STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
River City Developers, LLC,	)	CASE NO. 2017-CP-07-00851
Plaintiff(s),	)	
v.	)	
The Marshes at Lady's Island Homeowners' Association, Bundy Appraisal & Management, First Green, LLC, Tige Howie & Stephen Scott,	)	ORDER
Defendant(s),	)	

THIS MATTER came before the court on October 16, 2018 on Defendants' motion for summary judgment/declaratory judgment and Plaintiff's motion for summary judgment. Appearing on behalf of Defendants were Kevin W. Mims, Esq., Michael A. Timbes, Esq., and J. Barnwell Fishburne, Jr., Esq. Appearing for Plaintiff was Mills L. Morrison, Jr., Esq. For the reasons discussed below, the court answers Defendants' declaratory judgment in the affirmative, finds the subject lots are encumbered by the Declaration of Covenants, Conditions, and Restrictions ("CCRs" or "Declarations") for the development, grants Defendants' motion for summary judgment as to all adverse claims, respectfully denies Plaintiff's motion for summary judgment, and awards attorney's fees and costs to Defendants pursuant to the terms of the CCRs.

BACKGROUND

This is a property dispute case occurring at The Marshes at Lady's Island community in Beaufort County, South Carolina. The CCRs for the development were filed by NP Blue Gray Development, LLC in Book 02301 Pages 0662-0742 on January 10, 2006 in the Beaufort County Register of Deeds. Land initially submitted to the CCRs is described in Exhibit A to the CCRs. Land subject to annexation is described in Exhibit B to the CCRs.

with Plat # (Plat in CCR is wrong, New Plat never picked up by CCR)

Exhibit B

Already has CCR's Filed

According to Plaintiff's Complaint, Plaintiff was the owner of present day lots 16, 55, 56, 57, and 58 ("subject lots") within the community at the time this case was filed. Plaintiff's first cause of action seeks a determination that the subject lots are not encumbered with the rights and obligations of the CCRs under a theory that the lots merely existed as "future development" (as opposed to finally platted lots) at the time the CCRs were recorded. Plaintiff's remaining tortious causes of action relate to allegations the owners' association ("HOA"), or its agents, wrongfully attempted to collect HOA assessments from Plaintiff and have likewise breached a fiduciary duty owed to Plaintiff by not filing a Supplemental Declaration so as to subject Plaintiff's lots to the CCRs. Outstanding HOA assessments on lots currently owned by Plaintiff total $5,851.15.

Defendants argue the subject lots are encumbered by CCRs (and at all relevant times have been) because the plain language of the Declarations contemplates encumbering certain platted lots as well as other identified areas that existed as "future development" at the time the CCRs were filed in 2006. In an effort to enforce the terms of the CCRs as against Plaintiff, Defendants filed a declaratory judgment action seeking, among other things, a determination that Plaintiff's lots are subject to the terms of the CCRs, including fees and assessment obligations.

ANALYSIS

The construction, interpretation, and legal effectiveness of a restrictive covenant is a question of law for the court. Am. Jur. 2d Covenants § 282 (2015). Restrictive covenants are also contractual in nature, so the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. Palmetto Dunes Resort, Div. of Greenwood Dev. Corp. v. Brown, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct. App. 1985). When "the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning." Shipyard Prop. Owners' Ass'n v. Mangiaracina, 307

S.C. 299, 308, 414 S.E.2d 795, 801 (Ct.App.1992). "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." Taylor v. Lindsey, 332 S.C. 1, 5 498 S.E.2d 862, 864 (1998) (citation and quotation marks omitted). However, this rule of strict construction "should not be applied so as to defeat the plain and obvious purpose of the instrument." S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). Likewise, in construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law. Windham v. Riddle, 381 S.C. 192, 201, 672 S.E.2d 578, 582–83 (2009) (citations and quotation marks omitted).

Exhibit A & "Properties"

In Cullen v. McNeal, 390 S.C. 470, 485, 702 S.E.2d 378, 386 (Ct. App. 2010), the court of appeals was presented with a substantially similar question of law. One of the issues on appeal in that case was whether undeveloped land identified as "future development" was subject to a development's original Declarations. In Cullen, as in this case, the Declarations define encumbered property as property described in Exhibit A. The Cullen court examined the Declarations in their entirety and made two cogent findings: (1) that "property," as defined in the Declarations, includes all of the land described in Exhibit A, and (2) that a plat referenced in Exhibit A includes "future development." The court of appeals ultimately held the circuit court did not err in determining that encumbered property included "future development."

Here, according to Section 1.2 of the CCRs, "all property described in Exhibit A shall be owned, conveyed, and used subject to all of the provisions of this Declaration, **which shall run**

with the title to such property." (emphasis added). The word "property" is a defined term, and according to Page 5 of the CCRs, "properties" or "The Marshes at Lady's Island" is defined as "the real property described in Exhibit A."

The CCRs define "unit" as:

> **a portion of The Marshes at Lady's Island, whether improved or unimproved**, which may be independently owned and is intended for development, use, and occupancy as an attached or detached residence for a single family. The term shall refer to the land, if any, which is part of the Unit as well as any improvements thereon. In the case of a structure containing multiple dwellings for independent ownership, each dwelling shall be deemed to be a separate Unit. **A parcel shall be deemed to be a single Unit until such time as a plat subdivides all or a portion of the parcel.** Thereafter, the subdivided portion shall contain the number of Units shown on the plat. Any portion not subdivided shall continue to be a single Unit. (emphasis added).

What about other definitions in CCR's

According to the plat referenced in Exhibit A to the CCRs, the real estate that composes the subject lots existed as "future development" (or a "unit" in light of the above-referenced definition) at the time the CCRs were recorded in 2006. an exempted unit Plaintiff's counsel acknowledged as much at the hearing, but nevertheless argued the subject lots are not encumbered because they did not exist as platted lots in 2006. real property This argument fails because a reading of the CCRs as a whole plainly shows the declarant intended to encumber more real estate than simply certain platted lots. "Future development" is expressly referenced in Exhibit A, and moreover, the real estate that composes Plaintiff's present day lots falls "within the boundary lines of the parcel depicted in Plat Book 111, Page 17," critical language describing encumbered property referenced in Paragraph 6 to Exhibit A; specifically, it reads that "Said property also includes all roads, common areas, **future development tracts**, marsh, wetlands, **and any other undeveloped property included within the boundary lines of the parcel.**" (emphasis added). This position is supported by the affidavit of the learned Curtis L. Coltrane, which the court finds persuasive, in Paragraphs 5, 14, and 16.

> False, the 1.1 section clearly says it's intention

Further, Plaintiff does not dispute the land which is now the lots in question are contained within the lands described in Exhibit A.

Also of significance, the legal description in Plaintiff's deeds refers to the subject lots as part of The Marshes at Lady's Island, Phase I" (a phrase defined by the CCRs as real property described in Exhibit A). Plaintiff's deeds likewise make reference to a plat recorded at Plat Book 118 at Page 131. This plat is also titled "Phase I, The Marshes at Lady's Island," and a handwritten note on the plat states the plat depicts a portion of TMS # 200-018-000-076A—a TMS # expressly referenced in Exhibit A-1 to the CCRs. Plaintiff argues in its motion for summary judgment that "Exhibit A-1 has a list of the initial lots and does not include the lot subject to this action." However, as supported by the supplemental affidavit of Mr. Coltrane, because the subject lots were subdivided from the parcel bearing TMS # 200-018-000-076A, and because this very same TMS # is referenced in Exhibit A-1 to the CCRs, the subject lots are encumbered. And the court so finds that Plaintiff's lots 16, 55, 56, 57, and 58 are, and at all relevant times have been, subject to the applicable CCRs.

The Association who enforces the CCR's and collects assessments has not recognized these newly formed lots. The association merely exists and has control of the original parcels submitted to declaration. Section ~~4.5~~ Article IX Expansion of Community, Section 9.2 clearly provides the procedure for the Association to expand or increase its members. That procedure is effective only by filing a supplemental declaration recognizing the new property. This is clear, and if anything makes the document and plats ambiguous

Attorney's Fees and Costs

Attorney's fees are not recoverable unless authorized by contract or statute. Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993). According to CCR Section 7.4(a), "in any action to enforce the governing documents, if the Association prevails, it shall be entitled to recover costs, including, without limitation, attorneys' fees and court costs, reasonably incurred in such action." Defendants requested an award of attorney's fees at the hearing; and, having determined that the Association is the prevailing party in its action to enforce the CCRs, the court finds an award of attorney's fees and court costs is appropriate.

Counsel for Defendants is therefore requested to submit an affidavit(s) of attorney's fees and costs. The court will thereafter enter a supplemental order addressing the following six factors: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained. Seabrook Island Prop. Owners' Ass'n v. Berger, 365 S.C. 234, 240, 616 S.E.2d 431, 434–35 (Ct. App. 2005).

Based upon the foregoing, it is hereby,

ORDERED, ADJUDGED, AND DECREED that the subject lots are encumbered by terms of the CCRs; it is further, Our argument is the lots do not have voting rights or assessment liability until the sup. decl. is filed

ORDERED, ADJUDGED, AND DECREED that Defendants' motion for summary judgment is **GRANTED** as to all adverse claims, with all claims of Plaintiff against all Defendants being dismissed with prejudice, and **GRANTED** as to all affirmative claims; it is further,

ORDERED, ADJUDGED, AND DECREED that Plaintiff's lots 16, 55, 56, 57, and 58 are included in Exhibit A and are subject to the CCRs without the need for any Supplemental Declaration; it is further,

ORDERED, ADJUDGED, AND DECREED that Plaintiff shall pay an award and judgment of outstanding HOA fees/assessments totaling **$5,851.15** to Defendant The Marshes at Lady's Island HOA, and all fees/assessments paid to date under protest are found to be due, owing and appropriately paid, it is further,

ORDERED, ADJUDGED, AND DECREED that Plaintiff's motion for summary judgment is respectfully **DENIED**; it is finally,

ORDERED, ADJUDGED, AND DECREED that Defendants are entitled to an award of attorney's fees and costs as the prevailing party pursuant to CCR Section 7.4(a) and shall file an

affidavit(s) of attorney's fees and costs to support the award. The court will issue a separate award for attorney's fees and cost to the Association or reconvene for a separate hearing if necessary to determine the total amount of attorney's fees and costs to be awarded.

IT IS SO ORDERED.

_____

The Honorable Marvin H. Dukes, III
Beaufort County Master-in-Equity

This _____ day of _____, 2018.