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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-18-533

MOUNTAIN CREST, LLC, RODNEY FRISBEE, AND LINDA FRISBEE APPELLANTS V. MALCOLM KEITH KIMBRO, INDIVIDUALLY AND AS TRUSTEE OF THE MALCOLM KEITH KIMBRO REVOCABLE TRUST; AND CINDY KIMBRO APPELLEES	Opinion Delivered: December 12, 2018 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, TWELFTH DIVISION [NO. 60CV-17-3019] HONORABLE ALICE S. GRAY, JUDGE AFFIRMED

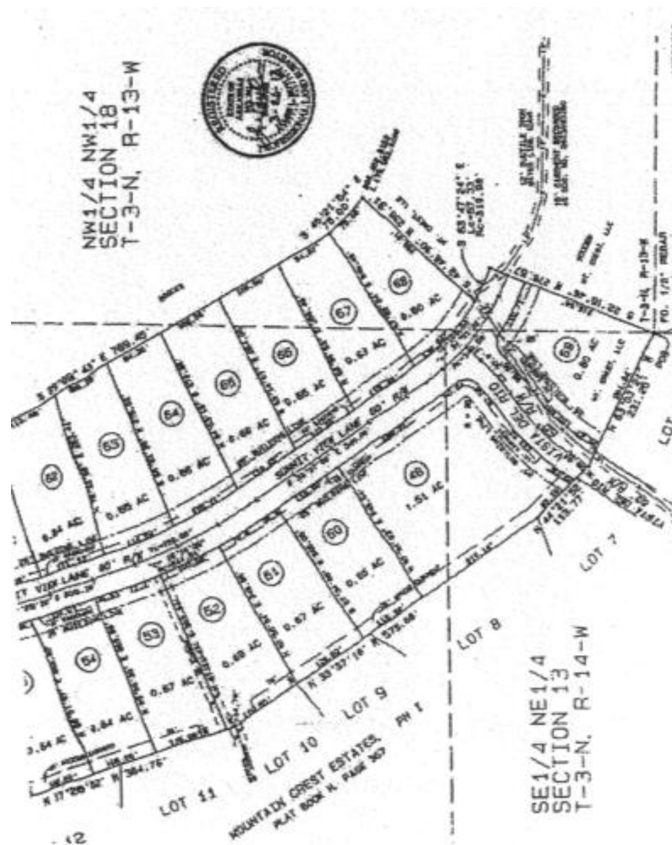
PHILLIP T. WHITEAKER, Judge

Appellants Mountain Crest, LLC, and Rodney and Linda Frisbee appeal the order of the Pulaski County Circuit Court granting summary judgment to appellees, Keith and Cindy Kimbro and the Malcolm Keith Kimbro Revocable Trust. Appellants argue that material issues of fact exist within the litigation and that the circuit court erred in granting summary judgment. We affirm for the reasons set forth more fully below.

Mountain Crest, LLC, is the developer of Mountain Crest Estates—a gated subdivision located in Maumelle, Arkansas. Mountain Crest Estates was developed in four separate phases.[1] Phase I of the subdivision contains lots 1–47; Phase II contains lots 48–

[1]Phases III and IV are not at issue here.

69. Phases I and II are adjacent to each other, with Phase II situated to the north of Phase I. The two phases have a common border with lots 48, 50, 51, and 52 of Phase II on the north abutting lots 7–10 of Phase I on the south. Both Phase I and Phase II are governed by separate and duly recorded bills of assurance and attached plat maps. The bill of assurance for Phase II requires the owners of lots 48–53 to construct and maintain a private drive on the south side of their lots and dedicates the private drive to the "Lot Owners serviced by the private drives." This private drive along the south side of lots 48–53 of Phase II abuts the north side of lots 7–10 of Phase I.



The Malcolm Keith Kimbro Revocable Trust owns lot 48[2] of Phase II upon which Keith and Cindy reside. Dixie Bryson and Laura Foster own lot 8 located in Phase I of the subdivision. Rodney and Linda Frisbee own lots 9 and 10 also located in Phase I of the development. Bryson and Foster were attempting to sell lot 8 and believed that they had access to their property by use of the private drive located on the Kimbros' property. The Kimbros disagreed and contended that none of the owners of lots 8–10 of Phase I had access to their lots using the private drive constructed on lot 48 pursuant to the Phase II bill of assurance.[3]

The Frisbees and Mountain Crest, LLC (collectively "Mountain Crest"),[4] filed suit seeking a declaratory judgment and an injunction against the Kimbros claiming that the easement for a private drive across the Kimbros' property designated in the bill of assurance for Phase II of the Mountain Crest Estates subdivision inured to the benefit of their Phase I lots. The Kimbros answered and counterclaimed, requesting a declaration that the private drive existed for the sole and exclusive benefit of the lot owners described in Phase II of the bill of assurance and that the owners of lots 8–10 had no right to the use

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[2]Lots 48 and 49 were combined into one single lot designated lot 48.

[3]While lot 7 also abuts lot 48, it was not included in the litigation below.

[4]Bryson and Foster were also named plaintiffs in this lawsuit and had separate causes of action for slander of title and tortious interference with a contract. These separate claims were rendered moot by the circuit court's grant of summary judgment and were not appealed. Because Bryson and Foster are not parties to this appeal, neither they nor their claims will be addressed further unless necessary for a more complete understanding of the case.

of the private drive. They further sought an injunction preventing the Mountain Crest plaintiffs from utilizing the private drive.

Eventually, the Kimbros filed a motion for summary judgment, arguing that the covenants and restrictions of the Phase II bill of assurance, including the reservation of the private drive, are applicable only to the property located within Phase II; therefore, the use of the private drive designated in the bill of assurance is unambiguously limited to those Phase II lot owners serviced by the drive. Mountain Crest responded that the covenants and restrictions contained in the Phase II bill of assurance applied to the "entire Addition," referring to the entirety of the Mountain Crest Estates subdivision, and that their interpretation was supported by the "general plan of development" for the entire neighborhood. Essentially, on summary judgment, the circuit court had to decide if the private drive described and defined in lots 48–53 of the bill of assurance for Phase II was limited only to Phase II or if it also applied to lots 8–10 of Phase I.

After a hearing, the circuit court granted the Kimbros' motion for summary judgment. The court found that the Phase II bill of assurance was clear and unambiguous with regard to the private-drive easement; that the easement benefited only lots 48, 50, 51, and 52 of Phase II; that only the lot owners of lots 48, 50, 51, and 52 of Phase II are entitled to use the easement; and the owners of lots 8, 9, and 10 of Phase I are not entitled to use the easement for the benefit of any Phase I lot. Mountain Crest and the Frisbees appeal.

Our standard of review for summary-judgment cases is well established. *Anderson v. CitiMortgage, Inc.*, 2014 Ark. App. 683, 450 S.W.3d 251. Summary judgment should be granted only when there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *Thomas v. Clear Investigative Advantage, LLC*, 2017 Ark. App. 547, 531 S.W.3d 458. The purpose of summary judgment is not to try the issues, but to determine whether there are any issues to be tried. *Graham v. Underwood*, 2017 Ark. App. 498, 532 S.W.3d 88. In reviewing a grant of a summary judgment, the appellate court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party left a material question of fact unanswered. *Thomas*, *supra*. We view the evidence in the light most favorable to the party against whom the motion for summary judgment was filed and resolve all doubts and inferences against the moving party. *Id.*

The circuit court in this case was correct in finding that no issues of material fact exist. Factually, Mountain Crest, LLC, is the developer of a subdivision. In accordance with the ordinary method of establishing restricted districts, it surveyed and platted Mountain Crest Estates into separate phases, recording a separate plat and bill of assurance for each phase. In doing so, Mountain Crest LLC, obligated itself to convey in conformity with the restrictions imposed in the bill of assurance. *McGuire v. Bell*, 297 Ark. 282, 761 S.W.2d 904 (1988). Factually, lots 48–53 are in Phase II of Mountain Crest Estates with each lot containing a private drive. Factually, the Kimbros are owners of lot 48 and are subject to the private drive. Factually, the Frisbees are owners of lots 9 and 10 of Phase I of

Mountain Crest Estates, and their lots are not included in the plat or the bill of assurance of Phase II.

The circuit court was also correct in finding that the bill of assurance for Phase II was clear and unambiguous and governed only those lots in that phase. The preamble to the Phase II bill of assurance defines who constitutes “Lot Owners” in accordance with the document. It refers to both appellant Mountain Crest, LLC, and appellee Malcolm Keith Kimbro Revocable Trust as “Lot Owners” or “Developers.”[5] The bill of assurance then gives a legal description of the property and states that the property had been surveyed and platted and that such property constituted an “Addition” known as Mountain Crest Estates, Phase II. The bill of assurance further states that the use of the land in “said Addition” was subject to the protective and restrictive covenants set forth therein. The property described and platted encompassed only lots 48–69 of Mountain Crest Estates. Clearly, by the very terms of the bill of assurance, the protective and restrictive covenants were intended to apply to only those lots within Phase II of the subdivision.

The circuit court was correct in finding that the private drive applied only to lots within Phase II. Paragraph C-28 of the bill of assurance for Phase II governs the private drive at issue here. It states:

> ROADS AND MAINTENANCE. Private drives are identified on the final Plat for Mountain Crest Estates, Phase II. Each Lot Owner shall construct the private drive on his property in accordance with the specifications and plans approved by the Architectural Control Committee. A private drive will be located on the south side

[5]The preamble also refers to Ramsey and Ruth Eddington as additional “Lot Owners” and “Developers” but they are not parties to this appeal.

> of Lots 48-53. Each Lot Owner is responsible for maintaining the portion of the private drive that is located on his Lot. In the event a Lot Owner fails to maintain the private drive, the other Lot Owners may undertake the maintenance and shall collect appropriate reimbursement from the non-contributing Lot Owner.

Paragraph E-5 states, "The private drives are dedicated to the Lot Owners serviced by the private drives."

The plain reading of these provisions reveals that the owners of lots 48–53 are responsible for constructing a private drive across the southernmost portion of their lots. The private drive is dedicated to those lot owners serviced by the private drive. By its very terms, those lots are lots 48 and 51–53. Lots 8–10 are not referenced anywhere in the document. Moreover, "Lot Owners" are defined in the preamble, which states that Mountain Crest, LLC, the Kimbros, the Eddingtons, and their successors are "Lot Owners" as provided therein. Owners of lots in Phase I of the subdivision are never mentioned in the bill of assurance, are not governed by the Phase II bill of assurance, and do not benefit therefrom.

Mountain Crest argues that the circuit court erred in reading the provisions of the bill of assurance in isolation and disregarding the plain and obvious purpose of the bill of assurance. Essentially, Mountain Crest attempts to defeat summary judgment by arguing that the bill of assurance at issue is ambiguous as to its intent, and therefore extrinsic evidence should have been used to determine the proper meaning of the private access easement. Their argument fails.

Generally, restrictive covenants are not favored, and if there is any restriction on land, it must be clearly apparent. *Hutchens v. Bella Vista Village Prop. Owners' Ass'n*, 82 Ark. App. 28, 110 S.W.3d 325 (2003). In the interpretation, application, and enforcement of restrictive covenants, our supreme court has stated that the intention of the parties as shown by the covenant governs. *McGuire*, *supra.* When the language of the restrictive covenant is clear and unambiguous, we have held that the parties will be confined to the meaning of the language employed, and it is improper to inquire into the surrounding circumstances of the objects and purposes of the restriction to aid in its construction. *Holmesley v. Walk*, 72 Ark. App. 433, 39 S.W.3d 463 (2001).

Here, the circuit court found that the restrictions were clear and unambiguous, that the parties were confined to the meaning of the language employed in the bill of assurance, and that it was improper to inquire into other extrinsic evidence argued by appellants. We agree. *Estes v. Merritt*, 96 Ark. App. 380, 384, 242 S.W.3d 295, 298 (2006); *Holmesley*, *supra*. Even if we were to determine that the language in the covenant is ambiguous, the solution is not to interpret it in Mountain Crest's favor; rather, it is to free lot 48 from the restrictions contained therein. When there is uncertainty in the language by which a grantor in a deed attempts to restrict the use of realty, freedom from that restraint should be decreed. *Estes*, *supra*. If we release lot 48 from the private-drive restriction, the Kimbros are free to restrict all use of their property. Thus, in either scenario, Mountain Crest and the Frisbees lose.

Affirmed.

VIRDEN and GLADWIN, JJ., agree.

Cross Gunter Witherspoon & Galchus, by: *Laura D. Johnson* and *M. Stephen Bingham*, for appellants.

Gill Ragon Owen, P.A., by: *Matthew B. Finch* and *Aaron M. Heffington*, for appellees.