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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY
COURT OF COMMON PLEAS,

MIKELL R. SCARBOROUGH, Master in Equity

Appellate Case No. 2019-001289

Raven's Run Homeowners Association, Inc., Appellant/Respondent

v.

Crown Pointe Association, Inc., Lois K. Novak as Trustee of the Lois K. Novak Living Trust dated 10/14/2013; Laurie T. Herron and Mark D. Herron; James B. Kubu and Melissa F. Kubu; Leila June Johnson; Danny Ta and Anita McCauley; Robert E. Luby, Jr., and Barbara Luby; Joshua D. Coonce; Lucius Roy Junevicus; Katherine Kinlaw; Thomas K. Kuyk and Melissa Ward; Roland Franklin Wooten, III, and Teresa Key Wooten; Michael P. Horvath; Timothy E. Moylan and Karen G. Moylan; Carl A. Counasse and Maureen Counasse; David A. Frielinghaus and Holly C. Frielinghaus; Christopher S. Finley and Holly M. Finley; Shirley D. Spigner a/k/a Shirley Deanna Spigner; Deirdre C. Knight; Robert Shane Johnson; Eric R. Sigman; Lamar R. Graves, Jr. and Terry W. Graves; Mary Elizabeth Gladden; Philip Wallace and Naomi Grad; Thomas Edwin Davis and Luis Miguel Gonzalez Melchor; John R. Funkhouser and Jennifer L. Funkhouser; Gregory S. Cooper and Jane B. Cooper; Frank C. Jones, Jr. and Elise Ubele Jones; William P. Topping and Kris B. Topping; LaRhonda S. Ptichko; Kenneth L. Tully and Anna J. Tully; Defendants,

Of Whom James B. Kubu and Melissa F. Kubu, and Leila June Johnson are the
..... Respondents

And Katherine Kinlaw is the Respondent/Appellant

FINAL BRIEF OF RESPONDENTS JAMES B. KUBU AND MELISSA F. KUBU

Charles Mac Gibson, Jr.
Attorney for Respondents
James B. Kubu's and Melissa
Kubu's

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STATEMENT OF THE ISSUES

- I. THE MASTER'S ORDERS IN CONCLUDING THE KUBU, KINLAW AND JOHNSON OWN THE DISPUTED PROPERTY ARE SUPPORTED BY UNDISPUTED FACTS AND OPERATION OF LAW.

- II. THE COURT SHOULD NOT REMAND THE TRESPASS AND NUISANCE CLAIM TO THE LOWER COURT FOR A FURTHER PROCEEDING.

STATEMENT OF THE CASE

Raven's Run subdivision and Crown Pointe subdivision consist of residential homes off of Rifle Range Road in Mt. Pleasant, South Carolina. The subdivisions are separated by a lake. Raven's Run subdivision is located at the southeast of the lake and Crown Pointe subdivision is located at the northwest of the lake. Respondents James B. Kubu and Melissa F. Kubu ("Kubu") own Lot 39-E at Crown Pointe subdivision.

Per the Kubu's deed, the applicable plat book BN, page 77 establishes a 60 foot drainage easement at the rear of the Kubu's lot, which abuts to the lake. The plat creates a 40 foot easement outwards to the lake and 20 foot easement inwards to the Kubu's lot. The drainage easement consists of a 10 foot to 12 foot land ("disputed property") that is appurtenant to the rear of the Kubu's lot. The Kubu have continuously maintained the disputed property without protest, objection or interference from Raven's Run for years. They have relied on the plats that are within their chain of title in asserting ownership in the disputed property and the lake.

Raven's Run Homeowner Association, Inc. ("Raven's Run") filed a Complaint on January 31, 2017, against Crown Pointe Homeowner Association, Inc. and various property owners including Kubu, Lelia June Johnson("Johnson"), and Katherine Kinlaw ("Kinlaw"). On March 9, 2018, Raven's Run filed an Amended Complaint, in which Raven's Run sought a declaratory judgment, an injunction, and damages for trespass and nuisance. The Kubu filed an Answer to Raven's Run's Amended Complaint on April 25, 2018. They denied Raven's Run's ownership of the disputed property and the lake, and they demanded strict proof from Raven's Run of its claimed ownership. Further, they claimed Raven's Run did not show conclusive proof of ownership concerning the lake as well as the disputed property. Also, the plats as referred in

the Raven's Run's chain of title do not identify the disputed property or Crown Pointe subdivision.

The Master held a hearing on August 28, 2018, to consider cross-motions for summary judgment. In the Order dated October 31, 2018, the Master granted a summary judgment to the Kubu, Kinlaw, and Johnson in concluding that Raven's Run did not own the disputed property. Also, the Master determined Crown Pointe has ownership and non-exclusive right to the 40 foot wide area and drainage easement on the 20 foot portion of the rear lot of Kubu's, Kinlaw's, and Johnson's.

Raven's Run filed a Motion for Reconsideration concerning the Master's Order dated October 31, 2018, and filed on November 8, 2018. The Motion was heard on January 8, 2019. The Master amended his prior Order for Summary Judgment in ruling that Raven's Run owns the lake that separates the Raven's Run subdivision and the Crown Pointe subdivision. Further, the Master decreed that Kubu, Kinlaw, and Johnson own the disputed property.

Raven's Run filed its Notice of Appeal on August 1, 2019 pertaining to the Master's Orders dated October 31, 2018 and July 9, 2019. Kinlaw filed her Notice of Appeal on August 6, 2019 relating to the same Orders.

1. FACTS

R.A.C. Enterprises, Inc. ("R.A.C.") purchased acreage in Mount Pleasant, South Carolina from Yaupon Plantation Investors on February 18, 1983. (R. p. 72). As a result of the purchase, R.A.C. developed Raven's Run subdivision and parts of the Crown Pointe subdivision. R.A.C. sold the remaining undeveloped lots in Crown Pointe subdivision to Spectra Development, Inc. on January 14, 1987. (R. pp. 337-338). Both subdivisions consist of residential homes, and they

are separated by a body of water. Kubu owns Lot 39-E, Kinlaw owns Lot 45-E, and Johnson owns Lot 40-E at Crown Pointe. (R. pp. 291-295, 287-289, 282-286).

Raven's Run asserted in its Complaint and Amended Complaint that the property owners at Crown Pointe impermissibly cut trees and vegetations that had grown over the years upon the disputed property. (R. p. 99). Raven's Run contends its ownership includes not only the lake that is between Raven's Run subdivision and Crown Pointe subdivision, but also the disputed property. The Kubu contested Raven's Run's claim of ownership of the lake and the disputed property and demanded strict proof of such claim of ownership. (R. pp. 108-110).

The Kubu purchased their property on December 4, 2012. (R. pp. 282-286). The deed to the Kubu indicated the size, shape, and dimensions are delineated in plat book BN, pages 176-177. (R. p. 282). Since the purchase of the property, the Kubu have maintained the disputed property without objection, protest or interference from Raven's Run for years. (R. p. 110). The Kubu sought a declaratory judgment as to Raven's Run's Amended Complaint that the respective property rights of the parties in the disputed property be determined as well as a judicially determined property line. (R. p. 110).

Raven's Run claimed the deed recorded in Book E-150, page 875 from R.A.C. to Raven's Run proves it owns the disputed property. (R. pp. 205-207). Such deed shows two irregular strips run along Rifle Range Road at east for 294.46 feet and west for 191 and 147.44 feet as in plat book BN, page 52. The Master concluded the strips of land did not extend inward to the Crown Pointe subdivisions. (R. p. 23). As a result, the Master reaffirmed his Order dated October 31, 2018, and filed on November 8, 2018, in holding that Kubu, Kinlaw, and Johnson have ownership in the disputed property. (R. pp. 17-18).

A. Deeds

1. Yaupon Plantation Investors to R.A.C. Enterprise, Inc.

R.A.C. Enterprise, Inc. purchased acreage from Yaupon Plantation Investors that make up what is known as Raven's Run subdivision and Crown Pointe subdivision. The first purchase occurred on February 18, 1983, and the deed was recorded on February 22, 1983, in Book T-130, Page 205. (R. p.72). The second purchase was completed on October 2, 1984, and the deed was recorded on October 29, 1984, in Book L-140, Page 746. (R. pp. 123-124).

2. R.A.C. to Raven's Run

On December 10, 1985, R.A.C. sold acreage to Raven's Run, and the deed was recorded on December 11, 1985, in Book E-150, Page 875. The deed referred to plat book BG, pages 52 thru 54 for the property description. (R. p. 268). At the time of the purchase, Crown Pointe subdivision had not been fully developed. Also, on January 5, 1987, Raven's Run acquired from R.A.C. certain non-specific roads, streets, lakes and bodies of water. The deed was recorded on April 1, 1987, at Book R-163, Page 134. The deed referred to plat book BL, page 57 for the description of the parcels of land. (R. pp. 118-119).

3. R.A.C. to Spectra Development

On January 14, 1987, R.A.C. sold acreage to Spectra Development, Inc., which lead to the infrastructure development of Crown Pointe subdivision. The deed was recorded on January 26, 1987, in Book O-161, Page 258. The deed referred to plat book BK, pages 1 and 2 for the boundaries of the lots. (R. pp. 337-338).

B. Plats

1. BG-52 through 54 (recorded on December 3, 1985)

This plat is mentioned in the recorded deed from R.A.C. to Raven's Run. The plat is described as conditional, and it represented Phase I for the development of Raven's Run. The plat does not show or depict Crown Pointe subdivision. Further, it does not include a dedication for the benefit of the property owners of Raven's Run. (R. p. 342).

2. BK-2 (recorded on August 21, 1986)

This plat applies to the acreage that Spectra Development purchased from R.A.C. as a part of developing Crown Pointe subdivision. The plat delineates a 60 foot dedicated easement which includes a 40 foot easement to the body of water and 20 foot easement towards the rear lots of the owners of Crown Pointe. The plat contained a notation from an authorized agent of R.A.C. that:

“by the recording of this plat, the green areas and lakes shown hereon are dedicated to the use of the East Crossing Subdivision and the Crown Pointe Subdivision Homeowners Association forever”

“by the recording of this plat, the easements and road rights-of-ways shown hereon are dedicated to the use of the public forever” (R. pp. 74-77).

The plat includes the Kubu's lot that being 39-E, and it does not show Raven's Run subdivision.

3. BL-57 (recorded on December 5, 1986)

This plat describes the boundaries for lot owners at Raven's Run, and it is referred in the deed from R.A.C. to Raven's Run. (R. p. 120). The plat depicts a lake, but it does not denote the

extent or the boundary of the lake. Also, the Crown Pointe subdivision is not apparent on the plat.

4. BN-177 (record on July 14, 1987)

The Kubu's deed refers to plat book BN, page 177 to describe the boundaries and the easement including the drainage easement. (R. p. 282). This plat is similar to plat book BK, page 2, on the basis that both plats include the 60 foot drainage easement at the rear of the Kubu's lot that being 20 foot from the rear lot inwards and 40 foot towards the lake. (R. p. 281). A lake between Crown Pointe subdivision and Raven's Run subdivision is shown on plat book BN, page 177.

5. BP-161 (recorded December 18, 1987)

This plat has a similar depiction of a 60 foot drainage easement that is dedicated to the lot owners at Crown Pointe. (R. p. 79). The plat shows the lake that exists between Raven's Run subdivision and Crown Pointe subdivision. The Kubu's lot is indicated on such plat.

6. BP-163 (recorded on December 18, 1987)

This plat was recorded one minute after the recordation of plat BP, page 161. (R. p. 348). The plat pertains to Phase III of Raven's Run, and it contains a 60 foot easement at the rear of the Raven's Run homeowners' lots. Unlike the plats for the Crown Pointe subdivision, the plat for Raven's Run subdivision does not include language regarding the dedication of green areas and lakes to the Raven's Run Homeowners Association.

C. Restrictive Covenants

R.A.C. as the developer of Crown Pointe subdivision executed Restrictive Covenants ("Covenants") on August 29, 1986, and recorded on October 17, 1986 at Book O-158, Page 414

(R. p. 38). In paragraph 7 of the Covenants, the enforcement of the terms is limited to the developer and persons who own lot(s) as shown on plat book BK, page 2. (R. p. 39). As addressed in paragraph 25 of the Covenants, the residents of Crown Pointe are required to pay an annual assessment to maintain the green areas and the bodies of water. (R. p. 43). In paragraph 26 of the Covenants, there is a reference that the portion of land between the rear lot lines of such lots and the water line is owned by Raven's Run. (R. p. 44).

Subsequent to the execution of the Restrictive Covenant, R.A.C. sold lots in Crown Pointe subdivision to Spectra. Neither R.A.C. nor Raven's Run retained or reserved any rights or privilege to Crown Pointe at the time of the conveyance to Spectra. (R. p. 337).

D. Quit Claim Deeds

On December 18, 2001, R.A.C. issued a Quit Claim Deed to East Crossing-Crown Pointe Association, Inc., which R.A.C. conveyed all common areas including "lake" and "green areas" located in East Crossing Subdivision and Crown Pointe Subdivision as shown at plat book BK at pages 2 and 3. The Quit Claim Deed contained an abstractor's note which stated:

"It the intention of this deed to convey all property set forth on the aforementioned plat, saving and exception all platted lots and public rights of way depicted thereon." (R. p. 352).

The derivation clause refers to the deed from Yaupon Plantation Investors to R.A.C. dated February 18, 1983, and recorded in Book T-130, page 205.

Subsequent to such transfer of interest, the East Crossing-Crown Pointe Association, Inc. ("East Crossing") conveyed by a Quit Claim Deed to Crown Pointe the same common areas including any "lake" and "green area" that it received from R.A.C.. The Quit Claim Deed was recorded on January 17, 2002, in Book H-392, Page 181. The Quit Claim Deed included the

identical language of the abstractor's note as expressed in the previous Quit Claim Deed from R.A.C. to East Crossing.

Raven's Run claimed in its Complaint and Amended Complaint that property owners at Crown Pointe impermissibly cut trees that existed on the disputed land. (R. p. 99). Raven's Run contended that its ownership includes not only the lake that separates the Raven's Run subdivision and Crown Pointe subdivision, but also the disputed property. The Kubu contested Raven's Run's claim of ownership and demanded strict proof that Raven's Run owns the lake and the disputed property. (R. pp. 108-110).

The Kubu purchased their property (Lot 39-E) on December 4, 2012. (R. pp. 282-286). The deed to Kubu referred to plat book BN, pages 176 and 177 to denote the size, shape, and dimensions of their lot. (R. p. 282). Since the purchase of their property, the Kubu have maintained the disputed property without any objection or protest from Raven's Run for years. (R. p. 110). The Kubu requested in their Answer that property rights in the disputed property be considered a part of their existing boundary line. (R. p. 110).

Raven's Run asserted ownership of the disputed land by referring to the Restrictive Covenants for Crown Pointe which included a provision that Raven's Run owns the disputed property. (R. pp. 165-166). Restrictive Covenants are not proof of or an indicia of ownership. Raven's Run did not show conclusive proof in its chain of title that it received title or interest to the disputed property.

Further; Raven's Run argued the disputed property and lake are included in a deed from R.A.C. to Raven's Run per Book E-150, page 875 and plat book BG, pages 52-54. Raven's Run contended the two irregular strips that run along Rifle Range Road at east for 294.46 feet and west for 191 and 147.44 feet as shown in plat book BG, page 52 are conclusive proof that it

owns the disputed property. (R. pp. 206-213). The Master opined the strip of land did not extend inland; therefore, it did not include the Crown Pointe subdivision or become a part of Crown Pointe subdivision. (R. p. 23). As a result, the Master reaffirmed his Order for Summary Judgment dated October 31, 2018, that Crown Pointe has ownership and a non-exclusive right to use 40 feet portion of the 60 foot drainage and has a drainage easement on the 20 foot portion of the lots. (R. pp. 17-18).

As a result of the Master reaffirming his Order dated October, 31, 2018, Raven's Run filed an appeal to this Court.

ARGUMENT

I. STANDARD OF REVIEW

The Kubu adopts the standard of review as propounded in Raven's Run's Final Brief and Katherine Kinlaw's Final Brief.

II. THE MASTER'S ORDERS IN CONCLUDING THE KUBU, KINLAW AND JOHNSON OWN THE DISPUTED PROPERTY ARE SUPPORTED BY UNDISPUTED FACTS AND OPERATION OF LAW.

a. Deeds and Plats

"Where a deed describes land as it is shown on a certain plat, such plat becomes a part of the deed for the purpose of showing the boundaries, metes, courses and distances of the property conveyed." Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 397, 252 S.E.2d 133, 136 (1979). Further, "the purchaser of lots with reference to the plat of the subdivision acquired every easement, privilege and advantage shown upon said plat." Carolina Land Co., Inc. v. Bland, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975). "[W]here a property sold is described in the conveyance with a reference to a plat..., an easement therein is created in favor of the grantee. Such an easement is deemed to be a part of the property to which the grantee is entitled and of which he

cannot be divested except by due process of law.” Id., 265 S.C. at 106, 217 S.E.2d at 20.

Moreover, “where a deed which describes land as bounded by a way indicates that the way extends beyond the land conveyed, or there has been some other indication of the extent of the way, the grantee acquires a right to the way, not merely in front of his property, but also to the full extent of the way as indicated.” Id. “It is well settled that where one enters land under a claim of title, possession of any part within the boundaries set out in the title in possession of the whole tract covered by title.” State v. Sloan Construction Co., Inc., 284 S.C. 491, ___, 328 S.E.2d 84, 89 (Ct. App. 1984).

The South Carolina courts have held that an “easement as referenced in a plat is dedicated to the use of the owners of the lots, their successors in title, and to the public in general.” Murrell Inlet Corp. v. Ward, 378 S.C. 225, ___, 662 S.E.2d 452, 456 (Ct. App. 2008). The dedication of the easement is complete when the grantor has conveyed the property with reference to the plat to the grantee and his successors. Id.

More importantly, there is rebuttable presumption “that a party granting land does not intend to retain a narrow strip between the land sold and his property line, in the absence of express provisions to that effect in the deed, especially where it would cut off the grantee from valuable privileges and where the strip is so narrow as to be of no practical use to the grantor.” Ward v. Woodward, 287 S.C. 343, 345-346, 338 S.E.2d 347, 348 (Ct. App. 1985).

The deed from R.A.C. to Spectra dated January 14, 1987, included Lots 25E through 49E, and such size, shape, dimensions, and bounding are defined in plat book BK, page 2. (R. p. 337). The plat establishes a 60 foot dedicated easement which includes a 40 foot easement to the body of water and 20 foot easement towards the rear lots of the owners of Crown Pointe subdivision. The plat includes a notation from an authorized agent of R.A.C. that:

“By recording of this plat, the green areas and lakes shown hereon are dedicated to the use of the East Crossing Subdivision and the Crown Pointe Subdivision Homeowner Association forever.”

“By recording of this plat, the easements and road rights-of-ways shown hereon are dedicated to the use of the public forever.”
(R. pp. 74-77).

As a further intent to relinquish all rights and privileges that R.A.C. had or may have had pertaining to the conveyance between R.A.C. and Spectra, R.A.C. issued a Quit Claim Deed to East Crossing, which R.A.C. conveyed all common areas including “lake” and “green areas” located in East Crossing subdivision and Crown Pointe subdivision as shown on plat book BK at pages 2 and 3. Also, the Quit Claim Deed contained an abstractor’s note which stated:

“It the intention of this deed to convey all property set forth on the aforementioned plat, saving and exception all platted lots and public rights of way depicted thereon.” (R. p. 352).

The derivation clause refers to the deed from Yaupon Plantation Investors to R.A.C. dated February 18, 1983, and recorded in Book T-130, page 205. (R. p. 352).

Upon receiving the Quit Claim Deed from R.A.C., the East Crossing issued a Quit Claim Deed to Crown Pointe, which referred to plat book BK, page 2. Such plat includes the same common areas that being any “lake” and “easements” that East Crossing received from R.A.C.. The Quit Claim Deed was recorded on January 17, 2002, in Book H-392, Page 181. The Quit Claim Deed included the identical language of the abstractor’s note as expressed in the previous Quit Claim Deed from R.A.C. to East Crossing.

As applicable to the Quit Claim deeds, “[t]he rule that if a general description is followed by a clause summing up the intention of the parties as to the premises conveyed, such clause has the controlling effect on all prior phrases used in the description....” Lake View Acres Development Co. v. Tidal, 306 S.C. 477, 481, 412 S.E.2d 457, 459 (Ct. App. 1991).

The Kubu purchased their property (Lot 39-E) on December 4, 2012. (R. pp. 282-286). The deed to Kubu referred to plat book BN, pages 176 and 177 to describe the size, shape, and dimensions of their lot. The plat as mentioned in the Kubu's deed includes the depiction of the 60 foot drainage easement at the rear of their lot, and the same 60 foot drainage easement is also shown in plat book BK, page 2. (R. p. 281). The Kubu have maintained the disputed property without any objection or protest from Raven's Run for years. (R. p. 110).

As held in Carolina Land Co., "where a deed which describes land as bounded by a way indicates that the way extends beyond the land conveyed, or there has been some other indication of the extent of the way, the grantee acquires a right to the way, not merely in front of his property, but also to the full extent of the way as indicated." Id., 265 S.C. at 106, 217 S.E.2d at 20. As a result, the Master correctly held in his Order for Summary Judgment that Kubu has ownership of the "portion of land and water depicted as the 40 foot portion of the 60 foot drainage to the east of the lots in questions. [Kubu] has ownership and a non-exclusive right to use this 40 foot wide area [as well as the] drainage easement on the 20 foot portion of the lots." (R. pp. 17-18).

Raven's Run contends the Master erred in concluding the recorded dedicated easement granted the Kubu, Kinlaw, and Johnson an interest in the disputed property. Such contention is misconstrued on the basis that the Master determined the disputed property as depicted on plats are within the chain of title for Kubu, Kinlaw, and Johnson. Raven's Run did not prove the disputed property was a part of its chain of title as required in S.C. Code Ann. §27-23-50, which mandates any conveyance or granting of interest, to, or out of any lands must be deeded in writing and signed by the grantor.

Further, Raven's Run argues the inclusion of the tax map numbers in a deed shows the scope of the property conveyed by a deed. (Appellant's Final Brief, p. 24). Raven's Run's argument is tenuous on the basis the Charleston County Real Property Record for tax map number 561-01-00-093 refers only to the lakes, parks, aircraft tie down, runway, walkway, island, and amenity area. (R. p. 276). The attached property card indicated per plat book CO-88, 7.74 acres were divided for park, aircraft, tie down, runway. (R. p. 277). Both the Charleston County Property Record and property card do not mention the disputed property or provide descriptions of the disputed property. Instead, both documents pertain to the amenities of Raven's Run.

Also, Raven's Run argued the 1985 deed and 1987 deed from R.A.C. were conclusive proof that R.A.C. conveyed the disputed property to Raven's Run. The 1985 deed referred to plat book BG, pages 52-54, which showed two irregular strips of land run along Rifle Range Road. The Master found the two irregular strips of land did not abut or include Crown Pointe subdivision. (R. p. 23). The Crown Pointe subdivision is not shown on plat BG, pages 52-54 that was a part of the 1985 deed to Raven's Run. (R. p. 342).

The Master correctly concluded Raven's Run does not own the disputed property that abuts the rear lots of Kubu's, Kinlaw's, and Johnson's.

b. Restrictive Covenants

The Court in McLeod v. Baptist¹ adopted the majority rule in holding the "grantor lacks standing to enforce a covenant against a remote grantee when the grantor no longer owns real property which would benefit from the enforcement of that restrictive covenant."

R.A.C. as the developer of Crown Pointe subdivision executed Restrictive Covenants

¹ 315 S.C. 246, 433 S.E.2d 834,835 (1993).

on August 29, 1986, and recorded on October 17, 1986, at Book O-158, Page 414 (R. p. 38). In paragraph 7 of the Covenants, the enforcement of the terms is limited to the developer and persons who own lot(s) as shown on plat book BK, page 2. (R. p. 39). Also, there is a reference in paragraph 26 of the Covenants that the portion of land between the rear lines of such lots and the water line of the Raven's Run lakes is owned by Raven's Run. (R. p. 44).

Subsequent to the execution of the Restrictive Covenants, R.A.C. sold lots in Crown Pointe subdivision to Spectra on January 14, 1987. At the time of the conveyance to Spectra, R.A.C. did not retain any rights or privilege to enforce the Restrictive Covenants against the lot owners of Crown Pointe. (R. p. 337). Further, R.A.C. reaffirmed that it did not retain any rights or privilege to enforce the Restrictive Covenants against the lot owners of Crown Pointe when it executed a Quit Claim Deed to East Crossing on December 18, 2001. The Quit Claim included the conveyance of all common areas including "lake" and "green areas" at located in East Crossing subdivision and Crown Pointe subdivision as shown in plat book BK at pages 2 and 3. The Quit Claim Deed contained an abstractor's note which stated:

"It the intention of this deed to convey all property set forth on the aforementioned plat, saving and exception all platted lots and public rights of way depicted thereon." (R. p. 352).

On January 17, 2002, East Crossing conveyed by a Quit Claim Deed to Crown Pointe the same common areas including any "lake" and "green area" that it received from R.A.C.. The Quit Claim Deed included the identical language of the abstractor's note as expressed in the previous Quit Claim Deed from R.A.C. to East Crossing.

Raven's Run asserted that it can enforce the applicability of the Restrictive Covenants in their favor, however, such contention fails by operation of law. Per S.C. Code Ann. §27-23-50, no estates or interest in, to or out of any lands shall at any time be assigned, granted or

surrendered, unless it be deeded in writing signed by the party so granting or surrendering them. Raven's Run did not present any evidence within its chain of title and plats that it received any interest in the disputed property from R.A.C.; therefore, Raven's Run cannot seek to enforce the Restrictive Covenants against the lot owners of Crown Pointe.

The Kubu's deed makes a specific reference to plat book BN, page 177, which shows the disputed property and the lake. Moreover, the Kubu's lot shows the same drainage easement, boundaries and lake as in plat books BK, page 2 and BP, page 161. (R. pp. 281, 74-77, 79). As held in Hobonny Club, Inc., "[w]here a deed describes land as it is shown on a certain plat, such plat becomes a part of the deed for the purpose of showing the boundaries, metes, courses and distances of the property conveyed." Id., 272 S.C. at 397, 252 S.E.2d at 136.

The Master correctly concluded that the Kubu owns the "portion of land and water depicted as the 40 foot portion of the 60 foot drainage to the east of the lots in questions. [Kubu] has ownership and a non-exclusive right to use this 40 foot wide area [as well as the] drainage easement on the 20 foot portion of the lots" are substantiated. (R. pp. 17-18).

III. THE COURT SHOULD NOT REMAND THE TRESPASS AND NUISANCE CLAIM TO THE LOWER COURT FOR A FURTHER PROCEEDING.

The Kubu proved Raven's Run does not own or have an interest in the disputed property that exists at the rear of their lot; therefore, Raven's Run's does not have any basis to seek a claim for trespass and nuisance.

"A trespass is any interference with 'one's right to the exclusive, peaceable possession of his property. (citation omitted). A nuisance, trespass's counterpart, provides a remedy for invasions of a property owner's right to the use and enjoyment of his property.'" Babb v. Lee County Landfill SC, LLC, 405 S.C. 129, 139, 747 S.E.2d 468, 473 (2013). "The distinction

between trespass and nuisance is that trespass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property, whereas nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment." Ravan v. Greenville County, 315 S.C. 447, 464, 434 S.E.2d 296, 306 (Ct. App. 1993).

The Kubu used and maintained the disputed property at the rear of their lot because it is referred in the plat of Kubu's deed; therefore, Raven's Run cannot prove intentional invasion of its interest or unreasonable interference with its use and enjoyment. (R. p. 110). The Master confirmed that such disputed property belongs to the Kubu, Kinlaw and Johnson. (R. pp. 17-18). The mere fact of ownership in the disputed property is still being contested is proof that Kubu's use of the disputed property did not rise to intentional or egregious action. Consequently, Raven's Run cannot prove the elements of trespass and/or nuisance.

CONCLUSION

Raven's Run did not and cannot prove within its chain of title that it has a vested ownership in the disputed property or lake. The plat that is in the Kubu's chain of title as well as those plats being plat books BK, page 2 and BP, page 161 conclusively show that Kubu own the disputed property at the rear of their lot. As held in Carolina Land Co., an easement that is referred in the grantee's deed becomes a part of the property to which the grantee is entitled and such entitlement cannot be divested except by due process of law. Id., 265 S.C. at 106, 217 S.E.2d at 20. The dedication easement as identified in the plats for Crown Pointe is for the benefit of the lot owners at Crown Pointe. The dedication easement as identified in the plats for Raven's Run is for the benefit of the lot owners at Raven's Run.

Further, as held Ward v. Woodward, there is rebuttable presumption "that a party granting land does not intend to retain a narrow strip between the land sold and his property line,

in the absence of express provisions to that effect in the deed, especially where it would cut off the grantee from valuable privileges and where the strip is so narrow as to be of no practical use to the grantor.” *Id.*, 287 S.C. at 345-346, 338 S.E.2d at 348. Again, Raven’s Run cannot show through its chain of title that R.A.C. conveyed the disputed property to Raven’s Run. Instead, R.A.C. executed a Quit Claim Deed to East Crossing-Crown Pointe Association, Inc. R.A.C. conveyed all common areas including “lake” and “green areas” located in East Crossing subdivision and Crown Pointe subdivision as shown on plat book BK at pages 2 and 3. Also, the Quit Claim Deed contained an abstractor’s note which stated:

“It the intention of this deed to convey all property set forth on the aforementioned plat, saving and exception all platted lots and public rights of way depicted thereon.” (R. p. 352).

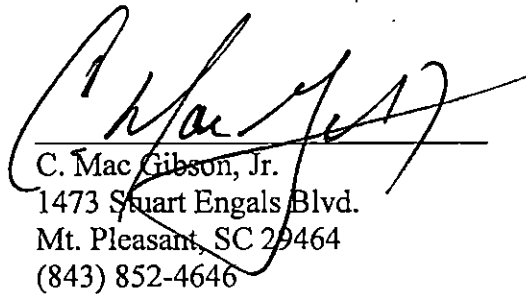
As held in Lake View Acres Development Co. v. Tidal, “[t]he rule that if a general description is followed by a clause summing up the intention of the parties as to the premises conveyed, such clause has the controlling effect on all prior phrases used in the description....” *Id.*, 306 S.C. at 481, 412 S.E.2d at 459. The corollary is R.A.C. did not retain any rights or privilege in the disputed property; therefore, R.A.C. could not convey and did not convey such interest in the disputed property to Raven’s Run.

Raven’s Run’s contention that the Restrictive Covenants for Crown Pointe grants Raven’s Run a vested ownership to the disputed property is disingenuous. Restrictive Covenants are not indicia of ownership, and they cannot grant a vested interest in real property to a third party per S.C. Code Ann. §27-23-50 (1976). Raven’s Run cannot prove though its chain of title that it has a vested ownership of the disputed property and lake.

James B. Kubu and Melissa F. Kubu respectfully request this Court to affirm the Master's Orders.

Respectfully submitted,

October 16, 2020



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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM THE CHARLESTON COUNTY
COURT OF COMMON PLEAS

MIKELL R. SCARBOROUGH, Master in Equity

Appellate Case No. 2019-001289

Raven's Runs Homeowners Association, Appellant/Respondent

v.

Crown Pointe Association, Inc., Lois K. Novak as Trustee of the Lois K. Novak Living Trust dated 10/14/2013; Laurie T. Herron and Mark D. Herron; James B. Kubu and Melissa F. Kubu; Leila June Johnson; Danny Ta and Anita McCauley; Robert E. Luby, Jr., and Barbara Luby; Joshua D. Coonce; Lucius Roy Junevicius; Katherine Kinlaw; Thomas K. Kuyk and Melissa Ward; Roland Franklin Wooten, III and Teresa Key Wooten; Michael P. Horvath; Timothy E. Moylan and Karen G. Moylan; Carl A. Counasse and Maureen Counasse; David A. Frielinghaus and Holly C. Frielinghaus; Christopher S. Finley and Holly M. Finley; Shirley D. Spigner a/k/a Shirley Deanna Spigner; Dierdre C. Knight; Robert Shane Johnson; Eric R. Sigman; Lamar R. Graves, Jr. and Terry W. Graves; Mary Elizabeth Gladden; Philip Wallace and Naomi Grad; Thomas Edwin Davis and Luis Miguel Gonzalez Melchor; John R. Funkhouser and Jennifer L. Funkhouser; Gregory S. Cooper and Jane B. Cooper; Frank C. Jones, Jr. and Elise Ubele Jones; William P. Topping and Kris B. Topping; LaRhonda S. Ptichko; Kenneth L. Tully and Anna J. Tully; Defendants,

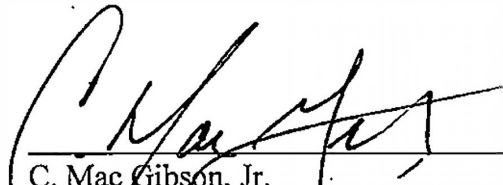
Of Whom James B. and Melissa F. Kubu, and Lelila June Johnson Respondents

And Katherine Kinlaw Respondent/Appellant

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Respondents James B. Kubu's and Melissa Kubu's Final Brief complies with Rule 211(b) SCACR.

October 16, 2020



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