

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

River City Developers, LLC,)
)
Plaintiff,)
)
v.)
)
The Marshes at Lady's Island)
Homeowners' Association, Bundy)
Appraisal & Management)
First Green, LLC, Tige Howie &)
Stephen Scott,)
)
Defendants,)
)
_____)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO. 2017-CP-07-851

PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION
PURSUANT TO RULE 59

RECEIVED
MAY 31 2019
SC Court of Appeals

TO KEVIN MIMS, ESQUIRE, ATTORNEY FOR THE DEFENDANTS ABOVE NAMED:

YOU WILL TAKE NOTICE that River City Developers, LLC ("Plaintiff") will move before the Court in 10 days after the filing of this Motion or as soon thereafter as counsel may be heard for an Order pursuant to Rule 59 of the South Carolina Rules of Civil Procedure with regard to the Court's Order of January 3, 2019. Plaintiff submits that the Court should vacate its Order granting summary judgment in the Defendants' favor and enter summary judgment in the Plaintiff's favor. Plaintiff submits that the Court's Order overlooks arguments made by Plaintiff and overlooks other pertinent aspects of the record and ramifications of the Court's Order. Plaintiff relies upon the entire record in this case and specifically the memoranda and exhibits filed in connection with the cross motions for summary judgment. Plaintiff further relies upon such memoranda which may be filed up to the time of hearing or which may be requested or permitted by the Court.

1. The crux of the matter in this case is whether or not lots owned by Plaintiff in the Marshes at Lady's Island subdivision are subject to the restrictive covenants for said subdivision. The Marshes at Lady's Island began in 2006 with the recording of the Declaration of Covenants, Conditions and Restrictions for the Marshes at Lady's Island ("Restrictive Covenants") in the Office of the Register of Deeds for Beaufort County in Book 2301 at Page 662. The Restrictive Covenants along with the referenced recorded plats are attached hereto as Exhibit A to this motion, in pertinent part. The entire Restrictive Covenants and recorded plats are already a public record and they are voluminous and much is not relevant to the question presented here.
2. The land initially submitted to the Restrictive Covenants does not include the lot subject to this action. The Table of Exhibits on Page 4 of the Restrictive Covenants states that the land shown in Exhibit A describes the land *initially submitted* to the Restrictive Covenants and that the land shown in Exhibit B describes the land *subject to annexation*. Exhibit A of the Restrictive Covenants refers to Plat Book 111 at Page 17 and some lots surveyed and numbered on other recorded plats. The lot subject to this action is not one of these lots. To the contrary, where the lot subject to this action is located, there is a blank larger tract shown as "Future Development." Exhibit A-1 has a list of the initial lots and does not include the lots subject to this action. Exhibit B shows Plat Book 75 at Page 874 which is a boundary survey of 86.03 acres.
3. The lots subject to this action simply did not exist when the Restrictive Covenants were recorded and, thus, were not subject to the voting rights and assessment obligations of the Restrictive Covenants. The area where the lot in question is located is, however, subject to annexation.

4. The method to effect an annexation is spelled out in Article IX of the Restrictive Covenants (entitled "Expansion"). Section 9.1 states "Declarant may, from time to time, subject to the provisions of this Declaration all of any portion of the property described in Exhibit "B" by Recording a Supplemental Declaration describing the property being subjected." Section 9.4 states "A Supplemental Declaration shall be effective upon Recording unless otherwise specified. Any property subjected to this Declaration shall be assigned voting rights in the Association and assessment liability in accordance with the provisions of this Declaration."
5. In Constitutional law, this type of language is called a "granting clause," because it grants the Declarant the authority to do an act, but does not accomplish that act. Plaintiff seems to take the position that, since the property was "subject to annexation," it is automatically annexed when lots are plotted out. This is simply not the case. 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. See eg. Hardy vs. Aiken, 369 S.C. 160, 631 S.E.2d 539 (S.C., 2006) In order for the subject lot to be annexed and become subject to voting and assessment obligations, a supplemental declaration must be filed.
6. Local attorneys Tom Mikell and Ray Williams have both reviewed the situation and relevant covenants and offered their opinions which support Plaintiff. Even though the Judge is the expert on the law, these opinions are helpful. It is worthy of note that agents of Defendant acknowledged to Ray Williams that a Supplemental Declaration needed to be filed and, yet, Defendant still refuses to simply file a Supplemental Declaration.

7. Defendants have tried to characterize this lawsuit as a simple dispute over the payment of HOA dues. That is simply not the case. If it were, the Defendants would be the Plaintiff in the case and the Plaintiff would be the Defendant. This case is about Plaintiff protecting its interest and the interest of similarly situated lot owners in the Marshes and the Defendants' refusal to assure the applicability of restrictive covenants by filing a proper supplemental declaration. Plaintiff has invested substantial amounts of Plaintiff's money and money of Plaintiff's investors in building upscale houses in the Marshes subdivision. The record in the case pretty well speaks for itself, but Plaintiff will summarize the timeline. The Marshes restrictive covenants are filed referencing the original plat. The original plat does not reference Plaintiff's lots, among other lots. A new plat is subsequently filed which totally reconfigures the subdivision, creating new lots out of future development tracts and open space. The two plats speak for themselves. Plaintiff acquires lots in the Marshes. Plaintiff then becomes aware of the fact that the new plat and new lots were not accompanied by a supplemental declaration and there is a problem with the applicability of the covenants. Plaintiff obtains opinions from Tom Mikell and Ray Williams, two of the most highly respected real estate attorneys in Beaufort County affirming the problems. Defendants chose to ignore Plaintiff's repeated requests and then demands to just file a supplemental declaration and Plaintiff is forced to file this lawsuit.
8. The Defendants cited the case of Cullen vs. McNeal 390 S.C. 470, 702 S.E.2d 378 (Ct. App. 2010). In that case, like the present case, the Developer submitted lots and undeveloped land to the covenants initially and the question arose whether lots created out of the undeveloped land "initially submitted" were subject to the covenants. An examination of the public records of Beaufort County reveal that a Supplemental

Declaration was filed in the *Cullen* case. Defendants also misinterpret Plaintiff's argument. Although the 17 acre "future development" tract may have been described in Exhibit A of the Marshes Covenants, the lots at issue in this case are neither described or identified in the Covenants or original plat. The Supplemental Declaration in the *Cullen* case is a public record of Beaufort County and a copy is part of the record. The 17 acre "future development" may have submitted, but the individual lots subsequently carved out of the "future development" were not initially submitted and, in order to make these new lots subject to dues and assessment obligations, a supplemental declaration should be filed describing these new lots, much like the *Cullen* case.

9. Defendants argued that the land "subject to annexation" included land outside of the development which was not shown in Exhibit A to the covenants. Therefore, Defendants argue, the land "subject to annexation" must have meant the land outside of the development. Defendants concede, however, that the land initially submitted was also included in the land "subject to annexation." Plaintiff's submit that the land initially submitted was included in Exhibit B in the event land in Exhibit A was subdivided or rearranged to create different or new parcels which are not shown in Exhibit A. It makes no sense, otherwise, that the land in Exhibit A was included in Exhibit B.
10. This case is important from a public policy perspective as well. If Defendants are right, a developer could file a boundary survey with covenants similar to those in this case and never have to file an amendment to the covenants in order to restructure lots, common areas and dues liability and voting rights. Developers could file subdivision plats and amended subdivision plats to their heart's delight and never document the changes further.

Certainly, this state should require some level of formality to document and effect such changes.

11. The award for past due assessments does not make sense. Plaintiff now owns two lots and dues are \$500 per lot. Defendants should check their math as to how they reached \$5,000 or adjust the amount accordingly.
12. The Court states it will consider awarding attorneys' fees to Defendants as the prevailing party under the covenants. Plaintiff submits this case is different. Plaintiff had and has good reason to believe there are serious problems with the covenants which Defendants have failed to acknowledge, and Plaintiff brought this action to resolve said problems when Defendants refused to cooperate. The opinions of Tom Mikell and Ray Williams far predate the filing of the suit. Beyond that, Plaintiff reserves the right to submit additional argument on this issue until a later date. Plaintiff has not seen any affidavit of attorneys' fees and reserves argument until such time as the claim for attorneys' fees is made and supporting documentation provided. Plaintiff requests a reasonable period of time to respond.

For these reasons and for all of the reasons previously stated in the record and which may be stated later, Plaintiff respectfully requests that the Court vacate its Order granting summary judgment in favor of the Defendants and enter summary judgment in favor of the Plaintiff.

Respectfully submitted.

[signature on pg. 7]

LAW OFFICE OF
DARRELL T. JOHNSON, JR., LLC

s/ Mills L. Morrison, Jr.

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January 9, 2019