RENDERED: March 11, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000134-MR

RICHARD MARBERRY, AND HIS WIFE[1] APPELLANTS

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 03-CI-00093

DAVID RAY FRASER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND MINTON, JUDGES.

JOHNSON, JUDGE: Richard Marberry has appealed from the August 21, 2003, order of the Lyon Circuit Court which granted summary judgment in favor of David Ray Fraser. Marberry claimed that Fraser violated the "restrictions and regulations controlling

[1] Marberry's complaint, the notice of appeal, and all documents of record in this case list "Richard Marberry, et ux", "Richard Marberry and his wife", or refer to "Plaintiffs". However, the wife's name is not mentioned in either the notice of appeal or in the circuit court record. Kentucky Rules of Civil Procedure (CR) 73.03(1) provides "[t]he notice of appeal shall specify by name all appellants and all appellees ('et al.' and 'etc.' are not proper designation of parties)[.]" Thus, there is a question as to whether Marberry's wife is a party to his appeal and whether she would be entitled to any relief granted in this appeal, but since we affirm, her status is moot.

the management, improvement and appearance of [a] subdivision[,]" known as Champion Hills Subdivision, by the "placing of a mobile home[2] on Lot No. 1." Having concluded that there is no genuine issue as to any material fact and that Fraser is entitled to judgment as a matter of law, we affirm.

Sometime in 1960, W. Herbert Champion developed a tract of land in Kuttawa, Lyon County, Kentucky, called Champion Hills Subdivision. A subdivision plat was recorded in the Office of the Lyon County Clerk,[3] but evidently it contained no restriction concerning a mobile home. Further, there was no deed of restrictions or any other instrument filed imposing restrictions upon the subdivision.

On July 12, 1968, Champion conveyed, by deed, Lot No. 18 of Champion Hills Subdivision to Farm Fans, Inc. After various changes in ownership, Lot No. 18 is now owned by Marberry.[4] Several conditions and restrictions were listed in the 1968 deed regarding Lot No. 18, including:

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[2] Fraser contends that his manufactured home does not constitute a "mobile home" under the alleged restrictions. Since we are affirming the trial court's determination that the restriction on a mobile home does not apply to Fraser's lot, whether Fraser's manufactured home is a mobile home is moot.

[3] Although Marberry states in his brief that the plat of Champion Hills Subdivision was recorded in Plat Book 3, pages 3-4 in the Office of the Lyon County Clerk, we were not provided with a copy of said plat in the record on appeal. Because the existence of this plat does not appear to be disputed, we accept it as true.

[4] Marberry refers to the 1968 deed in his brief and a copy of the 1968 deed was filed in the trial court record. However, the deed to Marberry for Lot No. 18 of Champion Hills Subdivision is not found anywhere in the record.

> The following conditions and restrictions are part of the consideration for this deed and run with the land, without which this deed of conveyance would not have been made[:]
>
> . . .
>
> 2. No trailers or mobile homes shall be placed on this property herein conveyed, except, this shall not be construed to prohibit the use of same for purposes other than living quarters during construction by any builder.

On June 10, 1988, several lots in Champion Hills Subdivision were sold to Marshall B. Fraser, including Lot No. 1, which is at issue herein. Following Marshall Fraser's death on June 16, 2001, Lot No. 1 of Champion Hills Subdivision was transferred to his children, including David Fraser, pursuant to Marshall Fraser's last will and testament. On December 18, 2001, David Fraser's siblings and their spouses conveyed by deed to David Fraser, a single person, their interests in Lot No. 1 of the subdivision. This deed contained no conditions or restrictions on Lot No. 1 of Champion Hills Subdivision.[5]

In 2002 David Fraser purchased a manufactured home and placed it on Lot No. 1 of Champion Hills Subdivision on a permanent, concrete foundation. On May 1, 2003, Marberry filed

[5] In his brief, Marberry quoted from a deed dated July 1, 1987, conveying property from the survivor of Champion, Robert Frances, to R. Stephen Canfield. He also quoted from a deed dated June 10, 1988, conveying property from Canfield to Marshall B. Fraser. The quotations taken from the deeds state that both deeds "contained only a general reference to 'valid and legally enforceable restrictions of record.'" However, neither the 1987 deed to Canfield nor the 1988 deed to Marshall Fraser is in the record on appeal.

a complaint for injunctive relief in the Lyon Circuit Court, alleging that David Fraser had violated "the restrictions and regulations controlling the management, improvement and appearance of [Champion Hills Subdivision]" by placement of the manufactured home on Lot No. 1.

On July 23, 2003, David Fraser filed a motion for summary judgment, claiming that Marberry's complaint did not "identify any conditions, restrictions, regulations or covenants that would prohibit placement of a mobile home on Defendant's lot." David Fraser claimed the complaint "merely references conditions and restrictions that are applicable to the Plaintiff's lot." In his response to the motion for summary judgment, Marberry argued that all lots contained within Champion Hills Subdivision were bound by the restrictions contained in the 1968 deed between Champion and Farm Fans, Inc.

The trial court, citing Oliver v. Schultz,[6] entered an order on August 21, 2003, granting summary judgment in favor of David Fraser. Marberry filed a motion for relief from judgment, or in the alternative, a motion for specific findings on September 2, 2003. That motion was denied by the trial court on December 19, 2003, and this appeal followed.

Marberry concedes that there is no genuine issue as to a material fact, but he contends that he, rather than David

[6] 885 S.W.2d 699 (Ky. 1994).

Fraser, was entitled to a judgment as a matter of law. An appellate court's standard of review of a trial court's summary judgment is whether the trial court correctly concluded that there was no genuine issue as to any material fact and that summary judgment was correctly granted as a matter of law.[7] Since legal questions are at issue and not findings of fact, an appellate court need not defer to the trial court's decision on summary judgment and its review is de novo.[8]

The crux of Marberry's argument is that all lots located in Champion Hills Subdivision, including David Fraser's Lot No. 1, are bound by the same restrictions. Marberry's argument is flawed because he fails to recognize that neither David Fraser's deed, nor any deed in his chain of title, nor any plat contains such a restriction. Instead, Marberry attempts to impose restrictions on Fraser's Lot No. 1 through the common law doctrine of reciprocal negative easement. A reciprocal negative easement has been defined as follows:

> An implied restrictive agreement or reciprocal negative easement has been defined as a covenant which equity raises and fastens upon the title of a lot or lots carved out of a tract that will prevent their use in a manner detrimental to the enjoyment and value of neighboring lots sold

[7] Scfries v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03.

[8] See Barnette v. Hospital of Louisa, Inc. 64 S.W.3d 828, 829 (Ky.App. 2002); and Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky.App. 2001).

> with express restrictions in their conveyance.[9]

As explained in First Security National Bank & Trust Co. of Lexington v. Peter:[10]

> "[I]n order for a reciprocal negative easement to arise, there must have been a common owner of the related parcels of land, and in his various grants of the lots he must have included some restriction, either affirmative or negative, for the benefit of the land retained, evidencing a scheme or intent that the entire tract should be similarly treated, so that once the plan is effectively put into operation, the burden he has placed upon the land conveyed is by operation of law reciprocally placed upon the land retained."[11]

The equitable doctrine of reciprocal negative easement arose prior to the creation of comprehensive zoning as a method to protect a purchaser of a lot who had a reasonable expectation that all the lots in a general development would be equally burdened and benefited according to the plan of development.[12]

Marberry asserts that the covenants and restrictions listed in the 1968 deed apply to all lots in Champion Hills Subdivision. Marberry cites Paine v. La Quinta Motor Inns,

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[9] 20 Am.Jur.2d Covenants, Conditions, & Restrictions § 157 (Supp. 2004).

[10] 456 S.W.2d 46 (Ky. 1970).

[11] Id. at 50 (quoting 20 Am.Jur.2d Covenants, Conditions, & Restrictions § 173). See also Bellemeade Co. v. Priddle, 503 S.W.2d 734 (Ky. 1973).

[12] See generally McCurdy v. Standard Realty Corp., 295 Ky. 587, 175 S.W.2d 28 (1943).

Inc.,[13] for the proposition that restrictive covenants cover all the lots of a subdivision, even if the restriction is not located in the direct chain of title.

However, our Supreme Court in Oliver overruled Paine and Bishop v. Rueff,[14] in part and held that a restrictive covenant appearing collaterally in a grantee's chain of title was not enforceable against the grantee. The Court in Oliver specifically stated:

> Again, even actual notice of a restriction created between parties by an unrecorded contract is insufficient to place a subsequent grantee on notice of the restriction. To the extent that Paine reaches an opposite conclusion, it is hereby overruled.[15]

As to Bishop, this Court had previously held:

> Where the owners of two or more lots situated near one another convey one of the lots with express restrictions applying thereto in favor of the land retained by the grantor[s], the servitude becomes mutual, and during the period of restraint the owner[s] of the lots retained may do nothing that is forbidden to the owner of the lot sold.[16]

[13] 736 S.W.2d 355 (Ky.App. 1987).

[14] 619 S.W.2d 718 (Ky.App. 1981).

[15] Oliver, 885 S.W.2d at 701-02.

[16] Bishop, 619 S.W.2d at 720-21.

But the Supreme Court in Oliver sought to clarify the law by substantially restricting application of the doctrine of reciprocal negative easement:

> [W]e hold that Bishop is only applicable under two circumstances: first, where the remainder of the grantor's property is restricted in a deed of conveyance in such a manner that the restriction runs with the land; and second, that a subdivision plat, a deed of restrictions, or some other instruction of record is filed that would place an ordinary and reasonably prudent attorney performing a title search on notice of the restrictions in question [emphasis original]. To the extent that Bishop allows a restriction placed in a collateral chain of title to bind a subsequent grantee in the absence of a recorded subdivision plat or deed of restrictions, it is overruled. In the future, restrictive covenants will be enforced under Kentucky law only when the restriction is placed in a recorded instrument, actual notice of a purported restriction notwithstanding.[17]

Thus, Oliver requires that in order to establish a reciprocal negative easement, a recorded instrument evidencing the restrictive covenant must be placed directly in the grantee's chain of title. In this case, no such recorded instrument exists. While Marberry argues that the 1968 deed evidences the mobile home restriction, the trial court determined that "[t]here are not restrictions or covenants in the Defendant's chain of title, and there are no restrictive covenants filed of record in the Lyon County [ ] Clerk's Office

[17] Oliver, 885 S.W.2d at 701.

for Champion Hills Subdivision." Since we have not been provided with either a copy of the plat of Champion Hills Subdivision or any other deeds in David Fraser's chain of title, we must assume that the record below supported the trial court's ruling.[18] Therefore, we conclude that the trial court was correct as a matter of law in ruling that the covenants and restrictions referred to by Marberry do not apply to David Fraser.

For the foregoing reasons, the summary judgment of the Lyon Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Kenneth V. Anderson, Jr. Paducah, Kentucky	B. Todd Wetzel Princeton, Kentucky

[18] Commonwealth, Department of Highways v. Richardson, 424 S.W.2d 601, 604 (Ky. 1968).