RENDERED: November 25, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-002300-MR

JUDY PONDER — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE DENNIS A. FRITZ, JUDGE
ACTION NO. 96-CI-000222

JANET PHILPOT — APPELLEE

AND

NO. 1996-CA-002946-MR

JUDY PONDER — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE DENNIS A. FRITZ, JUDGE
ACTION NO. 96-CI-000222

NORTHWOOD EAST HOMEOWNERS ASSOCIATION, INC.; OLDHAM COUNTY PLANNING AND ZONING COMMISSION; JANET PHILPOT — APPELLEES

OPINION
AFFIRMING

* * * * * * *

BEFORE: ABRAMSON, DYCHE, and HUDDLESTON, Judges.

ABRAMSON, JUDGE[1]: Judy Ponder, an Oldham County property owner, appeals pro se from July 19, 1996, and August 22, 1996, judgments and orders of Oldham Circuit Court dismissing her complaint against the Northwood East Homeowners Association, Inc. (the Association), of which she is a member; against fellow Association member and fellow Northwood East subdivision resident Janet Philpot; and against the Oldham County Planning and Zoning Commission. Ponder's complaint alleged that Philpot was building a fence and tack shed that violated various restrictive covenants applicable throughout the subdivision and further alleged that the Association and Zoning Commission had breached duties to enforce and uphold those covenants. Philpot responded to the complaint by moving, in effect, for summary judgment, and, when Ponder failed to respond to Philpot's motion, the trial count summarily dismissed the complaint against Philpot with prejudice. Ponder then moved to have the summary judgment reconsidered. Following a full hearing on the motion to reconsider, the trial court reasserted its former judgment and dismissed the complaint against the other defendants as well. On appeal, Ponder maintains that the trial court erred initially by dismissing her complaint and then abused its discretion by refusing to vacate

[1]This opinion was prepared and concurred in prior to the departure of Judge Abramson from the Court on November 22, 1998.

the erroneous judgment. Finding neither error nor abuse of discretion, we affirm.

At bottom, Ponder's complaint concerns improvements Philpot undertook on her 2.9 acre lot in preparation for keeping a horse, a use expressly permitted by the deed restrictions. Philpot fenced about a third of her lot for the horse, but did so in a manner which Ponder believes violates a deed restriction against "dividing" lots. Philpot also constructed a tack shed/stable which Ponder insists violates a deed restriction requiring that outbuildings "be neat and attractive in appearance and similar in design to the residence." As noted above, the trial court did not fully reach the merits of Ponder's claims in light of procedural lapses by Ponder's counsel. Ponder now contends that counsel's errors were not so egregious as to preclude the full development of her case. We agree with Ponder that in general summary disposition "is not to be used as a sanctioning tool of the trial courts." Ward v. Housman, Ky. App., 809 S.W.2d 717, 719 (1991). We further agree that summary judgments are to be cautiously applied, not as a substitute for trial, but only when there is no genuine issue of material fact so that judgment may be entered as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). Our review of these matters is *de novo*. Steelvest, *supra*.

Ponder filed her complaint on May 7, 1996. At that time, apparently, Philpot had begun but had not completed the fence and shed at issue. Accordingly, Ponder's complaint sought

to enjoin further construction until Philpot's alleged non-compliance with the restrictive covenants could be ruled upon. Her request for temporary injunctive relief, however, did not comply with the requirements of CR 65.04, and so was allowed to abate. In the meantime Philpot completed the improvements to her property. On May 30, 1996, Philpot moved to dismiss Ponder's complaint pursuant to CR 12.02 on the ground that the complaint failed to state a claim for which relief could be granted. She attached to the motion an affidavit in which she asserted that prior to her construction of the fence and shed she had obtained the written approval of both the Zoning Commission and the Association. Philpot also attached copies of these approvals to her motion. This affidavit, upon which the trial court relied, converted Philpot's motion to one for summary judgment under CR 56. McCray v. City of Lake Louisvilla, Ky., 332 S.W.2d 837 (1960).

By order entered June 3, 1996, the trial court gave Ponder 20 days in which to respond to Philpot's motion. On July 19, 1996, no response having been filed, the trial court granted summary judgment to Philpot.

Not surprisingly, the dismissal of his client's case prompted a flurry of activity by Ponder's counsel. On July 22, 1996, he belatedly filed a motion for extra time in which to respond to the motion to dismiss. On July 29, 1996, at the eleventh hour, he tendered via the night depository a CR 59.05 motion to vacate the dismissal. On August 5, having learned that his CR 59.05 motion had not been received by the clerk and had not been filed, he filed a motion pursuant to CR 60.02, again

seeking to have the July 19 judgment set aside. Attached to that motion was a copy of the allegedly tendered CR 59.05 motion.

On August 8, 1996, the trial court convened a hearing to consider the issues raised by Ponder's post-judgment motions. At the hearing, counsel claimed that he had not received notice of the court's twenty-day response deadline, and indeed the court's letter giving such notice had been returned as undeliverable. Counsel acknowledged, however, that the court had correctly used the mailing address counsel had provided and that counsel had failed to apprise the court of potential problems with that address or to supply an alternative. Counsel affirmed that he had seasonably tendered his CR 59.05 motion, but he acknowledged that the motion had not found its way to the clerk. Correctly, we believe, the trial court opined that counsel's problems were of his own making and did not present a case of excusable neglect. Nevertheless, mindful that Ponder would bear the brunt of counsel's omissions and that she did not appear to share responsibility for his conduct, the trial court looked to the substance of Ponder's claims and allowed her an opportunity to bolster her allegations. Without actually ruling on the merits of contentions not raised prior to its summary judgment, the trial court undertook to assess the likelihood of Ponder's success were her complaint to be reinstated. Under Ward v. Housman, supra, and CR 59.05[2], this was an appropriate inquiry.

[2]The trial court did not state whether it was reconsidering its judgment pursuant to CR 59.05 or CR 60.02. Apparently it did both. We note that CR 60.02 does not provide a substitute for CR 59.05 should the relief provided by that rule be waived or neglected. Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983).
(continued...)

Philpot's new fence extends across the entire depth of her lot from front to back. Ponder maintains that such a fence violates a deed restriction providing that no lot "shall be divided or diminished in size unless the same shall be used with an adjacent lot for purpose of constructing one dwelling thereon." The trial court understood this restriction as most probably referring to a division of the lot by transfer of ownership, not to the sort of merely superficial division Philpot has made. It deemed Ponder's interpretation of the restriction unlikely to be adopted by a court. We agree. On its face the restriction is concerned with assuring that no additional residences be squeezed into the development and that each residence be on a suitably spacious lot. The restriction does not seem to address the individual lot owner's use of his or her land, and Ponder has suggested no reason to conclude otherwise.

Ponder's other claim concerns Philpot's tack shed/stable, which Ponder alleges is so unlike Philpot's residence as to violate the subdivision's uniformity requirement. She objects to the fact that the shed's walls were finished in plywood although the residence has a brick exterior, and she complains that the shed simply looks different from the residence. Ponder concedes, however, that Philpot obtained approval for her project from the Association, and she apparently does not dispute that the Association has authority to screen

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[2](...continued)
The court's finding that counsel's tardiness was not excusable foreclosed any relief under CR 60.02. It is only under CR 59.05 that the trial court's more extensive review of Ponder's claims was warranted.

building projects for compliance with the deed restrictions. She concedes that the colors and roof lines of the shed and residence are recognizably similar. She also concedes that the restriction at issue, which requires that outbuildings be "neat and attractive in appearance and similar in design to the residence," is so vague that it necessarily invests the Association with broad discretion in its application. She contends, nevertheless, that the Association misapplied the restriction in this case and that its approval of Philpot's project is subject to judicial review along with the project itself.

In LaVielle v. Seay, Ky., 412 S.W.2d 587 (1967), our highest Court upheld the enforceability of a similarly vague deed restriction, the application of which had been assigned to a homeowners association. The Court qualified its approval of such covenants, however, by noting that any such restriction must further a clearly legitimate purpose of the property owners and that any application of the restriction must be reasonable and in good faith. We thus agree with Ponder that the Association's approval of Philpot's project is subject to judicial review, but, as the trial court noted, the scope of that review is more limited than Ponder suggests. We (and the trial court) are concerned not with whether the Association's decision could be deemed "incorrect" or whether a different reviewer might have reached a different decision, but instead with whether the Association acted arbitrarily or in bad faith. Cf. Raintree Homeowners Association, Inc. v. Bleiman, 342 N.C. 159, 463 S.E.2d 72 (1995) (holding that lack of evidence of the homeowners Association's bad faith or arbitrariness entitled the Association

to a directed verdict against a challenge to its application of an architectural uniformity covenant).

Ponder has alleged nothing which could be construed as evidence of the Association's bad faith or its arbitrariness. Although the Association's review of Philpot's plans appears to have been somewhat informal, Ponder does not allege that no review took place, that the Association's review procedure violated covenant requirements, or that the approval of Philpot's project is strikingly at odds either with the terms and intent of the restrictions or with the Association's review of other projects. We thus agree with the trial court that even in light of Ponder's belatedly urged allegations, were her complaint to be reinstated there is very little chance that it would survive a renewed motion for summary judgment. The trial court did not err, therefore, or abuse its discretion by refusing to vacate its July 19, 1996, dismissal of Ponder's complaint against Philpot.

Nor did the trial court err by dismissing Ponder's complaint against Northwood East Homeowners Association, Inc., and the Oldham County Zoning Commission. Philpot would be an indispensable party in Ponder's action against either of the remaining defendants, so that Philpot's dismissal renders the other actions improper. CR 19.02. Furthermore, Ponder failed to allege a breach of duty by either the Association or the Zoning Commission. As noted above, Ponder did not allege that the Association had acted arbitrarily or in bad faith in reviewing and approving Philpot's improvements. And while it is generally true that zoning ordinances do not override restrictive covenants, Osborne v. Hewitt, Ky., 335 S.W.2d 2 (1960), this does

not imply that zoning officials have a duty to enforce such covenants[3]. Meyer v. Stein, 284 Ky. 497, 145 S.W.2d 105 (1940). On the contrary, generally only those persons with an interest in the affected land may seek enforcement of deed restrictions. See Annotation: "Comment Note.--Who may enforce restrictive covenant or agreement as to use of real property," 51 A.L.R. 3rd 556 (1973). Ponder has suggested no reason to think that the Oldham County Zoning Commission might be subject to an exception to this rule, nor has she identified any source of the Zoning Commission's alleged duty.

For these reasons, we affirm the July 19, 1996, and August 22, 1996, judgments and orders of Oldham Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Judy L. Ponder
Crestwood, Kentucky

BRIEF FOR APPELLEE, NORTHWOOD EAST HOMEOWNERS ASSOCIATION, INC.:

James F. Williamson
LaGrange, Kentucky

BRIEF FOR APPELLEE, OLDHAM COUNTY PLANNING AND ZONING COMMISSION:

John R. Fendley
LaGrange, Kentucky

BRIEF FOR APPELLEE, JANET PHILPOT:

Roy Kimberly Snell
LaGrange, Kentucky

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[3]The Oldham County Zoning Ordinances incorporate this rule:

> In the case of any conflict between this ordinance, or part thereof, and the whole or part of any existing or future private covenants or deed, the most restrictive shall apply . . .

Article XV, Section 1501, paragraph 3.