

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001250-MR

GORDON SLONE
AND HATTIE SLONE

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 07-CI-01939

COPPERFIELD NEIGHBORHOOD
ASSOCIATION, INC.

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON AND MOORE, JUDGES; KNOPF,¹ SENIOR JUDGE.

DIXON, JUDGE: Gordon and Hattie Slone (“the Slones”), appeal from a Fayette

Circuit Court order granting summary judgment in favor of the Copperfield

Neighborhood Association, Inc. (“the Association”). We affirm.

¹ Senior Judge William L. Knopf sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

The Slones purchased a home in the Copperfield Subdivision in Lexington, Kentucky, in February 1992. The developers of Copperfield had recorded a Deed of Restrictions applicable to the entire subdivision, which required each homeowner to pay an annual maintenance fee of \$50.00. In October 2004, the Association was formed and incorporated as a nonprofit corporation. During the course of building the subdivision, the developers also created a separate corporate entity to operate the Copperfield Swim and Racquet Club² (“the Club”) within the subdivision. Copperfield residents had the opportunity to purchase annual memberships to use the Club facilities. The Slones chose not to pay the additional membership fees required to join the Club.

In 2002, the Association learned the developers planned to either sell the Club, or raze the Club and build additional houses on the land. The Association expressed interest in purchasing the Club, and, in November 2002, the Association sent information packets to neighborhood residents regarding options for purchasing the Club. The Association ultimately determined that the annual maintenance fee would have to be increased to \$200.00 to finance the purchase. In early 2003, the Association canvassed the subdivision to obtain signatures to amend the provision within the Deed of Restrictions pertaining to the maintenance fee. Two-thirds of Copperfield’s 432 households approved the amendment and increase in the maintenance fee. Thereafter, the Association sent invoices to all residents requesting payment of the new maintenance fee, \$200.00.

² The Club consisted of a pool, tennis courts, and clubhouse facility.

From 2003 through 2006, the Slones remitted payment of \$50.00, as they disagreed with the Association's authority to amend the Deed of Restrictions. The Association did not accept the partial payments tendered by the Slones.

In January 2007, the Association sent the Slones an invoice for \$1,000.00 to cover maintenance fees from 2003 through 2007. The Slones paid the fee under protest, because they feared the Association would place a lien against their home.

In April 2007, the Slones filed a complaint against the Association alleging the amendment to the Deed of Restrictions was *void ab initio*. They also sought a declaration that the maintenance fee could not exceed \$50.00 per year, that they were not members of the Association, that the maintenance fee could not support the pool facility, that they were entitled to a refund of \$950.00 and that the Association failed to comply with its own Bylaws.

Following a period of discovery, the Slones unsuccessfully moved for summary judgment in November 2007. Thereafter, the Association moved for summary judgment in March 2008. The court held a hearing on the motion and rendered an order granting summary judgment for the Association in May 2008. The Slones filed a motion to alter, amend, or vacate the order, which the court denied. This appeal followed.

The Slones argue: 1) the amendment to the Deed of Restrictions was void; 2) they are not members of the Association; 3) the Association failed to

follow its own Bylaws; and 4) the Association was not entitled to the equitable defenses of waiver and laches.

At the outset, we note that the underlying facts are not in dispute. The Slones contend the court erred in its application of the law to the facts and that the Slones, rather than the Association, were entitled to judgment as a matter of law.

Summary judgment is proper only when “there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (quoting Kentucky Rules of Civil Procedure (CR)56.03). It is well settled that “the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Id.*, citing *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985).

I. Amendment to Deed of Restrictions was *void ab initio*

Section 28 of the Restrictions states:

RESTRICTIONS RUN WITH THE LAND: These covenants and restrictions shall run with the land, shall be binding upon all parties and all persons claiming under them for a period of twenty-five (25) years from and after the date upon which they have been recorded, and shall be automatically extended for four (4) successive periods of ten (10) years each, **unless an instrument in writing signed by not less than the owners of two-thirds of the lots changing these covenants and restrictions is recorded in the Fayette County Clerk’s Office.**

(Emphasis added).

The Slones contend the Association did not have the authority to amend the Restrictions because they believe the Restrictions prohibit amendment for twenty-five years, until 2017. The Slones cite several cases from other jurisdictions to illustrate their argument. Specifically, they point to *Illini Federal Sav. & Loan Ass'n v. Elsay Hills Corp.*, 445 N.E.2d 1193, 1196 (Ill. App. 1983), for the proposition that, “[a]ccording to the ‘last antecedent clause’ rule of construction, a qualifying phrase is to be confined to the last antecedent unless there is something in the instrument requiring a different construction.” The Slones posit that the “unless” clause in Section 28 applies only to the renewal language immediately preceding it, thereby prohibiting amendment of the Restrictions during the first twenty-five years.

The Association disagrees with the Slones’ interpretation of the Restrictions. The Association cites *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456 (Ky. 2004), which is also noted by the Slones. However, the Association quotes a footnote in the *Popplewell’s* opinion which discusses rules of construction and concludes: “‘Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.’” *Id.* at 465, quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.33, p. 369-73 (6th ed. 2000 Revision). The Association further points out that the language examined in the *Illini, supra*,

opinion, did not contain a comma, while the “unless” language of Section 28 is, indeed, set off by a comma.

In *Colliver v. Stonewall Equestrian Estates Ass'n, Inc.*, 139 S.W.3d

521 (Ky. App. 2003), a panel of this Court summarized:

The fundamental rule in construing restrictive covenants is that the intention of the parties governs. Hence, ‘the construction [of covenants] may not be used to defeat the obvious intention of the parties though that intention be not precisely expressed.’ An important factor also to consider is the general scheme or plan of development and surrounding circumstances.

Id. at 522 (internal citations omitted).

The language of the specific covenant at issue, Section 26, states:

MAINTENANCE FEES: Every lot owner, with the exception of the Developer, shall be required to pay, on February 1, an annual maintenance fee not to exceed \$50.00 per lot, to the Copperfield Maintenance Fund at the address provided by the Developer. This annual maintenance fee may be increased or decreased at Developer’s discretion. When the Copperfield Homes Association is formed, and the rights and privileges to maintenance fees are assigned to said Homes Association, said Association shall have discretion to change any aspect of the maintenance fees.

Despite the Slones’ argument to the contrary, we are not persuaded that the developer intended to preclude an amendment to the Restrictions for twenty-five years. The language of Section 26 evidences intent for the Restrictions to be amended if the maintenance fee is changed, at the discretion of the developer or the Association. In light of the circumstances surrounding these covenants, we decline to accept the Slones’ interpretation of the language. We conclude the

Association acted within its authority, and the amendment to the Restrictions was not *void ab initio*. We find no error in the court's grant of summary judgment on this issue.

II. The Slones' Membership in the Association

The Slones argue they are not members of the Association; therefore, they are entitled to a refund of \$950.00 for the increased maintenance fees they have paid.

The Slones premise their assertion on their belief that the Association, in its present incarnation, did not exist at the time they purchased their home.³ The Association asserts the Slones became members of the Association when it was formed in 1994, by virtue of the fact that the Deed of Restrictions clearly contemplated the formation of the Association. Furthermore, Section 2.6 of the Association's Bylaws designates every person who owns a lot in Copperfield as a "member" of the Association.

We reiterate, "the construction [of covenants] may not be used to defeat the obvious intention of the parties though that intention be not precisely expressed." *Colliver*, 139 S.W.3d at 522 (citation omitted). It is clear the developer intended for all residents to pay fees to the Association and that the Association would enforce the restrictive covenants for the benefit of every resident of Copperfield.

³ In their brief, the Slones claim the Association failed to answer requests for admissions, and premise their argument on their belief that the admissions were admitted as true. However, a review of the record shows the Association responded to interrogatories on August 10, 2007, and stated answers that contradict the Slones' argument.

The Association also points out, as did the trial court, that the Slones paid the maintenance fee from 1992 through 2002 without complaint. The Slones even continued paying \$50.00 per year to the Association after the fee had been increased to \$200.00 per year.

The Slones contend they did not acquiesce in membership by paying the annual fee, and they assert they paid the \$1,000.00 past-due amount because they feared the Association would place a lien against their home and foreclose on their property. We are not persuaded by this contention, as Section 27 of the Deed of Restrictions grants the Developer or the Association the right to enforce the restrictive covenants “by appropriate legal action.”

Furthermore, we are likewise not persuaded the Slones did not know they were members of the Association or that they would ever have to pay increased maintenance fees. The Restrictions clearly indicate the developer’s intent to provide the Association with the discretion to change “any aspect” of the fees.

We conclude the Slones are members of the Association as a matter of law; consequently, they are not entitled to a refund of the annual fees. We find no error in the court’s ruling.

III. Breach of Fiduciary Duty

The Slones argue the Association acted outside the scope of its authority by increasing the maintenance fees without holding a meeting pursuant to Section 7.5 of its Bylaws. That provision states in relevant part:

Assessments

. . . Any special assessment, decrease or increase in the annual assessment, must be approved by a two-thirds majority vote at a special or annual meeting of the members, at which, for the sole purpose of this section, a quorum shall constitute fifty (50%) percent of the total number of residential members in good standing. For purposes of this section only, notice of such a meeting shall be in writing stating the specific purpose of the proposed special assessment or increase in the annual assessment, to be delivered not less than ten (10) nor more than thirty (30) days before the date of the meeting . . . [.]

The Slones contend that the Association owed a duty to its members to hold a meeting to vote on the fee increase pursuant to the Bylaws. We disagree.

The Association argues it had the authority to either amend Section 26 of the Deed of Restrictions, or hold a meeting and vote pursuant to Section 7.5 of the Bylaws. The Board of Directors believed that it would be untenable for the requisite quorum of 200-plus residents to attend a meeting and vote pursuant to the Bylaws. Instead, the Board considered a more realistic option of collecting signatures to amend the Deed of Restrictions. In early 2003, Association members canvassed the subdivision and secured notarized signatures of 2/3 of the 432 homeowners, the number required to amend the Restrictions pursuant to Section 28.

As we have concluded the Deed of Restrictions provided the Association with the authority to amend the maintenance fee, we are not persuaded that the failure to hold a meeting pursuant to the Bylaws rendered the amendment void. We find no error.

Finally, we decline to address the equitable arguments of waiver and laches addressed by the trial court, as we have disposed of the relevant legal issues.

For the reasons stated herein, the judgment of the Fayette Circuit Court is affirmed.

MOORE, JUDGE, CONCURS.

KNOPF, SENIOR JUDGE, CONCURS IN RESULT ONLY.

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