.24, line 24). Consider also appellant's conduct with *this* subdivision

request. Appellant's e-mail to the committee did not request a meeting. (Pl's Ex.10, p.1). Instead, appellant attached a "proposed resolution," ostensibly for approval. (Id.p.2).

After appellant's request to subdivide was denied, appellant attempted to call a meeting of the committee for January 24, 2016. (Pl's Ex.14). This would have been more than 15 days after appellant's verbal request on January 7 and his e-mail the following day. Appellant apparently said nothing about automatic approval at the neighborhood meeting in March of 2016 or in response to the text messages he received informing him that no further review would be conducted. (Pls' Ex. 15).

This matters because precedent explains when there is doubt about the proper construction of a contract the court may look to the construction employed by the parties. *Hoffman v. Cohen*, 262 S.C. 71, 77, 202 S.E.2d 363, 366 (1974). Nothing in this record suggests any of the parties—appellant included—believed the committee needed to act quickly or else the subdivision request would be deemed approved.

Contrast this case with *Hardy v. Aiken*, a case where it was possible to read part of a restrictive covenant different ways. There, the covenants had an expiration date but also said, in a separate section, that any change in the covenants must be signed by a majority of landowners in the subdivision. 369 S.C. 160, 163, 631 S.E.2d 539, 540 (2006). The question in *Hardy* was whether the power to amend the covenants included the power to extend their lifespan beyond the expiration date. Reading the covenant narrowly, *Hardy* held the power to amend did not include the power to extend. *Id.* at 160, 166, 631 S.E.2d at 542.

Here, however, there does not appear to be a sensible construction of the covenant applying the 15-day "automatic approval" language to an owner's request to subdivide his

or her lot. Appellant says the fact that there is a specific procedure for approving building plans implies that the same procedure was to be followed for subdivision requests, but the absence of a designated procedure for subdivision requests actually cuts the other way. If the covenants intended all kinds of committee requests to be treated the same, it would have been easy to write the covenants in a way that made that intent evident.

Appellant also says the master failed to construe the covenant in favor of the free use of property. It is difficult to see how that principle points in either direction here. A 15-day "automatic approval" requirement could conceivably result in more approvals of plans by default and inaction, but a time limit does not inherently favor more free use of land.

Precedent also explains the rule of construing restrictive covenants in favor of the free use of property cannot be used to defeat the plain and obvious purpose of the covenants. *Taylor*, 332 S.C. at 4, 498 S.E.2d at 864; *Sprouse v. Winston*, 212 S.C. 176, 185, 46 S.E.2d 874, 878 (1948). Again, if the covenants intended all kinds of committee requests to be treated the same, it would have been easy to write the covenants in a way that plainly explained requests to subdivide would be automatically approved unless the committee denied them within 15 days.

*

It bears mentioning that although the process here might have been imperfect, the decision to deny the subdivision was plainly right.

Appellant could not judge his own subdivision request. "The maxim that no man should be a judge in his own case is so well established, both in reason and by authority, that it needs neither argument nor the citation of adjudged cases in its support." *Bd. of Comm'rs*

of Carroll Cty. v. Justice, 30 N.E. 1085, 1087 (Ind. 1892). The covenants also make it plain that the remaining members of the committee are to appoint a third committee member in the event of a conflict. (Pl's Ex.1, p.4, ¶1). It is undisputed that a full committee met on appellant's request and denied the request. (Pl's Ex.29, p.2, ¶16).

The covenants give the committee complete discretion to deny a request to subdivide a lot. See, e.g., *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct. App. 1985) (restrictive covenant gave committee complete discretion to reject plans for "aesthetic considerations"). All owners in Terra Oaks voluntarily bound themselves to the covenants—appellant included. The court cannot and should not re-write what may seem in hindsight to have been "an improvident bargain." *Erkes v. Kasparek*, 303 S.C. 70, 73, 399 S.E.2d 6, 8 (Ct. App. 1990).

There is also nothing wrong with the fact that one member of the committee—Simpson—did the investigating and presented the evidence to his colleagues. Precedent explains a quorum of an adjudicatory body must consider all the evidence and that the taking of evidence may be delegated to a smaller number of the body. *Pettiford v. S.C. State Bd. of Ed.*, 218 S.C. 322, 342, 62 S.E.2d 780, 789 (1950).

And the committee correctly outlined significant substantive concerns with the proposal. The committee believed the division of Terra Oaks Lot 3 into two parts would negatively affect the property values of other lots. (Pl's Ex. 12). The committee also expressed apprehension about the fact that appellant was proposing to retain ownership of "Lot C," that appellant lacked the ability to access Lot C, and that appellant was proposing to take this property out of Terra Oaks. *Id.* These concerns seem imminently sensible.

It appears, on this record, that appellant bought the back of Terra Oaks Lot 4, probably without committee approval. He then further divided that property, again without committee approval, to create three lots out of two. This would be perfectly permissible if there was not a restrictive covenant requiring approval before a lot could be subdivided. But there *is* such a covenant. The request was not approved. The master correctly denied relief. This Court should affirm.

CONCLUSION

For the foregoing reasons this Court should affirm.

Respectfully submitted,

SC BAR # 77807
for Blake Hewitt

February 15, 2019

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellant with a copy of the *Initial Brief of Respondents* and *Designation of Matter to be Included in the Record on Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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February 15, 2019

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February 15, 2019

VIA HAND DELIVERY
The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Joseph Edward McMullen v. Terra Oaks Architectural Committee
Case Tracking No. 2018-000340

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal in this case. I have also enclosed a Proof of Service upon counsel for the Appellant. Please return the additional filed copies to me via our courier.

Thank you for your attention to this. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Kalen Reed
Paralegal to Blake A. Hewitt
Bluestein Thompson Sullivan, LLC

/emb
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cc: Ralph Gleaton, Esquire
Robert C. Childs, III, Esquire
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