THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Master-in-Equity

Maite Murphy, Master-in-Equity

Case No. 2009-CP-18-3315

Larry E. Kinard, Appellant,

v.

Douglas S. Richardson and Julie D. Richardson, Respondents.

INITIAL REPLY BRIEF OF APPELLANT

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Argument in Reply

Without restating the issues or making redundant arguments which have been thoroughly set forth in his opening brief, Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondents.

I. Commercial lease and admissions contrary to residential use

How do Respondents reply to the gravamen of Appellant's appeal, that the commercial leasing of the entirety of Tract "B" for horse grazing, riding and customer parking violates the requirement that "lots are known and designated and shall be used as single-family residential building lots"? While acknowledging that they "leased Tract B," with income and expenses being "run through" their "business" Greener Pastures LLC (Brief of Respondents Pg. 7), Respondents seek to tuck the LLC's business into the covenant horse-allowance word "keep", while all but ignoring the lot residential use requirement.

Despite having admitted at trial to having leased one hundred percent of Tract B for grazing (Trial Tr. 159:15-21) and to not using it for residential purposes (Trial Tr. 213:15-17), Respondents' brief nakedly asserts that they: "continue to live on the property" (Brief of Respondents Pg. 18); "reside on the property comprising the original Tract L" (Id.); and that they use it as a "side yard" (Brief of Respondents Pg, 19-20 and 22).

Respondent's four references to having subdivided for tax purposes in no way negate what their brief fails to once mention, the customer and horse consequences

their commercial leases have inflicted upon their neighbor across the street.

Nor do diversions such as three times referencing Kinard's settlement with the Nguyens (Brief of Respondents Pgs. 2, 7 and 25), whose land was granted agricultural rights in 1992 (Defendant's Ex. 1) and which is clearly not part of Senrab Farms subdivision, explain customer vehicles parking upon Richardsons' Tract "B" (Trial Tr. 160: 6-14 and Pl's Ex. 19, 20 and 21). Nor does labeling Kinard's use of his consolidated side lot (Trial Tr. 24: 7-11 and 32: 9-23) as "agricultural purposes" (Brief of Respondents Pg. 5) un-consolidate his lot, generate a single customer or a single parked car, or make it any less of a yard than any residential yard upon which fruit trees grow.

Respondents rely upon South Carolina Deparment of Natural Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E.2nd 299 (2001) in asserting that as with the word "remain," that the phrase "residential building lots" becomes clear when that particular covenant, or the covenants in their entirety, are construed as a whole. Appellant agrees.

Both the phrase "lots are known and designated and shall be used as single-family residential building lots," and the nature of covenants when taken as a whole, are highly protective of the residential character and quality of life within Senrab Farms subdivision (see Pl's. Ex.2 references to "shall be," "single-family," "residential," "dwellings," "completed within nine (9) months after" commencing construction, "side yard," "porches," "no noxious or offensive activity shall be carried on upon any lot," requirement to maintain the "front yard" in a clean and groomed condition," and a shared "subdivision" "Road Maintenance Assessment").

By Respondents' logic, because the covenants do not forbid leasing and

expressly permit in-ground pools (Pl's Ex. 2, ¶13f), that Respondents are entitled to build an in-ground pool on Tract B, and then lease it to a single individual without reference to the name they will do business as (Trial Tr. 202: 24 to 203: 12), who may then charge the general public to park and swim in the pool.

The Court in South Carolina Department of Natural Resources held that a new use restriction, a municipal use fee, did not violate the original covenant's restriction requiring that the boat landing must "remain" available to the public. Id, at 345 S.C. 623-624, 550 S.E.2nd at 302-303 (2001).

Here, Kinard sought enforcement of an unambiguous covenant requiring that lot use within Senrab Farms subdivision "remain" single-family residential. In light of the master's ruling that the developer's reservation of rights to subject additional lots to the covenants via recorded instrument was insufficient to do so, that lots may only be added via formal amendment, what started as a simple covenant enforcement action has been transformed into a battle to save a residential subdivision.

II. Respondents' Amended Answer neither contested covenant applicability nor Appellant's standing

In apparent support of their failure to affirmatively plead lack of privity or standing, Respondents twice assert that their Amended Answer both expressly "denied the applicability of the Covenants and Restrictions to their property, and contested Appellant's ability to enforce" them (Brief of Respondents Pg. 2 & Pg. 14). These unqualified assertions are not supported by the pleadings or references cited.

Cited Amended Complaint allegation 20 identified and asserted application of

both the original and amended restrictions to Tract L (Amended Complaint, Pg 6). In response, Amended Answer paragraph 14 admits the authenticity of both sets of restrictions, while only denying any allegations "that deviate" from them or "contrary to the clear language of those documents" (Amended Answer, Pg 3).

Cited Amended Complaint allegation 113 relates only to the sub-issue of the number of horses permitted by the covenants on Tract B following subdivision (Amended Complaint, Pg 24). Even there, Respondents' denial was rooted in the assertion that "Paragraph 113 calls for a legal conclusion to which Defendants Richardson are not required to respond but to the extent they are, Defendants deny the same and demand strict proof" (Amended Answer, Pg 9).

III. Respondents' overly broad reading of the summary judgment order

Respondents' brief seven times raises Judge Dixon's summary judgment order in asserting that it determined everything from the master's reasoning (Brief of Respondents Pg. 8), to ruling that the amendment "was a valid restriction" (Brief of Respondents Pg. 10), to ruling that the amendment "was original in that it did not change an existing restriction" (Brief of Respondents Pg. 16).

Clearly, the focus of Judge Dixon's summary judgment order was that restrictive covenants, including these, run with the land, even after subdivision of original Tract L. While expressly asked to rule upon the validity of the amendments in light of the recently discovered fact that the Barnes owned none of then restricted lots at the time of amendment, Judge Dixon declined to do so. Whether it was because the alleged invalidity had not been pled is unknown. Nor did he rule upon

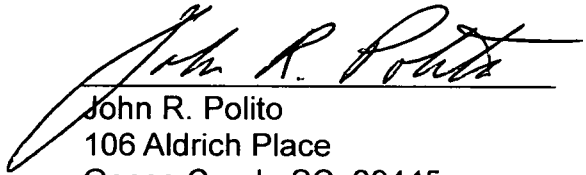
the operation or effect of any specific restriction. Instead, he expressly reserved for trial resolution of conflicts between the covenants.

At trial, Kinard moved to conform the pleadings to the evidence in "that the amended covenants, themselves, didn't have the required votes to amend" (Trial Tr. 169:9 to 171:7). Richardson's counsel's response to the motion was that "we don't object to his amending the pleadings ..." "We have no objection to that motion" (Trial Tr. 171: 9-19). Unlike summary judgment, the master expressly ruled that "Because Barnes no longer retained any interest in the property subject to the original Restrictive Covenants, which includes Plaintiff's property, he could not amend the original Restrictive Covenants that apply to the original six (6) lots to include Defendants' property within the scope of those Original Restrictive Covenants" (Order, Pg. 3, last ¶).

CONCLUSION

Respectfully, Appellant requests that the Court reverse the judgment of the Master-in-Equity, declare Defendants in breach, balance the equities and enjoin the violations.

Respectfully submitted,



April 18, 2013

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Initial Reply Brief of Appellant complies with the requirements of Rule 208(b), SCACR.

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PROOF OF SERVICE

I certify that I was served by mail with the Initial Brief of Respondents on April 9, 2013 and timely replied by serving one (1) copy of the Initial Reply Brief of the Appellant and a copy of Appellant's Designation of Matter to be Included in the Record on Appeal upon Respondents Douglas S. Richardson and Julie D. Richardson by depositing copies of the same in the United States Mail, postage prepaid on April 18, 2013, addressed to Respondents' attorney of record at the following address:

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