RENDERED: NOVEMBER 20, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000492-MR

MAJESTIC OAKS HOME OWNERS ASSOCIATIONS, INC. APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 09-CI-00873

MAJESTIC OAKS FARMS, INC.;
JOSEPH D. AND ASHLEY P. O'BRIEN APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KRAMER, AND VANMETER, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Shelby Circuit Court granting summary judgment to the Appellees, Majestic Oaks Farms, Inc. and Joseph and Ashley O'Brien. Based upon the following, we affirm the decision of the circuit court.

BACKGROUND SUMMARY

Rudy and Sharon Lewis owned a farm in Simpsonville, Shelby County, Kentucky. In 1995, the Lewises formed Majestic Oaks Farms, Inc. (hereinafter "the Farms") to develop Majestic Oaks Equestrian Estates (hereinafter "the Estates"). The farm was divided into Sections 1-5. Sections 1-4 were developed and Section 5 has been designated for future development. Section 5 is dedicated to agricultural use only and is home to a saddlebred horse breeding and training facility. In order to access Section 5, vehicles use the private roadways of Sections 1-4. The "road tract" is located on tracts of land within Section 5.

In November of 2009, the O'Briens sought to purchase the road tract. This sale would cause the Farms to rely on the use of the Estates' private roadway to access Section 5. The Majestic Oaks Home Owners' Association (HOA) filed a declaratory judgment action with the Shelby Circuit Court seeking to (1) prohibit the sale of the road tract; (2) create a requirement that any future sale of the road tract must allow for the Farms to retain a perpetual easement over the road; (3) enter a judgment that the Farms may not use the Estates' private roadways for any purpose not related to residential development; and (4) to compel the Farms to contribute annual assessments to the HOA.

The parties filed motions for summary judgment. The trial court overruled the HOA's motion for summary judgment on Farms' right to use the Estates' private roadways. The trial court granted the O'Brien's motion for summary judgment in regards to the HOA's claim to prohibit the sale of the road

tract and the farm's motion that their easement be deemed not to have been terminated by the HOA's attempt to amend the Declarations. This appeal followed.

STANDARD OF REVIEW

In reviewing the granting of summary judgment by the trial court, an appellate court must determine 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. Kentucky Rules of Civil Procedure (CR) 56.03.

"[A] trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only [when] it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. [While] [t]he moving party bears the initial burden of [proving] that no genuine issue of material fact exists, . . . the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Community Trust Bancorp, Inc. v. Mussetter*, 242 S.W.3d 690, 692 (Ky. App. 2007). Since summary judgment deals only with legal questions as there are no genuine issues of material fact, we need not defer to the trial court's decision and must review the issue *de novo*. *Lewis v. B&R Corp*., 56 S.W.3d 432, 436 (Ky. App. 2001). With these standards of review in mind, we examine the merit of the appeal.

DISCUSSION

Before examining the merits of the HOA's appeal, we must review the O'Briens' argument that they should not have the trial court's judgments against them overturned because the arguments set forth by the HOA do not involve their role in the sale of the property. We agree. The arguments set forth in the appeal relate to the easement and the HOA's argument that it is extinguished.

The HOA first argues that the Developer's easement expired as of March 13, 2006, and, therefore, the circuit court was wrong to conclude that the Developer continues to have an easement in gross over the property. The HOA asserts that the Developer's easement expired when it no longer owned any lots or properties that were subject to the Original Declarations.

The circuit court concluded that "…the amendment process was effective to amend the 1995 Declarations in all respects, except for its amendment removing the easement created in favor of Farms in the 1995 Declarations." Opinion at p. 6.

The circuit court based the above conclusion on the theory that:

> A restrictive covenant in the context of property law is defined as a "provision in a deed limiting the use of the property and prohibiting certain uses." Blacks Law Dictionary (6th Ed. 1990). The 1995 Declarations consisted in its majority of restrictive covenants, i.e., provisions addressing use restrictions, architectural control of homes built in Estates, etc. The language of Section 6.1 that the HOA sought to remove as part of its amendment, did not concern a restrictive covenant, rather

> it sought to remove a reservation of an easement in favor of Farms…
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> ****
>
> The easement created in Section 6.1 provides that the right of access extends to Farms and its heirs and assigns for so long as Farms and its successors or assigns own a lot in Estates. Easements and restrictive covenants are not interchangeable concepts of property law, and the Court cannot find that an easement can be extinguished by the servient estate pursuant to a vote of the lot owners. An easement is an interest in property, and the servient estate may not unilaterally reject an easement, as Farms does not have to surrender its property right involuntarily. The Court, surprisingly, located a case which contained an almost identical fact pattern on this issue in another jurisdiction. Chancy v. Chancy Lake Homeowners Association, Inc., 55 So. 3d 287 (Ala. Civ. App. 2010), is a well-reasoned opinion that confirmed this Court's analysis of the matters presented in this action, and the Court cites to this case as persuasive authority considered by the Court.
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> The amendment procedure undertaken by the HOA to amend the 1995 Declarations was not effective to extinguish the easement granted to Farms in that document. The amendment of the restrictive covenants with the adoption of the First Amendment Declarations was valid, with the only exception being the removal of the easement in an attempt to extinguish that right, which was invalid. HOA's attempt to terminate Farm's easement by amendment to the Declaration is void.

Opinion at pp7-8.

Majestic Oaks argues, however, that it continues to own lots and property in the community as defined by the language in the original declaration of covenants, conditions and restrictions. It contends that it never transferred the common areas to the HOA in March of 2006, but that it only turned over the common areas to the

newly created HOA. Finally, it argues that it did not relinquish ownership of its lots or property that it held for future development.

We agree with Majestic Oaks that it continues to own parts of the development for future projects. Specifically, the Developer owns two lots in Section 4 of the development. An easement does not expire unless it is terminated by an act of the parties, or by operation of law. 25 Am. Jur. 2d, *Easements and Licenses* § 101, et seq. (1966). Also, as stated by the trial court, the HOA cannot extinguish the easement by a vote. It is a legal right to the property.

The HOA contends that the decision of the Developer to no longer own any property within the community was a decision it made and that it extinguished the right without an ability to revive it. We hold, however, that the trial court was correct in finding that the Developer's easement was not extinguished.

The HOA next argues that the Developer's easement expired upon adoption of the amended declaration. The Amended Declaration superseded the Original Declaration. The HOA held a vote at which time they amended the Declaration of Covenants, Conditions and Restrictions. The Amended Declarations were filed with the Shelby County Clerk on October 6, 2006, and an attempt is made to extinguish the Developer's easement.

Section 6.1 of the Original Declaration provides that:

> [T]he Developer and its successors and assigns, shall have a superior right and easement in gross for ingress, egress, and access on and over, and use of, the Common Area for so long as the Developer, its successors or assigns, own any Lot or portion of the Property.

The trial court held that while the amendment process was effective in amending the covenant and restrictions, it did not extinguish the easement. We agree. While the HOA contends that it could amend the restrictions, therefore it could extinguish the easement, an easement is not a restrictive covenant. Pursuant to Kentucky law, an express easement is created by a written grant such as a deed. *Loid v. Kell*, 844 S.W.2d 428, 429-30 (Ky. App. 1992). A covenant only restricts the use of property, while an easement confers a right to enter the property upon which the easement is held.

The trial court relied on the case of *Chancy v. Chancy Lake Homeowners Association, Inc.*, 55 So.3d 287 (Ala. Civ. App. 2010), to support its decision. In *Chancy*, there was an attempt by the Homeowners Association to amend the declarations and covenants in order to restrict the easement rights, as there is in this case. As the trial court did here, the court in *Chancy* determined that the easement could not be modified by such a process. We agree with the court's reasoning.

Finally, the HOA argues that the Developer is estopped from using the easement because its sole shareholders, directors and officers voted to remove the Developer's easement when they voted to approve the amended declaration and the Developer subsequently ratified the conduct. While the HOA raised these facts before the trial court, it did not raise the issue of estoppel. Thus, we will not entertain it here.

We, therefore, affirm the decision of the trial court.

ALL CONCUR.

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