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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002193-MR

PATRICK VONDERHAAR; CAROLEE VONDERHAAR; RONALD ADAMS; AND LISA ADAMS — APPELLANTS

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 09-CI-00537

LAKESIDE PLACE HOMEOWNERS ASSOCIATION, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND DIXON, JUDGES.

CAPERTON, JUDGE: The Appellants, Patrick and Carolee Vonderhaar and Ronald and Lisa Adams, appeal from the October 5, 2012, findings of fact, conclusions of law, and summary judgment/injunction issued by the Russell Circuit Court in favor of Appellee, Lakeside Place Homeowners Association, Inc.

(hereinafter "Lakeside"), based upon the finding that Appellants had violated the Declaration of Covenants and Restrictions of Lakeside Place in light of the fact that they utilized their property for commercial purposes. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

The Appellants, the Adamses and Vonderhaars, are co-owners in fee of a single family home located in the Lakeside subdivision, in Russell County, Kentucky. Lakeside Place Homeowners Association is a homeowners association designated to preserve and protect the interest of the real property owned by its members in Lakeside Place subdivision located in Russell County, Kentucky.

The Declaration of Covenants and Restrictions of Lakeside Place was executed on July 20, 1988, by developers Donald H. Byrom and Larry Kinnett. These restrictions were recorded in the Russell County Clerk's Office on January 20, 2002. Lakeside instigated litigation to seek injunctive relief against Appellants, based upon the assertion that they were in violation of the Declaration of Covenants and Restrictions because the Declaration restricted the use of the land in the subdivision to single family residential purposes only, and there were to be no business, commercial, trade, or professional uses permitted.

Article VII of the Declaration, entitled Building and Use Restrictions, stated as follows:

> Section 1. Single Family Residential Use. Each lot (including land and improvements) shall be used and occupied for single family residential purposes only. No owner or other occupant shall use or occupy his lot, or permit the same or any part thereof to be used or occupied, for any purpose other than as a private single

> family residence for the Owner or his tenant and their families. As used specifically, but without limitation, the use of Lots for duplex apartments, garage apartments, or other apartment use. No lot shall be used or occupied for any business, commercial, trade, or other professional purpose either apart from or in connection with the use thereof as a private residence, whether for profit or not.

The Appellants originally purchased their first lot in Lakeside Place, Lot 22, in the early 1990s. At that time, the Adamses sought an opinion letter from the developer, Don Byrom, granting them the ability to rent their property in the neighborhood on a short-term basis. That letter was written by Byrom. After a home was constructed on this lot, the Appellants engaged in renting the home on Lot 22 for several years prior to the purchase of the second lot, Lot 13. Appellants subsequently purchased Lot 13.

Other homeowners in Lakeside became concerned when the Appellants built a house on Lot 13 in Lakeside that they immediately began to use as a short-term rental facility, rather than as a single family residence. The Appellants advertised the property for rent on various websites, including for periods of time as short as three nights.

In his deposition, Ronald Adams confirmed that the tax returns for the years 2007 and 2008 indicated that the rental property was listed as a "motel." The Appellants' income tax returns were submitted into evidence below and indicated the rents received as income as well as expenses, including cleaning, maintenance, repairs, supplies, utilities, insurance, legal and professional fees, and depreciation of the property. Additionally, Appellants paid the required Russell County Tourist

and Convention Commission Transient Room Tax and the Kentucky Sales Use and Transient Room Tax, as is required of motels, hotels, and persons renting their property for a short period of time.

Lakeside asserted that Appellants made short-term rentals to large groups of people who created a noise disturbance, played loud music, and left trash in the roadway, in addition to leaving cars parked in the roadways, which created problems for traffic movement on the subdivision roads.

As noted, on October 5, 2012, the Russell Circuit Court entered a judgment restricting the Appellants from any rental or lease activity on their property. It is from that judgment that Appellants now appeal to this Court.

As their first basis for appeal, Appellants argue that the trial court erred in determining that the Declaration prevents rentals because it specifies a "tenant" as a permissible party and provides no specific detail as to length of time that the property can be rented. Appellants assert that Article VII of the Declaration plainly states that the use of the property by "tenant" for single family purposes is acceptable, and notes that in order to preclude the Appellants' rental activities, the Declaration would have had to use the term "tenant" to clearly and specifically prohibit any "rental or leasing" of the properties subject to the Declaration. Appellants assert that restrictive covenants should be strictly construed against those seeking to enforce them, and that in this instance the covenant was not specific enough to restrict rental activity of the properties at issue. Appellants also assert that Kentucky should move toward accepting a more

modern approach which favors an unfettered use of land, and urge this Court to find accordingly.

In conjunction with their argument that the trial court erred in determining that the Declaration prevents rentals, Appellants argue that the trial court erred because it "refused to see" that Article VII was subject to more than one interpretation and is therefore ambiguous. Appellants assert that though the court attempted to distinguish a "lease" from a "rental," the Declaration itself makes no such distinction and is at best ambiguous on this point. Appellants assert that if ambiguity on this issue exists, the facts make clear that the drafters of the Declaration clearly intended to allow rental arrangements and that no specification was made as to how long the property could be rented or leased.

Further, Appellants argue that the trial court erred in determining that Appellants' rental was a "business use," or that, alternatively, this creates a second ambiguity in the Declaration. While the court found that the short-term rentals of Appellants' property were a "business use," Appellants argue that merely receiving money for the rented property did not mean that the property was being utilized for "non-residential," or "business use" purposes. Alternatively, Appellants argue that the Declaration was at best ambivalent on this point.

In response to the first four arguments made by Appellants, Lakeside argues that the trial court properly determined that the rental of the house located on Lot 13 of Lakeside was in violation of Article VII of the Declaration. Lakeside asserts that by virtue of advertisements on the internet, tax returns indicating that

the business use for the property was a "motel," and by payment of the hotel and motel tax of Russell County, the Appellants could present no proof that they were not engaged in a commercial enterprise in the rental of their home.

In addressing this issue, we note that interpretation of a restrictive covenant is a matter of law appropriate for de novo review by this Court. *Colliver v. Stonewall Equestrian Estates Ass'n, Inc.*, 139 S.W.3d 521, 522-23 (Ky. App. 2003). Upon review, we note that there are no factual disputes between the parties and, accordingly, we focus solely on interpretation of the Declaration as a matter of law.[1] In so doing, we turn first to applicable precedent. It is clearly established

[1] In addressing this issue, we also direct the parties to our previous unpublished opinion in *Hyatt v. Court*, 2009 WL 2633659 (Ky. App. 2009), which we cite pursuant to Kentucky Rules of Civil Procedure 76.28(4), and which we believe to be directly on point in this matter. In *Hyatt,* as was the case with the Appellants *sub judice*, the Hyatts advertised their home on the internet, and charged a cleaning fee, security deposit, and a charge for Kentucky sales tax.

This Court ultimately found that the Hyatts were using their property as a business, stating:

> Merriam-Webster's 2009 Online Dictionary defines commercial as of or relating to commerce, which is defined as the exchange or buying or selling of commodities on a large scale involving transportation from place to place, and is synonymous with business. There can be no doubt that the Hyatts define their rental enterprise as a business. The Hyatts cannot label the rental of their vacation home one thing to the Internal Revenue Service and characterize it to the contrary to this Court.
>
> The Hyatts urge us to note that the people who rent their property engage in the very same recreational activities as do the owners or their guests who reside in the dwellings within the Sherwood Shores subdivision. While this may indeed be the case, it is not what the tenants do to occupy their time while on the property that is forbidden, it is the fact that the property is being held out for remuneration in much the same manner as a hotel or motel that is restricted.
>
> The creators of the subdivision plainly intended to restrain deed-holders from engaging in anything more than recreation while using their property. Such is the privilege of the creators. That the other property owners seek to enforce the protections of the restrictive covenants is their right.

that when attempting to construe ambiguous restrictive covenants the party's intention governs. *See Glenmore Distilleries v. Fiorella,* 273 Ky. 549, 554, 117 S.W.2d 173, 176 (1938). If known, the surrounding circumstances of the development are likewise an important consideration when ambiguous language creates a doubt as to what the creators intended to be prohibited. *Brandon v. Price,* 314 S.W.2d 521, 523 (Ky. 1958). Thus, the construction may not be used to defeat the obvious intention of the parties though that intention may not be precisely expressed. *Connor v. Clemons,* 308 Ky. 9, 213 S.W.2d 438 (1948).

Furthermore, we note that Kentucky has approached restrictive covenants from the viewpoint that they are to be regarded more as a protection to the property owner and the public rather than as a restriction on the use of property, and that the old-time doctrine of strict construction no longer applies. *Highbaugh Enterprises Inc. v. Deatrick and James Construction Co.,* 554 S.W.2d 878, 879 (Ky. App. 1977).

> Indeed, in 1952, our Supreme Court noted:
>
> [W]e are among the jurisdictions which adhere to the concept that such restrictions constitute mutual,

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> What is equally clear is that the Hyatts have gone to a great deal of trouble to treat their vacation property as a business. The rental agreement, copyrighted web-site, check-in and check-out times, and the supply of various sundries to tenants, underscore the appropriateness of this commercial classification. Further, the fact that the Hyatts are required to pay the same taxes as is required of motels and hotels only emphasizes the business-related nature of their endeavor. It is unmistakable that the Hyatts have violated the restrictive covenant as the trial court found.

Hyatt at 4.

reciprocal, equitable easements of the nature of servitudes in favor of owners of other lots of a plot of which all were once a part; that they constitute property rights which run with the land so as to entitle beneficiaries or the owners to enforce the restrictions, and if it be inequitable to have injunctive relief, to recover damages. *Crutcher v. Moffett,* 205 Ky. 444, 266 S.W. 6; *Starck v. Foley,* 209 Ky. 332, 272 S.W. 890, 41 A.L.R. 756; *Doll v. Moise,* 214 Ky. 123, 282 S.W. 763; *Bennett v. Consolidated Realty Co.,* 226 Ky. 747, 11 S.W.2d 910, 61 A.L.R. 453.

Ashland-Boyd County City-County Health Dept. v. Riggs, 252 S.W.2d 922, 924-25 (Ky. 1952).

Having thus expressed the state of the law in the Commonwealth concerning restrictive covenants, we now turn to the factual scenario before us. *Sub judice*, the Appellants have labeled their home as a "motel," for tax purposes, have treated it as a business, have advertised it on various websites, have a rental agreement along with check-in and check-out times, and pay taxes required of hotels and motels. Upon review of the record, it is clear that the Appellants define their rental enterprise as a business, and have indeed stated as much to the Internal Revenue Service. They cannot now characterize it to the contrary to this Court.

While the Appellants argue that the individuals who rent their property engage in the very same recreational activities as do the owners or their guests who reside in the dwellings permanently, or as is the case for long-term rentals, we do not find the activities of the occupants to be determinative. Indeed, it is not what the individuals do to occupy their time while on the property that is forbidden; it is the fact that the property is being held out for remuneration in much the same manner as a hotel or motel.

Upon review of the record and the testimony of the parties, we believe that the creators of the subdivision did not intend for properties in the subdivision to be utilized as motels or hotels in the manner in which

Appellants are currently utilizing their property. That the other property owners seek to enforce the protections of the restrictive covenants is their right. We are in agreement with the court below that Appellants have violated the restrictive covenant and, accordingly, we believe the trial court appropriately granted summary judgment.

Having so found, we now turn to the Appellants' fifth basis for appeal, namely that the trial court erred in ordering the Appellants to produce their income tax returns which they assert are confidential, privileged materials. Appellants assert that they stipulated the fact that they were renting the property for profit as a single-family rental and that, accordingly, their tax returns were not relevant to any material issue in this matter, particularly because there is no claim for punitive damages.

In response, Lakeside argues that the trial court properly ordered Appellants to provide their tax returns. Lakeside asserts that as part of discovery, it had requested income tax returns from Appellants which, when provided, indicated that the "business purpose" for the house rental was designated as "motel" on the Schedule C for tax year 2007, that expenses were deducted, and that the property was depreciated. Accordingly, Lakeside argues that the tax returns were clearly relevant as to the use of the property. We agree.

Pursuant to Kentucky Rules of Evidence 401, "relevant evidence" is that which has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be

without the evidence. *Sub judice*, we are in agreement with Lakeside and the court below that the designation of the property for tax purposes was relevant and, accordingly, we decline to reverse on this basis.

As their sixth and final basis for appeal, Appellants argue that the trial court erred in depriving them of a jury trial on their "waiver" argument. Appellants assert that they had rented or leased their two properties in the subdivision for years without contest from the homeowner's association. They assert that they asked Attorney Byrom if the property in the subdivision could be rented and he agreed. Moreover, Appellants note that Byrom sent them a letter, which has since been misplaced, indicating that the property could be rented. Appellants assert that their testimony as to the contents of this letter was uncontroverted. Accordingly, they argue that this permission, in conjunction with the length of time they had rented the properties without objection, amounted to waiver of any right that might otherwise have existed.

In response to Appellants' argument concerning waiver, Lakeside argues that the trial court properly held that there was no waiver of the Declaration. Lakeside asserts that while other homeowners may have rented their property to other parties for long-term periods of time, this was different than the short-term rentals *sub judice* and in no way constituted a waiver of the covenants and restrictions contained in the Declaration. Again, we agree.

As our Kentucky Supreme Court previously held in *Hardesty v. Silver*, 302 S.W.2d 578, 582 (Ky. 1956):

> Where the restrictive covenant has not been rigidly enforced, and where certain structures and uses have been tacitly permitted which are violative of the strict terms, but where, in spite of such relaxation, there still remains something of substantial value to those entitled to benefit by its provisions, they are still entitled to enforce it insofar as they were not affected by the principles of estoppel and waiver.

We agree with Lakeside and the court below that there is a significant difference between a long-term rental of a property by one family in contrast to short-term rentals by different individuals or families every weekend. While the restriction may not have been rigidly enforced with respect to long-term rentals, Lakeside retained the right to do so with respect to the short-term rentals because the continued enjoyment of the subdivision by all homeowners was an ongoing interest of substantial value. Accordingly, we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the October 5, 2012, findings of fact, conclusions of law, and summary judgment/injunction issued by the Russell Circuit Court granting summary judgment in favor of Appellees, the Honorable Vernon Miniard, Jr., presiding.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Harlan E. Judd
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

M. Gail Wilson
Jamestown, Kentucky