ORIGINAL

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

Gordon G. Cooper, Master-In-Equity

Case No. 2009-CP-42-5129

Katheryna Mulholland-Mertz . . . . . .Appellant,

v.

Corie Crest Homeowners Association of Spartanburg, Inc., Richard T. Biggs, Kathleen A. Biggs, James Hannah, and Elizabeth A. Hannah . . . . . Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUE ON APPEAL

I. The master applied the appropriate standard of review in granting Respondents' Rule 41, SCRCP motion and properly found that Appellant failed to prove that Respondents violated the Restrictions.

STATEMENT OF THE CASE

On September 17, 2009, Appellant Katheryna Mulholland-Mertz ("Appellant") and Kenneth Mertz[1] filed a Complaint against Corie Crest Homeowners Association of Spartanburg, Inc., Richard T. Biggs, Kathleen A. Biggs, James Hannah, Elizabeth A. Hannah, and Joseph P. Denicola.[2] ("Respondents" or "Corie Crest"). (R. p. 68). Appellant sought a declaratory judgment declaring Respondents to be in breach of certain property restrictions, and a permanent injunction prohibiting construction of storage buildings in the neighborhood. Appellant also filed a Motion for Temporary Injunction to prevent such construction pending the outcome of the litigation, which motion was granted. (R. pp. 66, 67). Respondents timely answered. (R. p. 71).

Appellant filed a Motion to Amend Complaint and Proposed Amended Complaint on January 13, 2011. (R. p. 74). Respondents consented to this filing, and timely answered. (R. p. 80).

The case was referred to the Honorable Gordon G. Cooper for trial, which took place on August 24 and 25, 2011. (R. p. 64). At the close of Appellant's case, Respondents moved under Rule 41(b), SCRCP to dismiss the action. (R. p. 102). Judge

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1 Kenneth Mertz was dismissed from the case prior to trial. (R. p. 66).

2 Joseph Denicola was dismissed from this case prior to trial.

Cooper granted this motion. (R. pp. 58, 107-109). Appellant filed a Motion to Amend Findings of Fact and Conclusions of Law and Motion for New Trial on September 22, 2011. (R. pp. 4, 10). Judge Cooper heard arguments on these motions on February 23, 2012, and issued an order on March 9, 2012 denying these motions. (R. pp. 2, 16). This appeal followed.

STATEMENT OF FACTS

Appellant Katheryna Mulholland-Mertz ("Appellant") purchased a home at 1088 Corie Crest Drive in the Corie Crest Subdivision in May of 2007. (R. p. 100). She was immediately dissatisfied with the presence of two outbuildings that had been constructed in the neighborhood and filed formal complaints with the management company two days after she moved in because she believed that the buildings did not comply with the Declaration of Protective Covenants, Conditions, Restrictions, and Easements of the Corie Crest Subdivision ("Restrictions"). (R. p. 105). At that time, Corie Crest had not elected its Board. Appellant shortly thereafter filed a lawsuit to have these buildings removed. This suit was later dismissed without a finding of fault or violation, and the parties reached an agreement to remove the buildings. (R.106-110, 147, 150).

When the Board was elected, Respondent Richard Biggs was elected as Chairman. Appellant soon challenged a building constructed by Mr. Biggs by filing a covenant violation complaint. (R. p. 114). She also complained of a building constructed by Respondents James and Elizabeth Hannah. Both of these buildings had been properly approved by the Board's Architectural Review Committee under the Restrictions. Appellant simply disagreed with the approval, and thought her opinion should prevail. She therefore brought

this action requesting a permanent injunction against Respondents requiring, among other things, the removal of the structures. She later amended her complaint to seek a declaratory judgment nullifying certain Amendments to the Restrictions that were lawfully passed by the Association and recorded on August 26, 2010. (R. pp. 74, 268, 295).

In her complaint, Appellant claims that the Respondent landowners constructed ancillary buildings on their properties that violated the Restrictions at the time they were constructed, and that Respondent Association wrongfully approved them, all in violation of the Restrictions. Specifically, Appellant claims the buildings violated Section 2 of the Restrictions, which read as follows:

> Single Family Residential Use: No lot shall be used except for private, single family residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one detached single family dwelling, not to exceed two (2) stories in height, and, if approved in advance in writing, a private detached garage.

Additionally, in her complaint, Appellant refers generally (though inexplicably) to Section 18 concerning the construction of ancillary outbuildings:

> Portable or Metal Buildings Prohibited: Portable buildings, metal storage buildings or other similar off-site constructed storage buildings are prohibited to be placed or remain on any lot unless approved by the Developer or Association.

Appellant alleges that these sections prohibited the construction of the buildings that she found offensive.

Despite her contentions, Appellant flatly ignored the remaining body of the Restrictions, as well as the fact that Section 18 did not prohibit the types of buildings set forth; it only required approval of those types of buildings. In fact, several provisions in the Restrictions specifically allowed for the approval and construction of various types of

ancillary buildings, including verandahs, breezeways, terraces, garages, buildings, structures, hobby-type/storage buildings, portable buildings, and off-site constructed storage buildings. (R. pp. 269, 270, 271, and 272). Such approval was governed by Section 7, which provided that no structure may be built until the plans were approved, and that the structure must be built as a permanent structure, and must be designed in harmony with the main dwelling. (R. p. 270). Section 8 also required aesthetically appropriate building materials. (R. p. 270). Appellant at trial refused to even acknowledge the existence of these sections, steadfastly clinging to her view that only Section 2 applied, and that it limited structures to a single family home and one detached garage.

Appellant also challenges the Board's Amendments to Restrictions, which were duly recorded on August 26, 2010. In an effort to clarify the Restrictions for ease of application, the Board passed Amendments in compliance with the procedures set forth in the Restrictions. To wit, it obtained the written agreement of owners of 2/3 of the lots in Corie Crest. (R. p. 167). Appellant claimed that she was somehow deprived of a "vote" in this process, but offered no evidence to challenge the validity of these signatures at trial, as was her burden. (R. p. 45)

When the Restrictions are read as a whole, as they must be, the types of structures about which Appellant complains are clearly allowed, Respondent homeowners followed the appropriate process, Respondent Board followed the appropriate process, and Appellant's claims are without merit. The master therefore properly found that Appellant had not proved any violation of the Restrictions. The master also properly found that Appellant had failed to meet her burden of challenging the process by which the

Restrictions were amended in August of 2010. For the reasons set forth herein, Respondents respectfully request that the Court affirm the master's rulings.

ARGUMENT

Appellant sets forth a number of issues on appeal, but they can be condensed to a single issue: Whether or not the master applied the correct standard of review in ruling on Respondents' Rule 41(b) motion, and whether his evaluation of the evidence should be upheld on appeal. The record is clear that it should.

Appellant makes the puzzling argument that, at the close of her case, the master should have applied a summary judgment standard to her evidence, viewing it in the light most favorable to her. She appears to claim that the master was somehow bound by Judge Cole's earlier denial of Respondents' summary judgment motion, arguing repeatedly at the hearing, at the post-trial motions' hearing, and on appeal that the master inappropriately ruled "on the merits" at the close of her evidence without hearing the entire case. Under Rule 41, SCRCP, this was the master's duty, and he properly did so.

I. Standard of review on appeal.

Rule 41(b), SCRCP provides, in pertinent part, as follows:

> After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits.

Rule 41(b), SCRCP.

Much like Appellant, in Johnson v. J.P. Stevens & Co., the plaintiff claimed that the master erred in ruling on the defendant's Rule 41(b) motion by failing to view the evidence at the close of the plaintiff's case in the light most favorable to the plaintiff. The court soundly rejected this argument, holding that the law is clear that under Rule 41 in a nonjury trial, the trial judge may evaluate the merits at the close of the plaintiff's case and dismiss the action "even though the plaintiff may have established a prima facie case." Johnson v. J.P. Stevens & Co., 308 S.C. 116, 417 S.E.2d 527, 529 (1992). The courts have long recognized that Rule 41(b) allows the trier of facts to weigh the evidence, determine the facts, and render a judgment against the plaintiff at the close of his case. Id.

An action seeking a declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. Doe v. South Carolina Medical Malpractice Liability Joint Underwriting Ass'n, 347 S.C. 642, 557 S.E.2d 670 (2001). Actions for injunctive relief are equitable in nature. In equitable actions the appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence. Id. In an action at law, the findings of fact of the trial court will not be disturbed on appeal unless found to be without evidence that reasonably supports the court's findings. Waterpointe I Property Owner's Ass'n, Inc. v. Paragon, Inc., 342 S.C.454, 536 S.E.2d 878 (Ct. App. 2000). Where a party seeks both equitable and legal relief, the "main purpose" rule provides that "characterization of the action as equitable or legal depends on the plaintiff's 'main purpose' in bringing the action." Gordon

v. Drews, 358 S.C. 598, 595 S.E.2d 864 (Ct. App. 2004); Floyd v. Floyd, 306 S.C. 76, 412 S.E.2d 397, 399 (1991).

Appellant in her first cause of action seeks construction of the Restrictions, a contract, and a finding that Respondents violated its terms. In her second cause of action, she seeks a finding that Respondents violated the terms of the Restrictions by not following the proper procedure for their amendment, and a declaration that the revised Restrictions are null and void. Also in this cause of action, she requests a permanent injunction prohibiting the enforcement of the revised Restrictions. A fair reading of Appellant's complaint shows that the primary relief sought is equitable.

Although the appellate court reviews factual findings and legal conclusions in an equitable action de novo, this review does not require the appellate court to disregard the trial court's findings or to ignore the fact that the trial judge is in a better position to assess the credibility of the witnesses. Further, the appellant is not relieved of the burden of convincing the appellate court that the trial court committed error in its findings. Consequently, an appellate court will affirm the trial court unless the appellant satisfies the court that the preponderance of the evidence is against the findings of the trial court. Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011); Pinckney v. Warren, 344 S.C. 382, 544 S.E.2d 620 (2001).

II. Appellant did not meet her burden of proving that Respondents violated the Restrictions in either approving or constructing the buildings to which she objected.

A close look at Appellant's first cause of action shows that she has alleged the following wrongs on behalf of Respondents: (1) that Richard and Kathleen Biggs

constructed a storage building on their lot in violation of the Restrictions; (2) that James and Elizabeth Hannah constructed a "lean-to" building in violation of the Restrictions, and that (3) the Association failed to enforce the Restrictions.

Specifically, Appellant pled violation of two sections of the Restrictions. Appellant first cites Section 2, which states as follows: "No lot shall be used except for private, single family residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one detached single-family dwelling, not to exceed two (2) stories in height, and, if approved in advance in writing, a private detached garage."

She also cites violation of section Section 18, which states as follows: "Portable buildings, metal storage buildings or other similar off-site constructed storage buildings are prohibited to be placed or remain on any lot unless approved by Developer or Association."

Notably, Appellant did not challenge the validity of the original Restrictions, only their application/enforcement by the Association.

Appellant survived summary judgment, and the case proceeded to trial after referral to the master. Appellant, however, did not present evidence sufficient to meet her burden of production and establish her claim.

Restrictions on the use of property are historically disfavored. Rhodes v. Palmetto Pathway Homes, Inc., 303 S.C. 308, 400 S.E.2d 484 (1991). Courts will strictly construe restrictive covenants, and resolve any doubts or ambiguities in a covenant on the presumption of free and unrestricted use. Edwards v. Surratt, 228 S.C. 512, 90 S.E.2d 906 (1956). The historical disfavor of restrictive covenants stems from a widely settled view that society's best interests are advanced by encouraging the free and unrestricted use of land. Hamilton v. CCM, Inc., 274 S.C. 152, 263 S.E.2d 378 (1980).

Restrictive covenants are contractual in nature. The paramount rule of contract construction is to ascertain and give effect to intent of the parties as determined by the whole document. Penny Creek Associates, LLC v. Fenwick Tarragon Apartments, LLC, 375 S.C. 267, 651 S.E.2d 617 (Ct. App. 2007). Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution. Taylor v. Lindsey, 332 S.C. 1, 498 S.E.2d 862 (1998). 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. Davey v. Artistic Builders, Inc., 263 S.C. 431, 211 S.E.2d 235 (1975). In construing restrictive covenants, ambiguities must be strictly construed against the party seeking to enforce them. Queen's Grant v. Greenwood Development, 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006).

Appellant testified at length that she holds a personal belief that no ancillary structures other than a detached garage could be built in Corie Crest. While that might be her personal preference, the language of the Restrictions does not bear this out.

According to the applicable provisions of the Restrictions, no building or structure shall be placed on any lot until the plans and specifications have been approved by the Developer or its nominee (the Board). (R. p. 270) Additionally, under Section 8, "hobby-type/storage buildings" are specifically allowed in the subdivision and should have exterior finishes of brick, stone, stucco, wood, vinyl or some other approved material. Furthermore, under Section 18, portable or metal storage buildings are prohibited in the subdivision unless approved by the Developer or Association. It is abundantly clear from the language in the Restrictions that storage buildings and other such structures were contemplated and are specifically allowed in the subdivision, as long as the property owners obtain Board

approval. The record is clear from the testimony of Appellant and her own witnesses, that Respondent landowners obtained the necessary architectural approvals prior to the construction of their buildings. Appellant's own witnesses acknowledged this. (R. pp. 169, 186-188, 199, 205, 210-212).

Mark Cramer, one of Appellant's main witnesses, testified that he was a member of the original Architectural Review Committee, and that it was his understanding that hobby-type/storage buildings were allowed as long as they were aesthetically pleasing and in harmony with the main dwelling. (R. pp. 205,210-212). Another of Appellant's witnesses, Terry Burgess, testified that he actually approved Respondents Hannahs' building while serving on the Board. (R. p. 199). Appellant's third homeowner witness, Christine Stenger, turned a blind eye to the language of the Restrictions, and appeared like Appellant to simply judge structures based on whether she liked them or not. She testified that she didn't object to the Hannahs' patio cover, but she objected to the storage building adjacent to the cover because she "didn't like that." (R. pp. 187-188).

Appellant's final witness, property appraiser Woody Willard, gave no testimony indicating a reduction in value of Appellant's property. In fact, he offered testimony that Corie Crest's property values mirrored "what has taken place in the overall market for similar size and price range homes." He also testified that the sole sale in the subdivision in 2011 was higher per square foot than the median for the area. (R. pp. 220-221, 228-229).

Appellant appeared to imply at trial that she was upset because she did not get an individual say in the approvals of the Board's Architectural Review Committee. However, there is nothing in the Restrictions that calls for the approval of individual property owners.

The property owners elect the Board each year, and like all elected officials, the Board is charged with administering its duties under the Restrictions.

The master ruled on two basic issues: (1) whether the Restrictions allow any type of building other than a detached garage, including "hobby-type/storage buildings" and (2) whether the outbuildings at issue received the proper approval. Even if the Restrictions were ambiguous, they must be construed as a whole. Read in this manner, the master properly recognized that the manifest intent of the Restrictions was to allow the construction of permanent, nonresidential ancillary structures with proper approval. This approval would and did include an evaluation of whether the structures were designed in harmony with the main dwelling.

Appellant did not challenge the validity or legality of the Restrictions themselves, only their application. She cannot prevail on her claim by simply disagreeing with the Board's decisions under the Restrictions. She could have called board members to establish that the proper procedures were not followed. She did not. She had the burden of proof and did not carry it. The Court should therefore uphold the master's decision.

III. Appellant did not meet her burden of proving that Respondents violated the Restrictions in the process of obtaining approval for the Amendments to Restrictions.

Likewise, Appellant challenged the amendment of the Restrictions on August 26, 2010, but did not call a single witness to establish that the Board did not follow the proper process as outlined in the Restrictions.[3]

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[3] While Appellant insinuates that the execution of the amendments somehow violated Judge Cole's summary judgment ruling, Respondents would note that the parties agreed on the record that the Board's right to amend the restrictive covenants did not come within the purview of Judge Cole's order. The sole directive of

The procedure for amendments to the Restrictions in Section 41 read as follows:

> TERMS OF ENFORCEMENT AND AMENDMENTS: The covenants, conditions, easements and restrictions shall be binding upon the Developer, its successors and assigns, and upon all future owners, their respective heirs, successors and assigns, and all parties claiming under them, until October 1, 2040, at which time the terms hereof shall be automatically extended for successive periods of then (10) years thereafter, unless the then owners owning at least two-thirds (2/3) of the Lots in Corie Crest agree in writing to terminate or change same.
>
> The terms and conditions of this instrument may be amended only upon written agreement of the owners owning at least two-thirds (2/3) of the Lots in Corie Crest.
>
> Notwithstanding anything herein to the contrary, the Developer, its successors and assigns, reserves the right to waive, modify or change in writing, any of the terms hereof with respect to the application thereof to a lot based upon special, unique or unusual circumstances, but no such waiver, modification or change shall substantially affect the overall plan of development.

Appellant urged the master to interpret this section to impose a ban on any amendments until October 1, 2040. This is not consistent with the plain language of Section 41. It expressly provides for the amendment of the restrictions with written agreement of 2/3 of the owners of lots in Corie Crest. Appellant's only argument on this point at trial was that the Board did not call a meeting and allow her to vote. The Restrictions - which she did not challenge - do not provide for that procedure.

Further, the recorded Amendments to Restrictions specifically note that "owners of at least two-thirds (2/3) of the Lots in Corie Crest have consented and agreed to the following amendments to the Declaration in writing which written consents have been

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this order was to halt the construction of any outbuilding other than a detached garage during the pendency of the litigation. (R. p. 93).

supplied to the Association." Appellant acknowledged that 24 homeowners in Corie Crest signed off on the Amendments to Restrictions, and that she received a copy of the Amendments. She claimed that they did not know what they were signing. However, she did not call a single signatory homeowner in her case in chief or otherwise present any evidence to refute the evidence that the requisite number of homeowners agreed in writing to the changes. (R. pp. 167-168). The master therefore properly found that Appellant did not prove her claim.

CONCLUSION

For the reasons set forth herein, Respondents submit that the Court must affirm the master's ruling granting judgment in Respondents' favor under Rule 41(b), SCRCP.

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October 9, 2012

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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondents on the following parties by depositing a copy of it in the United States Mail, postage prepaid, on October ___, 2012, addressed to the attorneys of record listed below:

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APPEAL FROM SPARTANBURG COUNTY

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondents complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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