THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
COURT OF COMMON PLEAS

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Case No.2019-000516

Palmetto Air Plantation Homeowners Association, Inc. .....Respondent,

vs.

Kim E. Bevier.....Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

SOUTH CAROLINA CASES

SOUTH CAROLINA RULES OF CIVIL PROCEDURE

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN HOLDING THAT THE PROPERTY OF APPELLANT (BEVIER) WAS SUBJECT TO RESTRICTIVE COVENANTS CONTAINED IN A RECORDED DECLARATION THEREOF WHEN THE COVENANTS WERE NEVER IMPOSED UPON THE PROPERTY BY REFERENCING THEM IN A CONVEYANCE DEED OR OTHER SEVERANCE OF TITLE?

STATEMENT OF THE CASE

This is an appeal from an action by Palmetto Air Plantation Homeowners Association, Inc. (Association) seeking enforcement of restrictive covenants alleged to encumber the property of Kim Bevier (Bevier). Bevier denied that his property was encumbered by the restrictive covenants. (R. p. 34, para. 4) The trial court granted partial summary judgment holding that the covenants encumbered the property. (R. pp. 3-11)

This action was commenced by the filing of a complaint on April 17, 2017. (R. p. 19) The Complaint and Amended Complaint seeks equitable relief and damages, including temporary relief, alleging that Bevier's two lots were subject to restrictive covenants listed in a recorded Declaration of Covenants Conditions and Restrictions (DCCR), (R. pp. 25-26, para. 5) and that Bevier had violated them (R. pp. 26-27, para. 6-8)

Bevier answered denying that his property was subject to the covenants. (R. pp. 34-35 para. 5)

Association, on June 14, 2018, filed a motion for partial summary judgment as to the existence of the covenants. (R. pp. 44-46) The parties waived oral argument and agreed to submit the issue to the court upon briefs and a stipulation of facts. (R. pp. 113-115)

Association's brief in support of the motion for summary judgment was filed on July 19, 2018. (R. pp. 49-56) The parties submitted the Stipulation of Facts on August 21, 2018. (R. pp. 113-115) The Stipulation of Facts reflects the record title history of the property (R. pp. 113-115).

Bevier's memorandum (R. pp. 57-112) in opposition to the motion was filed on August 24, 2018. Therein Bevier argues that the covenants were never imposed upon his property because they were never referenced in his deed nor any severance of title, by or to any predecessor in title to his property. (R. pp. 61-62)

Additionally, Bevier argued that the terms of his deed, rather than the contract of sale or other documents, controlled as to whether his property was subject to the covenants. (R. pp. 62-64)

The order (R. pp. 3-12) granting the motion holding that the property was subject to the covenants was entered on December 17th, 2018.

On December 21, 2018, Bevier filed a Rule 59(e) SCRCP motion raising the same issues and requesting reconsideration. (R. pp. 47-48) No hearing was held to consider the motion. By order dated and filed February 28, 2018, the Rule 59(e) Motion was denied. (R. pp. 13-14)

Notice of appeal (R. p. 209) was filed and served (R. p. 210) on March 27, 2018.

STATEMENT OF FACTS

The property in question consists of two lots upon which Bevier has his residence. It is a portion of an original 82.91 acre tract conveyed to MidEastern Truck Wash, Inc., (Midwestern) by Edward G. Gibbons on November 18, 1996, (R. p. 113 para.1, R. pp. 67-69,) and a 22.22 acre tract conveyed to MidEastern Truckwash Inc by Marion Moore, et al, on May 9, 1997. (R. p. 113, Para. 1, R. pp. 71-74,) Both conveyances were seller financed and secured by purchase money mortgages using the same legal descriptions. (R. p. 113 para. 2-3)

On July 11, 2001, a "Declaration of Covenants, Conditions and Restrictions Palmetto Air Plantation Clarendon County, South Carolina" (DCCR) were filed in the Office of the Register of Deeds for Clarendon County in Deed Book A435 at Page 223. It references Tax Map Parcel 223-00-02-005, and a survey of subdivision lots to be prepared. (R. p. 113-114, para. 4, R. p. 76)

There is no evidence that any deed or other instrument affecting title references the DCCR.

By deed dated October 9, 2001, MidEastern conveyed to Palmetto Air Plantation, LLC, (Palmetto) the 82.91 acre tract purchased from Gibbons and the 22.22 acre tract purchased from Moore. Descriptions are identical to the acreage descriptions contained in the deeds into MidEastern. The deed does not mention any restrictive covenants, nor does it incorporate by reference the DCCR. The deed contains covenants of general warranty. It states that the Moore mortgage which was assigned to Land and the Gibbons Mortgage are assumed by the grantee. (R. p. 113-114, para. 4, R. pp. 98-99)

By mortgage recorded February 8, 2002, Palmetto granted to Edward G. Gibbons a mortgage using acreage descriptions from the Gibbons and Moore deeds. The mortgage has covenants of general warranty and no reference to the DCCR or other restrictions. (R. p. 114, para. 4, R. pp. 102-105)

On May 23, 2003, Bevier and his wife, now deceased, entered into a written contract for the purchase of lots 33 and 34 of Palmetto Air Plantation Subdivision. The contract of sale references the covenants and prior thereto the covenants had been discussed by Bevier and the attorney who had prepared the contract. (R. p. 114, paras. 7-10)

A Subdivision Plat of Palmetto Plantation Subdivision was recorded on September 19, 2003. Though it contains a recitation of set-back restrictions it does not reference the DCCR. (R. p. 115, para. 11, R. p. 107)

Lots 33 and 34, referencing the plat were conveyed to Bevier and his then wife (now deceased) by general warranty deed recorded on September 26, 2003. (R. p. 115, para. 12, R. pp. 109-110) The deed does not mention the DCCR nor incorporate it by reference.

The title opinion given to Bevier by the closing attorney states that the property is subject to the covenants. (R. p. 115, para. 13, R. pp. 207-208)

ARGUMENT

THE EVIDENCE DOES NOT SUPPORT THE HOLDING THAT THE SUBJECT PROPERTY WAS ENCUMBERED BY RESTRICTIVE COVENANTS.

I. Standard of Review.

When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v Rose,* 350 S.C. at 493, 567 S.E.2d at 860 (2002) (citing *Peterson v. West Am. Ins. Co.,* 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct.App.1999)). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id.* In order to withstand a motion for summary judgment "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." *Hancock v. Mid–South Mgmt. Co., Inc.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). *Fountain v. First Reliance Bank,* 398 S.C. 434, 441, 730 S.E.2d 305, 308, (2012)

The determination of the existence of an easement is a question of fact in a law action and subject to an "any evidence" standard of review when tried by a judge without a jury. *Springob v. Farrar,* 334 S.C. 585, 514 S.E.2d 135 (Ct.App.1999).

The party who seeks to enforce a restrictive covenant has the burden of proving the Existence of the covenant. *Spurs at Williams Brice Owners Ass'n, Inc. v. Lalla,* 415 S.C. 72, 83–84, 781 S.E.2d 115, 121, (Ct. App. 2015)

The circuit court held that the covenants in question were binding upon the Bevier property by granting the motion for partial summary judgment. The question to be decided on appeal is whether the evidence dictates, as a matter of law that the Bevier Property is encumbered by the covenants.

II. Restrictive Covenants Were Never Created Because They Were Never Referenced in a Severance of Title.

Like other easements, restrictive covenants which run with the land, are servitudes of the property encumbered (the servient tenement) in favor of the property benefited thereby (the dominant tenement). *West v. Newberry Elec. Co-op.,* 357 S.C. 537, 543, 593 S.E.2d 500, 503, (Ct. App. 2004)

Customary residential subdivision restrictive covenants, when properly created, result in dominant and servient estates on each lot, the servient aspect being the burden created by virtue of the non-owners having the right to restrict the use of an owner's lot and the dominate aspect being the right of a lot owner to restrict the use of the property of the other owners. When incorporated into a conveyance, they restrict (servient aspect) the lot conveyed, and running with the lot conveyed, extend the right to restrict, in accordance with the covenants, the usage of the other lots (the dominant aspect). Until there is some separation of some portion of the property, accompanied by the imposition of the covenants, no dominant and servient estates exist and the owner is, therefore, capable of conveying fee simple title unencumbered. Unless limited in the conveyance, the quality of title conveyed is the same as that of the grantor.

Dominant and servient estates do not exist on property under common ownership. "The

essential ingredient of a right of way would be wanting; it would not be a right of way over another's land, but over his own land." *Haselden v. Schein,* 167 S.C. 534, 166 S.E. 634, 635 (1932).

The legal issues raised in the lower court and in this appeal were addressed in the case of *Windham v. Riddle,* 381 S.C. 192, 202, 672 S.E.2d 578, 583, (2009). In reference to an easement described in an installment sale contract and the deed later consummating the same, citing Haselden, the court held that easements described in the sales contract, were not and could not have been created at the time the contract was entered into because at that time legal title to all the property, remained in the seller and if any were created they could only have been created in the deed severing title.

While *Haselden* and *Windham* involved easements, the relevant legal principals apply to covenants. *West v. Newberry Elec. Co-op.,* 357 S.C. 537, 543, 593 S.E.2d 500, 503, (Ct. App. 2004) (enforcement of an agreement to relocate a utility pole contained in a powerline easement).

The notion that the recordation of a declaration of covenants creates dominant and servient estates in property under common ownership is inconsistent with this principle. Notwithstanding the recording of the DCCR, so long as all the property described therein was under the same ownership, the property was unencumbered.

After the DCCR was recorded, by general warranty deed, MidEastern conveyed the property, describing it by acreage and not as subdivision lots, to Palmetto. (R. p. 114, para.5, R. pp. 98-100) Immediately prior to the conveyance, MidEastern owned fee simple title to the property and the ability to convey it unburdened by the DCCR. The deed does not mention restrictive covenants, nor does it incorporate by reference the DCCR. The deed contains

covenants of general warranty, though it states that the Moore mortgage, which was assigned to Land, and the Gibbons mortgage are assumed by the grantee.

Following the conveyance it was owned in fee simple by Palmetto and not subject to the DCCR. Following the conveyance, Palmetto mortgaged the property to Edward Gibbons. The mortgage contains a general warranty and specifically provides that the property is free of encumbrances. (R. p. 114, para. 6, R. p. 104, paragraph1)

A general warranty in a deed of conveyance embraces the covenant that it is free from all encumbrances not excepted from its provisions. *Lancaster v. Smithco, Inc.,* 246 S.C. 464, 468, 144 S.E.2d 209, 210 (1965). A restrictive covenant running with the land is an encumbrance that violates a covenant against encumbrances 20 Am. Jur. 2d Covenants, Etc. § 95

III. *Harbison Cmty. Ass'n, Inc. v. Mueller* Distinguished

The lower court cites as authority for its ruling and suggests that the issue of whether the Bevier property is subject to the Covenants is controlled by the decision in *Harbison Cmty. Ass'n, Inc. v. Mueller*, 319 S.C. 99, 459 S.E.2d 860, (Ct. App. 1995) (R. pp. 8-9) While this case discusses constructive notice as a result of the recording of the covenants the issue was whether the assessments provided for in the covenants ran with the land. The circuit court, on appeal from a magistrate had reversed, holding that the liability for assessments provided for in the covenants were personal and did not run with the land. The Court of Appeals reversed holding that the obligation for assessments ran with the land. That case is distinguishable in two ways:

1. The decision does not address, and presumably the issue was not raised, as to whether the restrictive covenants, of which the assessments were only a part, had been created; and,

2. The deed to Mueller, while not specifically referencing the recorded covenants, incorporated them by reference with the language that the conveyance was subject "to easements and restrictions of record and otherwise affecting the property." *Harbison Cmty. Ass'n, Inc. v. Mueller*, 319 S.C. 99, 101–02, 459 S.E.2d 860, 863 (Ct. App. 1995)

IV. The Terms of the Deeds to Bevier and Those in His Chain of Title Determine Whether the Property Is Subject to the Covenants.

The deed to Bevier (R. p. 115, para. 12, R. pp. 108-112) contains covenants of general warranty with no exceptions. It does not mention restrictive covenants nor incorporate by reference the DCCR. The deeds into its predecessors in title likewise have covenants of general warranty with no exceptions and no reference to the DCCR. (R. p. 114, para. 5, R. pp. 98-100)

An agreement to convey real estate is merged into in the deed and the deed alone (emphasis added) regulates the rights and liabilities of the parties. *Shoney's, Inc. v. Cooke*, 291 S.C. 307, 310, 353 S.E.2d 300, 302 (Ct. App. 1987) *Windham v. Riddle*, 381 S.C. 192, 202, 672 S.E.2d 578, 583, (2009)

In *Windham*, the property owner, Covington, by survey, divided his property into two large tracts. Though shown as separate the on the survey, the two properties shared a common irrigation pond and the equipment. He contracted to sell the first tract to Windham under an installment sale contract payable over a ten-year period. The contract allowed the purchaser immediate possession but provided for the retention of an easement by the Covington for use of the irrigation equipment, pond and access thereto in connection with the operation of a farm on the tract retained. Before the payout of the installment sale contract, the other tract was sold to Riddle, reciting in the deed that the conveyance was subject to the easement recited in the Riddle installment sale contract. Thereafter, upon payment in full of the installment sale contract, the property was deeded to Windham. In the Windham deed, the same language as

contained in the contract of sale was used, thereby reserving to the seller, Covington, the easements mentioned in the contract of sale though Covington no longer owned the adjoining property the easements were intended to benefit. Though Windham and Riddle used the irrigation system jointly for a considerable period of time before and after the deed to Windham, a dispute arose and Windham commenced a declaratory judgment action to have the court determine whether Riddle had an easement. The court ruled that because the wording of the Windham deed reserved the easement to the seller, Covington, who no longer owned the adjoining property, the easement, if any, was one in gross, rather than one appurtenant and, consequently, did not benefit Riddle. Though evident that the easements were intended to benefit both properties, the court, acknowledging that the decision may seem inequitable, recognized the importance of adherence to "current property jurisprudence." *Windham v. Riddle, 381 S.C. 192, 202, 672 S.E.2d 578, 583, (2009)*

In *Windham* the jurisprudence adhered to and thereby dictating the outcome included that which stands for the proposition that no easement appurtenant could be created by the contract of sale because legal title to both tracts at the time were under common ownership; the contract of sale, merged into the deed, and the deed controlled, regardless of the intent evident from the terms of the contract of sale and other circumstances.

CONCLUSION

Because Bevier's property was never burdened by the restrictive covenants the order granting partial summary judgment should be reversed.

August 13, 2019.

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CERTIFICATE OF COUNSEL

I hereby certify, pursuant to SCACR 211(b), that the Brief of Appellant and the Reply Brief of Appellant have not been altered from their initial form except for those changes specifically referenced in SCACR 211(b).

RESPECTFULLY SUBMITTED.

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