IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

THE PANTRY, INC. AND
CIRCLE K STORES, INC.,

Appellants,

v. Case No. 5D20-612

MIJAX MANAGER, LLC,

Appellee.

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Opinion filed December 31, 2020

Appeal from the Circuit Court
for Seminole County,
Susan Stacy, Judge.

D. Kent Safriet and Winston K. Borkowski,
of Hopping Green & Sams, P.A.,
Tallahassee, for Appellants.

Gary L. Summers, of Gary L. Summers,
P.A., Tavares, for Appellee.

EDWARDS, J.

A properly executed, notarized, and recorded restrictive covenant, limiting the type of business that may be conducted on a parcel of land, can bind subsequent purchasers under the doctrine of constructive notice. Appellants, The Pantry, Inc., ("Pantry") and Circle K Stores, Inc., ("Circle K") are the parties protected by a restrictive covenant that prohibits using the land in question, Parcel 6A, for any competing retail business

operating singularly or in combination as a convenience store, fast food hamburger restaurant, or gas station. They appeal the summary judgment, entered in favor of Appellee, Mijax Manager, LLC, ("Mijax") which declared the restrictive covenant to be unenforceable against Appellee. Appellants also appeal the denial of Appellants' competing motion for summary judgment. As explained below, we hold that the restrictive covenant was validly created and properly recorded in the public land records, thereby providing constructive notice to Mijax, which is bound thereby. Accordingly, we reverse the summary judgment entered in favor of Mijax and remand with instructions to enter summary judgment in favor of Appellants.

This case centers around the enforceability of a restrictive covenant against real property on the corner of State Road 46 and Orange Boulevard in Sanford, Seminole County, Florida. For over forty years, Circle K and its predecessor businesses have owned and operated a convenience store with gas pumps and a fast food restaurant at the northeast corner of the intersection, identified as Parcel 21A ("Pantry Property"). For about twenty-eight years, Circle K's predecessor companies (including Pantry) leased a parcel of land at the southwest corner of the same intersection, identified as Parcel 6A.[1] Parcel 6A is a corner subparcel of Parcel 6.

<u>Agreement to Create Restrictive Covenant</u>

In 2005, Robert T. Ferris, the owner of Parcel 6A through his company, Area Properties, LLC, asked Pantry, Circle K's predecessor, to agree to an early termination of Pantry's 1977 lease on Parcel 6A so Ferris could sell that parcel to Primerica

[1] In Appellee's lower court filings and the lower court's final summary judgment, Parcel 6A is referred to as Parcel 1.

Developments, Inc. ("Primerica"). Richard Trzcinski was president of Primerica.[2] Pantry sought to prevent Parcel 6A from becoming a retail operation that would compete with its business across the street on Pantry's Property. Therefore, Pantry insisted that any agreement to terminate its lease include use restrictions applicable to Parcel 6A. The current owner and the prospective owner of Parcel 6A agreed to the use restrictions and joined Pantry in executing a written Lease Termination Agreement that spelled out what was prohibited.

On March 4, 2005, a representative of Pantry, Trzcinski (on behalf of Primerica the prospective purchaser), and Ferris/Area Properties, LLC, signed a Lease Termination Agreement.[3] The Lease Termination Agreement included the following restrictions on Parcel 6A in favor of Appellants:

> So long as Pantry or its successors in interest continues to operate the above described business on the Pantry Property, Primerica agrees that neither it nor any successor or assign will operate, lease, sell or otherwise transfer the Property for use as (i) a convenience store, (ii) a fast food hamburger restaurant, (iii) tobacco/beverage store, (iv) gasoline sales or (v) for parking or storm water retention for such facilities ("Prohibited Uses"). . . . Primerica agrees to include a provision prohibiting the Prohibited Uses in any future leases of real estate or in a deed conveying the Property for so long as Pantry or its successors in interest continues such operation on the Pantry Property.

According to the Lease Termination Agreement, Pantry's lease on Parcel 6A would not terminate until Primerica took title to Parcel 6A from Area Properties, LLC, through Ferris. All of the parties executed two amendments to the Lease Termination Agreement,

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[2] Trzcinski, through another one of his companies, Orange Commons, LLC, was in the process of purchasing Parcel 6.

[3] The signatures on the Lease Termination Agreement were not witnessed or acknowledged.

which explicitly included and ratified the above restrictions, for the purpose of extending the anticipated closing date on Parcel 6A.

On January 9, 2006, Ferris executed a warranty deed as managing member of Area Properties, LLC, which conveyed Parcel 6A to Orange Commons, LLC, another of Trzcinski's companies, and to which Trzcinski had assigned Primerica's contract.

On the same day that the sale of Parcel 6A closed, Trzcinski signed a Termination of Lease Affidavit in which he affirmed that the lease subject to termination was the same lease as referenced in a Memorandum of Lease recorded by Circle K predecessor Miller Enterprises, Inc. in 1980.[4] Trzcinski also reaffirmed and incorporated into the Termination of Lease Affidavit, by attachment and reference, a copy of the March 4, 2005 Lease Termination Agreement and its two amendments, which contained the agreed-upon use restrictions on Parcel 6A. The Termination of Lease Affidavit identifies Area Properties, LLC/Robert Ferris, Primerica Developers, Inc. and The Pantry, Inc., "collectively [as the] Parties," to the earlier Lease Termination Agreement. The Termination of Lease Affidavit was timely recorded in the public land records of Seminole County, Florida, in sequence with the deed from Area Properties, LLC/Ferris to Orange Commons, LLC/Trzcinski.

In order to create a valid, enforceable restrictive covenant that runs with the land, there must be "(1) the existence of a covenant that touches and involves the land, (2) an intention that the covenant run with the land, and (3) notice of the restriction on the part of the party against whom enforcement is sought." *Winn-Dixie Stores, Inc. v. Dolgencorp, Inc.*, 964 So. 2d 261, 265 (Fla. 4th DCA 2007) (citing *Maule Indus. v. Sheffield Steel*

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[4] An amended version of this Memorandum of Lease was recorded by Miller Enterprises in 1994. This is the same lease referred to in all relevant documents.

Prods., Inc., 105 So. 2d 798, 801 (Fla. 3d DCA 1958); Ralph E. Boyer, *Survey of the Law of Property* 530 (3d ed. 1981)). There are no disputes in the instant case regarding the first two parts of the test. Rather, as will be seen, the issue in this case involves whether constructive notice was provided to the party burdened by the restriction.

Subsequent Purchase and Attempted Sale of Parcel 6A by Appellee

In November 2014, Appellee purchased Parcel 6 and Parcel 6A from Eagle FL I SPE, LLC ("Eagle"), the successor in title to Orange Commons, LLC. As part of the transaction, Eagle provided Appellee with title insurance for the $600,000 purchase price paid by Appellee. Old Republic Title Insurance Company ("Old Republic") first issued a title commitment and then provided a title insurance policy, neither of which excepted from coverage or otherwise mentioned the subject restrictive covenant.

Appellee attempted to sell Parcel 6 and Parcel 6A to Racetrac, a competitor of Circle K. Racetrac discovered the use restriction prohibiting gas stations and convenience stores in the Lease Termination Agreement, which was incorporated into Trzcinski's Termination of Lease Affidavit. Appellee told Racetrac that the lease was terminated but Racetrac concluded, after performing its due diligence, that Parcel 6A was subject to the use restriction. Racetrac reduced its original offer amount due to the use restrictions, which Appellee refused.

Dispute Regarding Constructive Notice

Appellee then filed a claim with Old Republic under the title insurance policy. Instead of paying on the claim, Old Republic retained counsel and filed the underlying complaint seeking to quiet title and to obtain a declaratory judgment. Appellee asserted that it did not have actual or constructive notice of the use restriction; thus, it claimed that

the use restriction did not apply to Appellee.[5] Appellee argued that it did not have constructive notice of the use restrictions because Trzcinski's signature on the Termination of Lease Affidavit was not "acknowledged," and instead reflected that Trzcinski had sworn to the truth of the affidavit, which he subscribed before the notary public. Circle K filed an answer, affirmative defenses, and a counterclaim seeking enforcement of the use restriction. Both sides moved for summary judgment.

Constructive notice of a restrictive covenant is "imputed to a person not having actual notice; for example, such as would be imputed under the recording statutes to persons dealing with property subject to those statutes." *Sapp v. Warner*, 141 So. 124, 127 (Fla. 1932). It "includes all recitals, references or matters appearing upon the face of any deed which forms an essential link in the chain of title." *Fla. Masters Packing, Inc. v. Craig*, 739 So. 2d 1288, 1291 (Fla. 1st DCA 1999) (citation omitted).

An instrument concerning real property must be recorded to give a subsequent purchaser constructive notice of an interest in real property. § 695.01(1), Fla. Stat. (2019). In order for an instrument concerning real property executed in Florida to be recorded, "[a]n acknowledgment or a proof[[6]] may be taken, administered, or made within this state by or before . . . any notary public . . . of this state[.]" § 695.03(1), Fla. Stat. (2019).

Section 695.04 requires that "[t]he the certificate of the officer before whom the acknowledgment or proof is taken . . . shall [] set forth substantially the matter required to

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[5] Appellee's lack of actual notice of the restrictive covenant is undisputed.

[6] A "proof" occurs when a subscribing witness swears that the person actually signed the document. *See* § 695.03, Florida Statutes (2019); *Jackson v. Haisley*, 17 So. 631, 632–33 (Fla. 1895). Here, there were no subscribing witnesses to the Affidavit so a "proof" cannot be used to properly execute the document.

be done or proved to make such acknowledgment or proof effectual." § 695.04, Fla. Stat. (2019).[7] A "jurat or certificate of acknowledgment shall contain . . . (b) The type of notarial act performed, an oath or an acknowledgment, evidenced by the words 'sworn' or 'acknowledged.'" § 117.05(4), Fla. Stat. (2019). "When notarizing a signature, a notary public shall complete a jurat or notarial certificate in substantially the same form as those found in subsection [117.05](13)." *Id.*

While subsection (13) states that the forms it provides do not preclude the use of other forms, it also states that the forms "are sufficient for the purposes indicated." § 117.05(13), Fla. Stat. (2019). The example form for "an oath or affirmation" uses the phrase "[s]worn to (or affirmed) and subscribed before me . . ." § 117.05(13)(a), Fla. Stat. (2019). Both example forms for an acknowledgment use the phrase "[t]he foregoing instrument was acknowledged before me . . ." *Id.* at (13)(b), (c).

Appellee asserts that because Trzcinski's signature on the Termination of Lease Affidavit was not notarized using the term "acknowledged" and was instead notarized using the words "sworn to and subscribed before me," that it was not entitled to have been recorded in the public land records. Appellee's argument continues that, if it should not have been recorded, then the Termination of Lease Affidavit with attached copies of the Lease Termination Agreement would not give subsequent purchasers of Parcel 6A constructive notice of the restrictive covenant. Appellee relied upon *Summa Investing Corp. v. McClure*, 569 So. 2d 500 (Fla. 3d DCA 1990), for the proposition that a defectively

[7] This statute was amended in 2019, effective January 1, 2020, to add the words "as set forth in s. 117.05" at the end of the previous version of the statute.

notarized document is not entitled to recordation and does not provide constructive notice to subsequent purchasers.

The trial court agreed with Appellee's arguments, relied upon *Summa Investing,* and ruled that Appellee would not be bound by the restrictive covenant. The question in *Summa Investing* was not whether the notary public used proper terminology in confirming that the mortgagor's signature was genuine. In that case, the notary public who witnessed and notarized the mortgagor's signature was in fact one of the mortgagees. *Id.* at 501. Under Florida law, an interested person who will benefit from the documented transaction cannot serve as either a witness or notary public. *Id.* at 502. Because that notary public could not legally witness or acknowledge the mortgagor's signature, the court in *Summa Investing* treated the mortgage as though it had not been acknowledged or witnessed; thus it was not a recordable document, and was deemed to be a nullity in terms of providing constructive notice. *Id.*

We find that both the Appellee and the trial court failed to distinguish between the absolutely void notarization of a signature in *Summa Investing* and the sufficiency of the notarization of Trzcinski's signature on the Affidavit of Lease Termination. In *Edenfield v. Wingard*, the Florida Supreme Court upheld the recordation of an imperfectly notarized mortgage. 89 So. 2d 776 (Fla. 1956). In that case, C.B. Edenfield gave a mortgage to E.B. Edenfield. *Id.* at 777. However, the notary public mixed up the two parties' roles, and stated in the jurat that E.B. Edenfield acknowledged that he executed the mortgage. The supreme court stated, "that the whole of the instrument acknowledged may be resorted to for support of the acknowledgment." *Id.* at 778. The mortgage itself, apart from the jurat, clearly indicated that C.B. Edenfield was the mortgagor and E.B. Edenfield

was the mortgagee. "[W]herever substance is found, obvious clerical errors and all technical omissions will be disregarded." *Id.* (citation omitted). The supreme court held that when considering the entire document, misidentifying the mortgagee as though he were the mortgagor in the jurat did not void the notarization; thus, the mortgage was recordable and gave constructive notice to third parties.

The case at hand is more similar to *Edenfield* than it is to *Summa Investing*. Nobody contends that the notary public, here, was legally unauthorized to notarize the signature on the controlling document, as was the case in *Summa Investing.* Rather, the question here, as in *Edenfield*, is whether the notarized document and the notary public's statement adequately confirmed that the signature was affixed by the person purporting to execute the document.

Section 695.03(4) and section 695.26(4) preserve constructive notice imparted by documents that do not strictly comply with technical notarial requirements. Subsection 695.03(4), adopted in 2019,[8] states:

> All affidavits [or] oaths . . . taken, administered, or made in any manner as set forth in subsections [695.03](1), (2), and (3) are validated and upon recording may not be denied to have provided constructive notice based on any alleged failure to have strictly complied with this section, as currently or previously in effect, or the laws governing notarization of instruments. This subsection does not preclude a challenge to the validity or enforceability of an instrument or electronic record based upon . . . any other basis not related to the notarial act or constructive notice provided by recording.

Although the effective date of the provision was January 1, 2020, it is retroactive due to the inclusion of the phrase "as currently or previously in effect[.]" *Id.* Furthermore, Section 695.26(4), enacted before Appellee purchased the property, states that "[t]he failure of

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[8] Section 695.03, section 95.231(1), and section 694.08, Florida Statutes (2019), were all amended by the same law. *See* Fla. HB 409 (2019).

the clerk of the circuit court to comply with this section does not impair the validity of the recordation or of the constructive notice imparted by recordation." § 695.26(4), Fla. Stat. (1990).

Here, the jurat confirms that the Termination of Lease Affidavit was sworn to and signed by Trzcinski in the presence of the notary public. The attached copies of the Lease Termination Agreement, which were discussed and incorporated by reference, laid out the nature of the restrictions and the agreement of all parties to imposing those restrictions. The fact that the notarization was in the form consistent with an affidavit, rather than an acknowledgment in the form consistent with real estate documents is, at most, a failure of strict compliance with the statutory requirements. Under both *Edenfield* and section 695.03, the notarization of Trzcinski's signature was sufficient to permit the Termination of Lease Affidavit to be recorded, which in turn, provided binding constructive notice to Appellee. Thus, the trial court erred in finding to the contrary.

The trial court also erred in finding that the Lease Termination Agreement and the Termination of Lease Affidavit were not signed by the owners of the property which would be burdened by the restrictive covenant. The trial court found that the Lease Termination Agreement was not executed by Area Properties, LLC, who was the record owner; however, in doing so, the trial court did not fully take into account the document as a whole, as *Edenfield* clearly requires. In the Lease Termination Agreement, the parties chose to abbreviate Area Properties, LLC, owner of Parcel 6A, and Robert Ferris, managing member of Area Properties, LLC, simply as "Ferris." That abbreviation permitted Robert Ferris to execute the agreement on behalf of Area Properties, LLC, without requiring any further statement of representative capacity in the signature block.

Likewise, the trial court erred in finding that the Affidavit of Lease Termination was not properly executed, because the affidavit says that Trzcinski "is the Manager of Orange Commons, LLC ("LLC") and LLC is to become the owner" of Parcel 6A rather than saying he or it "is" the owner of Parcel 6A. The affidavit also identifies Trzcinski as president of Primerica and states that Primerica assigned the contract for purchase and sale of Parcel 6A to Orange Commons, LLC. The affidavit was executed on the same day that Parcel 6A was deeded to Orange Commons, LLC. Furthermore, the affidavit confirms the overall use restriction agreement entered into by Pantry, Areas Properties, LLC, Ferris, Trzcinski, and Primerica. The Affidavit of Lease Termination was recorded on the same day and in sequence with the deed from Area Properties, LLC, to Orange Commons, LLC; thus, ownership was clearly established. If anything, the belt and suspenders approach employed here amounts to overinclusion of every conceivable owner of the property imposing the restrictive covenant; it does not render it void. Thus, the restrictive covenant is binding upon Appellee.

We reverse the trial court's entry of summary judgment in favor of Appellee and remand for entry of summary judgment in favor of Appellant.

REVERSED AND REMANDED WITH INSTRUCTIONS.

ORFINGER and COHEN, JJ., concur.