

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000216-MR

WALTER ALLRED, individually;
and IRVIN COBB MARINA, INC.

APPELLANTS

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 07-CI-00474

JOHN J. DIETRICH,
SUSAN DIETRICH and
IRVIN COBB RESORT, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND ACREE, JUDGES; HARRIS,¹ SENIOR JUDGE.

CLAYTON, JUDGE: Walter Allred and Irvin Cobb Marina, Inc. (“Appellants”)

have appealed from the Calloway Circuit Court’s order awarding summary

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

judgment to John and Susan Dietrich and Irvin Cobb Resort, Inc. (“Appellees”) and finding that Appellants must abide by an agreement concerning certain uses of both Appellants’ and Appellees’ properties. Because the trial court properly concluded that the agreement was a covenant, easement, and restriction running with the land, we affirm.

Clifton and Patricia Roberson and Irvin Cobb Resort, Inc. (the “Resort”) initially owned a tract of land adjacent to Kentucky Lake (the “Original Tract”). In October 1995, the Robersons and the Resort conveyed to Irvin Cobb Marina, Inc. (the “Marina”) and Paul Krueger, its president, a portion of the Original Tract directly adjacent to Kentucky Lake which included a boat launch ramp (the “Conveyed Tract”). As part of this conveyance the parties executed an Agreement to Agree dated October 12, 1995 (the “Agreement”), which was recorded with the clerk’s office in Calloway County. The Agreement stated that the patrons of the Resort had the right to use the boat launch ramp located on the Conveyed Tract, and that the patrons of the Marina had the right to use a parking lot located on the remaining portion of the Original Tract. The boat launch ramp in question provided the only access to Kentucky Lake for Appellees and their patrons.

Subsequently, Walter Allred purchased the Conveyed Tract from the Marina and Krueger in June 2001. In addition to a deed to convey the property,

the parties entered into an Assignment of the Agreement to Agree (the “Assignment”). The Assignment assigned the rights and obligations of the Marina and Krueger under the Agreement to Allred. The remaining portion of the Original Tract was ultimately conveyed to John and Susan Dietrich, with the land contract incorporating the terms of the Agreement and the Assignment.

Although Allred adhered to the provisions of the Agreement and Assignment for a period of approximately six years after he purchased the Conveyed Tract, beginning in September 2007, Allred began refusing to permit Appellees’ patrons to use the boat ramp without paying a fee. In October 2007, Appellees filed suit against Appellants alleging that Appellants had violated the Agreement and sought enforcement through an injunction. The trial court entered a temporary injunction ordering Appellants to abide by the Agreement. Both parties filed motions for summary judgment, and the trial court granted summary judgment in favor of Appellees, determining that the Agreement constituted a covenant, restriction, and easement that ran with the title of the land, and therefore that Appellant was required to abide by its terms. Appellants subsequently filed a motion to reconsider, which was denied by the trial court. This appeal followed.

When a trial court grants a motion for summary judgment, the relevant standard of review is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Scrifes v. Kraft*, 916 S.W.2d 779, 781 (Ky. App.

1996)). The party opposing summary judgment must present “at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Lewis*, 56 S.W.3d at 436 (quoting *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991)). The trial court must “view the evidence in the light most favorable to the nonmoving party[.]” *Id.* (citing *Steelvest*, 807 S.W.2d at 480-82). Because summary judgment involves only legal issues, “an appellate court need not defer to the trial court’s decision and will review the issue *de novo*.” *Lewis*, 56 S.W.3d at 436.

With these standards in mind, we will examine Appellants’ claims of error. Appellants first claim that the trial court erred in finding that the Agreement was a covenant, restriction, and easement that runs with the title to the land.² The Supreme Court of Kentucky has found that a contract between a grantor and a grantee can create a covenant or restriction upon the use of land. *Oliver v. Schultz*, 885 S.W.2d 699, 701 (Ky. 1994). Under Kentucky law:

[t]he criteria for determining whether a covenant runs with the land or is merely personal between the grantor and the grantee include the intent of the parties, whether the covenant must affect or concern the land with which it runs, and whether privity of estate exists between the party claiming the benefit and the party who rests under the burden.

² Specifically, Appellant asserts that the trial court found that the Agreement was a reciprocal negative easement. However, we do not believe this doctrine is applicable, as it is generally applied in situations where a party wishes to place a restriction on the use of a parcel of land in order to preserve the physical integrity of a larger development, such as a residential subdivision. *See Reiger v. Wessel*, 319 S.W.2d 855 (Ky. 1958); *Galbreath v. Miller*, 426 S.W.2d 126 (Ky. 1968); and *First Security National Bank & Trust v. Peter*, 456 S.W.2d 46 (Ky. 1970).

Oliver, 885 S.W.2d at 700 (quoting *Bishop v. Rueff*, 619 S.W.2d 718, 720 (Ky. App. 1981)). Additionally, a restriction cannot create a burden running with the land unless it is recorded in an instrument of record “that would place an ordinary and reasonably prudent attorney performing a title search on notice of the restrictions in question.” *Oliver*, 885 S.W.2d at 701.

The Supreme Court of Kentucky has stated that the applicable intent when determining whether a covenant runs with the land is that of the original promisor and promisee, and whether those parties intended the burden to run with the land. *Paine v. La Quinta Motor Inns, Inc.*, 736 S.W.2d 355, 358 (Ky. App. 1987) (overruled on another point by *Oliver*, 885 S.W.2d at 702). The Court in *Paine* additionally held that the burden of a covenant touched and concerned the land because the parcels were adjacent, and because limiting the use of the grantor’s land would enhance the value of the grantee’s land. Finally, Kentucky courts have held that the requisite privity of estate is met when a grantor-grantee relationship exists at the time the restriction is created. *Fishback v. Dozier*, 362 S.W.2d 490, 491 (Ky. 1962).

In this case, we agree with the trial court that the Agreement created a covenant that runs with the land. It is evident from the language in the Agreement and the conduct of the parties that they intended subsequent purchasers of the adjacent property to be bound. Further, both the original grantor and the original grantee provided affidavits that it was their intention that subsequent purchasers would be bound, as the need to have access to the lake would always be an

essential part of any business operating on the property. As in *Paine*, the restriction relates to the land sold to Appellees in that both parcels are adjacent, and allowing Appellees patrons free access and use of the boat ramp and the patrons of Appellants free use of the parking lot enhances the value of both tracts. Additionally, the privity of estate required under *Bishop* and *Oliver* is present, as a grantor-grantee relationship existed between the original promisor and promisee at the time of the creation of the restriction. Finally, the Agreement was recorded within the chain of title.

Because we have determined that the Agreement created a covenant that runs with the land, we need not address Appellants' arguments that the Agreement or Assignment could be terminated at will by the parties.

Based on the foregoing, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Dennis L. Null, Jr.
Mayfield, Kentucky

BRIEF FOR APPELLEES:

Trevor H. Coleman
Murray, Kentucky