

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000504-MR

CLAY HORN AND
SUSAN KAY HORN

APPELLANTS

v. APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 08-CI-00271

ROBERT MESSAMORE
AND JANET MESSAMORE

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND COMBS, JUDGES.

TAYLOR, CHIEF JUDGE: Clay Horn and Susan Kay Horn bring this appeal from a March 5, 2010, Second Amended Order & Judgment of the Garrard Circuit Court, amending earlier orders entered February 8, 2010, and December 7, 2009, that dismissed the Horns' complaint as being time barred and awarding Robert

Messamore and Janet Messamore attorney's fees and costs. We affirm in part, reverse in part, and remand.

The relevant facts are uncontroverted. In July of 1999, the Horns purchased Lot 17 in the Nature's Trace Subdivision in Garrard County and built their house thereon. Thereafter, in July 2001, construction started upon a house located on Lot 43 by C.T. Conn Builders, Inc., which was completed in August 2001. On September 22, 2003, the Messamores purchased Lot 43 and the new house built thereon.

In the recorded covenants and restrictions for Nature's Trace Subdivision,¹ Restriction number 9 required any dwelling on Lot 43 to front Palisades Pointe Drive. However, the house on Lot 43 was built fronting on Sylvan Way rather than Palisades Pointe Drive, clearly contrary to the subdivision restrictions.

On July 26, 2008, the Horns filed a complaint against the Messamores alleging breach of Restriction number 9. The Horns sought a "permanent mandatory injunction requiring removal of the offending dwelling and prohibiting the building of any dwelling in violation of the restriction on lot 43." Eventually, the circuit court rendered summary judgment for the Messamores, concluding that the Horns' action was time barred by the five-year limitation set forth in Kentucky Revised Statutes (KRS) 413.120(4). The circuit court further awarded the

¹ The record reflects that these restrictions were recorded on October 2, 1998, in the Garrard County Clerk's Office.

Messamores attorney's fees and costs in the amount of \$17,973.16, pursuant to Restriction number 23 of the subdivision restrictions. This appeal follows.

The Horns contend that the circuit court erred by concluding that their action was time barred under KRS 413.120(4). Specifically, the Horns argue that the Messamores were estopped from relying upon the statute of limitations as a defense. In support thereof, the Horns maintain:

When the Horns first noticed the Messamore house was being built on Lot 43 in violation of the subdivision restrictions, they met in person with the developer, Danny Irvin. In his affidavit Mr. Horn explains that Irvin said he knew of the violation, but that the committee responsible for enforcement did not intend to do anything because it had approved the building plans, as provided in Restriction No. 21. That restriction reads:

A three member Architectural Review [B]oard is to approve all buildings, including outbuildings. There must be written approval of plans by a (sic) least two members. The Review Board shall consist of Danny Irvin, Cliff-Ed Irvin, and Donnie Lane.

Horns' Brief at 7 (citations omitted). The Horns argue that the developer misled them into believing that an architectural review board had given written approval for the home on Lot 43 to face Sylvan Way; because of the Horns' reliance on this misrepresentation, the Messamores should be estopped from asserting the limitations defense.

In this Commonwealth, our Supreme Court has set forth the rule upon estoppel as to a defense against the statute of limitations:

[A] party may be estopped to plead limitations where he has induced inaction on the part of plaintiff by his false representations or fraudulent concealment. However, the fraudulent action must be of a character to prevent inquiry or elude an investigation or otherwise mislead the party having cause of action, and such party is under the duty to exercise reasonable care and diligence.

Burke v. Blair, 349 S.W.2d 836, 838 (Ky. 1961).

Herein, we do not believe the Horns have set forth a *prima facie* case of estoppel. First, the alleged false representation made by the developer in no way prevented the Horns from bringing an action seeking enforcement of the subdivision covenant. Restriction number 22 specifically states that all “restrictions shall continue in force unless changed by a vote of at least three-fourths (3/4) of all property owners.” In fact, the Horns admitted that the current action was filed even though they still believed that the architectural review board had given its written approval. Second, there are no allegations made against the Messamores nor evidence in the record that they in any way made misrepresentations to the Horns. Finally, regardless of the developer’s alleged misrepresentation, the Horns were still required to exercise reasonable care and diligence to protect their rights to enforce the restrictions. Clearly, the Horns should have conducted a reasonable inquiry into the basis of the alleged written approval by the developer and sought legal advice concerning their rights in 2001. Accordingly, we do not believe that the Horns set forth a *prima facie* case of estoppel. There being no grounds for estoppel, the time for bringing an action for breach or violation of the restrictions for the subdivision began to run in 2001,

when the Horns discovered that the house on Lot 43 was fronting on Sylvan Way. The Horns filed their complaint in 2008. They were clearly beyond the five-year limitation period.

Next, the Horns alleged that the circuit court erred in its award of attorney's fees to the Messamores. We disagree.

The law is well settled that a contractual provision providing for the award of attorney's fees is valid and enforceable. *Aetna Casualty & Surety Co. v. Com.*, 179 S.W.3d 830 (Ky. 2005); *Cummings v. Covey*, 229 S.W.3d 59 (Ky. App. 2007).

The Horns' and Messamores' lots were subject to recorded restrictions applicable to Nature's Trace Subdivision. In particular, Restriction number 23 reads:

Any lot owner may enforce the restrictions and covenants aforesaid by appropriate legal procedure. Invalidation of any one or more of these covenants by judgment or court order shall in no way affect any of the other provisions which shall remain in full force and effect. In any action to enforce these restrictions, the successful party shall be entitled to recover attorneys' fees incurred in said action.

Under Restriction number 23, the "successful party" is entitled to an award of attorney's fees in an action to enforce the restrictive covenants. We view a recorded restrictive covenant providing for attorney's fees as essentially constituting an enforceable contract providing for attorney's fees. KRS 411.195; *Triple Crown Subd. Homeowners Ass. Inc. v. Oberst*, 279 S.W.3d 138 (Ky. 2009). Additionally, valid restrictions and covenants set forth in deeds constitute property rights which run with the land. *McFarland v. Haney*, 258 S.W.2d 3 (Ky. 1953).

Accordingly, the restrictions are valid and enforceable as to the enforcement of a provision for attorney's fees.

Herein, the Horns filed a complaint seeking enforcement of Restriction number 9 and seeking attorney's fees "as provided in the restrictions." As the Messamores clearly prevailed in this action, we believe that the Messamores were entitled to attorney's fees under Restriction number 23.

Alternatively, the Horns argue that the award of attorney's fees and costs was excessive. The circuit court awarded the Messamores \$17,973.16 in attorney's fees and costs. Specifically, the Horns maintain that a \$200 per hour fee was unreasonable and that certain attorney's fees and costs should be disallowed.

As to the amount charged per hour, we think \$200 is both reasonable and well within the circuit court's discretion for which we find no abuse. *Angel v. McKeehan*, 63 S.W.3d 185 (Ky. App. 2001). However, we think the court erred by awarding any attorney's fees and costs incurred by the Messamores in pursuit of their third-party complaint against Charles T. Conn and Cathe M. Conn. In the third-party complaint, the Messamores claimed breach of warranty, fraud, and negligent misrepresentation. The Messamores' third-party complaint essentially alleged that the Conns sold Lot 43 with the home thereupon in violation of Restriction number 9.

Since the fees related to the third-party complaint were incurred to enforce the warranty provisions of the Messamores' deed, the circuit court erred by requiring the Horns to pay any attorney's fees associated therewith. The Horns

were not a party to the Messamores' third-party complaint and certainly cannot be considered the unsuccessful party responsible for the Messamores' attorney's fees and costs related thereto. As to the third-party complaint, attorney's fees are simply not recoverable from the Horns under Restriction number 23, and related costs are not recoverable from the Horns under Kentucky Rules of Civil Procedure 54.04. In all other respects, we conclude the circuit court's award of attorney's fees and costs was proper. Upon remand, the circuit court should recalculate its award of attorney's fees and costs and exclude any fees and costs associated with proceedings related to the third-party complaint.

For the foregoing reasons, the second amended order and judgment of the Garrard Circuit Court is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR

BRIEFS FOR APPELLANTS:

Richard Clay
Danville, Kentucky

BRIEF FOR APPELLEES:

Bruce E. Smith
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