NO. COA11-205
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

FAIRFIELD HARBOUR PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiff

v. Craven County
No. 10 CVS 1349

PETER B. DREZ, and wife, MARGUERITE R. DREZ, NEAL E. GUMPEL, and wife, HELEN GUMPEL,

Defendants.

Appeal by plaintiff from order entered 6 December 2010 by Judge George L. Wainwright, Jr., in Craven County Superior Court. Heard in the Court of Appeals 1 September 2011.

Jordan Price Wall Gray Jones & Carlton, by Henry W. Jones, Jr., and Brian S. Edlin, for plaintiff.

K&L Gates LLP, by Roy H. Michaux, Jr., for defendants.

Bailey & Dixon, LLP, by David S. Wisz, amicus curiae.

THIGPEN, Judge.

Peter B. Drez, Marguerite F. Drez, Neal E. Gumpel, and Helen Gumpel (collectively "Defendants") are property owners in Fairfield Harbour, a large residential community with several

recreational amenities. All property owners in Fairfield Harbour are members of the Fairfield Harbour Property Owners Association, Inc. (the "Association"), which charges all owners "an annual charge" ("assessments"). The Association became interested in purchasing several recreational amenities from the current owner, MidSouth Golf, LLC, ("MidSouth Golf") and sought a declaratory judgment that the Association can purchase or finance the purchase of the recreational amenities through assessments collected from property owners. We must decide whether the trial court erred by granting Defendants' motion for judgment on the pleadings. After a complete review of the record on appeal, we affirm the order of the trial court.

MidSouth Golf is the current owner of two golf courses, docks, and tennis courts located in Fairfield Harbour. In 2008, MidSouth Golf closed the Shoreline golf course and the Harbour Pointe golf course. The Harbour Pointe golf course was re-opened in the spring of 2009, but the Association alleges it is not currently being maintained or operated at an optimal level. Because the Association believes MidSouth Golf has not completely maintained the golf courses, the Association began contemplating purchasing the recreational amenities from MidSouth Golf. As part of its planning, the Association met

with owners, sent a survey to the owners regarding the recreational amenities, formed a "Negotiating Committee", and met with potential management companies. On 21 July 2010, Defendants' counsel sent a letter to the President of the Association objecting to the Association's purchase of the recreational amenities and stating, "In our opinion, the Declarations applicable to Fairfield Harbour do not authorize the purchase of recreational amenities to be paid for by the lot owners within the community."

On 1 December 2010, the Association filed a second amended complaint seeking, *inter alia*, a declaratory judgment that the Association can purchase the recreational amenities "through an increase in the annual fee and/or financing supported by the annual fee." Defendants filed motions to dismiss and a motion for judgment on the pleadings. After a hearing on Defendants' motions, on 6 December 2010, the trial court entered an order granting Defendants' motion for judgment on the pleadings. In its order, the trial court also concluded:

> Regardless of the terms and provisions of the Planned Community Act, the Declarations applicable to Fairfield Harbour do not give the Association any right or power to: (1) purchase, lease or otherwise assume control over the Recreational Amenities owned by MidSouth Golf, LLC through an expenditure of funds generated from assessments[.]

The Association appeals from this order.

"Motion for judgment on the pleadings is authorized by Rule 12(c) of the North Carolina Rules of Civil Procedure. . . . The rule's function is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." *Ragsdale v. Kennedy*, 286 N.C. 130, 136-37, 209 S.E.2d 494, 499 (1974) (internal citations omitted). "A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain. When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate." *Id*. "This Court reviews *de novo* a trial court's ruling on motions for judgment on the pleadings. Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *North Carolina Concrete Finishers, Inc. v. North Carolina Farm Bureau Mut. Ins. Co., Inc.*, __ N.C. App. __, __, 688 S.E.2d 534, 535 (2010) (citations omitted).

On appeal, the Association argues the trial court erred by holding the Association did not have the right to purchase the recreational amenities with assessments collected from the owners. Specifically, the Association argues its organizational

documents, the developer's intent, and the applicable statutes allow the Association to purchase the recreational amenities through an increase in assessments and/or financing supported by assessments.

I. Organizational Documents

The Association first contends its organizational documents authorize the Association to purchase the recreational amenities with assessments collected from the owners. We disagree.

When interpreting a homeowners' association's organizational documents, "we are mindful that, like all other restrictive covenants, . . . [the documents] must be strictly construed in favor of the unrestricted use of property." *Wise v. Harrington Grove Community Ass'n, Inc.*, 357 N.C. 396, 403-04, 584 S.E.2d 731, 737 (citations and quotation marks omitted), *reh'g denied*, 357 N.C. 582, 588 S.E.2d 891 (2003). "Restrictive covenants are strictly construed, but they should not be construed in an unreasonable manner or a manner that defeats the plain and obvious purpose of the covenant." *Hultquist v. Morrow*, 169 N.C. App. 579, 582, 610 S.E.2d 288, 291 (quotation and quotation marks omitted), *disc. review denied*, 359 N.C. 631, 616 S.E.2d 235 (2005). "The fundamental rule is that the intention of the parties governs, and that their intention must

be gathered from study and consideration of all the covenants contained in the instrument or instruments creating the restrictions." *Id.* (quotation and quotation marks omitted) (emphasis omitted).

The three main organizational documents the Association relies on are: (1) Declaration of Restrictions Treasure Cove of the Atlantic, Inc.[1] (the "Declaration of Restrictions") recorded in 1971; (2) Supplemental Declaration of Restrictions Treasure Lake of North Carolina, Inc., (the "Supplemental Declaration") recorded in 1975; and (3) Master Declaration of Fairfield Harbour (the "Master Declaration") recorded in 1979. We agree that each of the restrictive covenants at issue contain provisions allowing the Association to own the recreational amenities; however, none of the restrictive covenants contain a provision authorizing the Association to use the assessments collected from the owners to purchase or to finance the purchase of the recreational amenities.

Article III, section 2 of the Master Declaration states the following regarding the conveyance of the recreational amenities to the Association:

> The ownership of all of the recreational

[1]Fairfield Harbour was previously known as Treasure Cove of the Atlantic, Inc.

> amenities within Fairfield Harbour which may include but shall not be limited to . . . golf courses . . . shall be in FHI or its successors, grantees, or assigns . . . ; provided, however, that any and all of such amenities *may be conveyed to the Association*, which conveyance shall be accepted by it, provided the same is free and clear of all financial encumbrances.

(Emphasis added). Section 12.B of the Declaration of Restrictions contains an almost identical provision which provides that the recreational amenities "may be conveyed to the Association." The Supplemental Declaration similarly provides that "any or all of the aforesaid recreational amenities *may be conveyed* to the Treasure Cove Property Owners Association, Inc. [n/k/a Fairfield Harbour Property Owners Association, Inc.], whereupon the maintenance, repair and upkeep of such recreational amenities will be as provided for in the aforesaid Declaration of Restrictions[.]" (Emphasis added). Moreover, the Amended and Restated Bylaws for the Association provide that the Board of Directors of the Association has the power to "[*a*]*cquire and accept title* to any and all amenities within the Development, including but not limited to the roads, parks and recreational facilities." (Emphasis added).

Additionally, the following provisions of Article II of the Master Declaration address the Association's right to levy

assessments and to use the assessments collected from the owners:

> 4. The Association shall have all the powers that from time to time are set out in its Articles of Incorporation and all other powers that belong to it by operation of law, including but not limited to the power to levy against every member of the Association an annual charge . . . , the amount of said charge to be determined by the Board of Directors of the Association after consideration of current maintenance needs and future needs of the Association for the purposes set forth in its Articles of Incorporation. . . .
>
> 5. The fund accumulated as the result of the charges levied by the Association shall be used exclusively to promote and operate the recreational facilities . . . and for the improvement and maintenance of those areas designated as parks, and other property and facilities within Fairfield Harbour which shall have been conveyed to or acquired by the Association.

Although the organizational documents allow the recreational amenities to be "conveyed to" the Association and allow the Association to "acquire title" to the recreational amenities, they do not authorize the Association to use the assessments collected from the owners to purchase or to finance the purchase of the recreational amenities. Rather, the Master Declaration provides that the assessments "shall be used *exclusively* to promote and operate the recreational facilities .

. . and for the improvement and maintenance" of property that has been conveyed to or acquired by the Association. (Emphasis added). Accordingly, we conclude this argument has no merit.

II. The Developer's Intent

The Association next argues its power to purchase the recreational amenities is demonstrated through two rights of first refusal to buy the recreational amenities and through disclosure statements made by the developer, Fairfield Harbour, Inc., pursuant to the Interstate Land Sales Full Disclosure Act. We disagree.

"Where the meaning of restrictive covenants is doubtful the surrounding circumstances existing at the time of the creation of the restriction are taken into consideration in determining the intention." *Westminster Co. v. Union Mut. Stock Life Ins. Co. of America*, 95 N.C. App. 117, 121, 381 S.E.2d 857, 859 (1989) (quotation and quotation marks omitted); *see also Angel v. Truitt*, 108 N.C. App. 679, 681, 424 S.E.2d 660, 662 (1993) ("In interpreting ambiguous terms in restrictive covenants, the intentions of the parties at the time the covenants were executed 'ordinarily control,' and evidence of the situation of the parties and the circumstances surrounding the transaction is admissible to determine intent") (citation omitted).

The Association argues the rights of first refusal and disclosure statements are "surrounding circumstances" that demonstrate the developer's intent for the Association to have the right to purchase the recreational amenities. In this case, however, the rights of first refusal and disclosure statements were executed years after the primary restrictive covenants relied on by the Association. Specifically, the Declaration of Restrictions was recorded in 1971, the Supplemental Declaration was recorded in 1975, and the Master Declaration was recorded in 1979, while the earliest right of first refusal was granted in 1993 and the earliest disclosure statement cited by the Association was filed in 1985. When interpreting restrictive covenants, "[i]ntent is . . . properly discovered from the language of the document itself, the circumstances *attending the execution of the document*, and the situation of the parties *at the time of execution*." *Angel*, 108 N.C. App. at 682, 424 S.E.2d at 662 (citation omitted) (emphasis added). Here, the rights of first refusal and disclosure statements are not relevant to the parties' intent regarding the Association's right to purchase the recreational amenities because they were not in existence at the time the restrictive covenants were executed. Accordingly, we conclude this argument has no merit.

III. Statutes

The Association lastly contends the Planned Community Act and Nonprofit Corporation Act authorize the Association to purchase the recreational amenities and to finance the purchase through borrowing supported by assessments. We disagree.

Although much of the Planned Community Act does not apply to planned communities created prior to January 1, 1999, unless the community adopts the Act,[2] certain provisions of the Planned Community Act apply to "all planned communities created in this State before January 1, 1999, unless the articles of incorporation or the declaration expressly provides to the contrary[.]" N.C. Gen. Stat. § 47F-1-102(c) (2009). For instance, unless the articles of incorporation or the declaration expressly provides to the contrary, a homeowners' association in a community that has not adopted the Planned Community Act may make contracts and incur liabilities; assign its right to future income, including the right to receive common expense assessments; exercise all other powers that may be exercised in this State by legal entities of the same type as the association; and exercise any other powers necessary and proper for the governance and operation of the association.

[2]Fairfield Harbour is a planned community created prior to 1 January 1999 and has not adopted the Planned Community Act.

N.C. Gen. Stat. §§ 47F-3-102(5), (15), (16), and (17) (2009); *see also* N.C. Gen. Stat. § 47F-1-102(c) (listing the provisions that apply to communities that have not adopted the Planned Community Act).

Pursuant to the Nonprofit Corporation Act, unless its articles of incorporation provide otherwise, every nonprofit corporation[3] has the power:

> (4) To purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located;
>
> (5) To sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;
>
> (6) To purchase, receive, subscribe for, or otherwise acquire; own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of; and deal in and with shares or other interests in, or obligations of, any other entity;
>
> [and]
>
> (7) To make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income[.]

N.C. Gen. Stat. § 55A-3-02(a) (2009).

---

[3]The Association is a nonprofit corporation.

The Association contends it "has the authority to finance the purchase of the Recreational Amenities through borrowing in accordance [with] N.C.G.S. § 55A-3-02(a)(5), (6), (7) and N.C.G.S. § 47F-3-102(5), (16), and (17)." However, none of these statutory provisions, nor the additional provisions of the Planned Community Act which apply to the Association, give a homeowners' association the right to collect assessments from owners to purchase real or personal property. Nor do these provisions give a homeowners' association the right to finance the purchase of real or personal property through borrowing supported by assessments. Accordingly, we conclude this argument has no merit.

In conclusion, we hold the trial court did not err by granting judgment on the pleadings in favor of Defendants because the Association does not have the right to purchase the recreational amenities with assessments collected from the owners based on its organizational documents, the developer's intent, or the Planned Community Act and Nonprofit Corporation Act.

AFFIRMED.

Judges GEER and STROUD concur.

Report per Rule 30(e).