FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-3574

GATE VENTURE, LLC,

Appellant,

v.

ARTHUR CHESTER SKINNER, III, as Trustee of the Arthur Chester Skinner, III, Revocable Living Trust dated February 10, 1984, DAVID GODFREY SKINNER, as Trustee of the David Godfrey Skinner Revocable Living Trust dated March 12, 1986, KATHERINE SKINNER NEWTON, as Trustee of the Katherine Skinner Newton Living Trust Agreement dated March 31, 1987, CHRISTOPHER FORREST SKINNER, as Trustee Of the Christopher Forrest Skinner Revocable Living Trust dated November 28, 1989, LANNY S. THOMAS, as Trustee of the Susan Skinner Thomas Revocable Living Trust Dated August 11, 1985, PATRICIA SKINNER CAMPBELL, as Co-Trustee of the Patricia Skinner Campbell Revocable Trust Dated October 24, 2002, CHARLES BRIGHTMAN SKINNER, JR., as Trustee of the Charles

Brightman Skinner, Jr., Living
Trust dated September 2, 2003,
RANDALL THOMAS SKINNER,
LESLIE JONES, as personal
Representative of the Estate of
Jan Malcolm Jones, Jr., EDWARD
SKINNER JONES, as Trustee of
the Edward Skinner Jones
Revocable Trust dated January
31, 1989, and VIRGINIA JONES
CHAREST, as Trustee of the
Virginia Skinner Jones Living
Trust dated September 16, 1998,

Appellees.

On appeal from the Circuit Court for Duval County.
Eric C. Roberson, Judge.

October 19, 2022

LEWIS, J.

Appellant, Gate Venture, LLC, appeals the dismissal of its Second Amended Complaint ("complaint") with prejudice. Appellant argues that because it sufficiently stated a cause of action for the removal of deed restrictions on the property at issue, the trial court erred in dismissing its complaint. For the following reasons, we agree and, therefore, reverse the dismissal order. Given our disposition, we need not address Appellant's alternative contention that the dismissal should have been without prejudice.

Factual Background

In its complaint against Appellees, Appellant alleged in part:

> 1. On February 5, 2007, Defendants [Appellees] conveyed to Gateway Professional Campus, LLC ("Gateway") . . .

approximately 15.46 acres of property . . . (the "Property") pursuant to a warranty deed . . . .

. . . .

4. The Defendants and Gateway agreed upon certain restrictions relating to the use and development of the Property . . . .

5. Among other limitations, the Restrictions limited the development of the Property "solely for all office uses permitted by law, including, but not limited to, general office, professional office and medical office (including surgery centers but not walk-in clinics)."

. . . .

15. At the time that the First Deed was executed, Defendants owned almost all of the non-residential property adjacent to or nearby the Property.

16. At the time that the First Deed was executed and recorded, the Property was zoned PUD [Planned Unit Development] pursuant to Ordinance 2006-1204, City of Jacksonville (the "Original PUD").

. . . .

18. The Original PUD designated approximately 13.33 acres south of the Property as "Parcel B."

19. The Original PUD allowed commercial sales and services uses on Parcel B.

20. In case number 2010-CA-011743, filed in the Circuit Court in and for Duval County, Florida, title to the Property was conveyed pursuant to a Certificate of Title to Space Coast Credit Union . . . .

. . . .

22. Subsequent to taking ownership of the Property, Space Coast sought and obtained [in 2015] an amendment to the zoning of the Property pursuant to 2015-0240 (the "Revised PUD"). . . .

23. As owners of property within three hundred and fifty (350) feet of the Property at the time, Defendants received notice of the rezoning.

24. Upon information and belief, the Defendants did not object to the Revised PUD.

25. The Revised PUD approves a development plan that would not be allowed if the Restrictions controlled.

26. Specifically, the Revised PUD:

> a. allows a total building area of 180,000 square feet
>
> b. increased the allowed height of buildings on the Property to fifty (50) feet; and
>
> c. changed the site plan as compared with the original PUD

27. Subsequent to the approval of the Revised PUD, Space Coast conveyed the Property to Gate Venture [Appellant] [on March 21, 2018] pursuant to that special warranty deed . . . .

28. The Gate Venture Deed makes no reference to the Restrictions.

29. The Property is designated as Residential Professional Institutional Category ("RPI") on the Future Land Use Map in the City of Jacksonville Comprehensive Plan.

30. At the time that the First Deed was recorded, all of the non-residential property near the Property was also designated RPI.

31. At the time that the Original PUD was approved, the Property and Parcel B were designated RPI.

32. The RPI category limits commercial retail sales and service establishments to fifty percent (50%) of an area.

33. Approximately 29.39 acres of the property surrounding the Property has been changed on the Future Land Use Map to Community General Commercial ("CGC").

34. The CGC category has no limit on the amount of commercial retail sales and service establishments within an area.

35. Since the Property was conveyed to [Appellant], Parcel B has changed from RPI to CGC on the Future Land Use Map.

36. Defendants authorized the change of Parcel B to CGC.

37. Since the Property was conveyed to [Appellant], the property to the north of the Property (the "North Property") has changed from RPI to CGC on the Future Land Use Map.

38. Defendants authorized the change of the North Property to CGC.

39. Since the Property was conveyed to [Appellant], the North Property has been entitled by the City of Jacksonville for commercial retail sales and services pursuant to a planned unit development zoning.

40. Defendants authorized the rezoning of the North Property for commercial retail sales and services.

41. Since the Property was conveyed to [Appellant], Parcel B has been entitled by the City of Jacksonville for expanded commercial retail sales and services pursuant to a planned unit development zoning.

42. Defendants authorized the rezoning of Parcel B for expanded commercial retail sales and services.

43. Defendants no longer own any property adjacent to or nearby the Property.

44. A representative for Defendants informed [Appellant] that Defendants believe the Restrictions apply to [Appellant's] use of the Property, and the Defendants would agree to remove the Restrictions in exchange for six million dollars . . . .

45. Moreover, after [Appellant] acquired the Property, an international pandemic known as COVID-19 spread across the country.

46. One of the largest adverse economic impacts of COVID-19 is on office space.

. . . .

53. On February 2, 2021, [Appellant] notified the Defendants' representative of its desire to develop the Property as a multi-family community and that this development would compliment, and not compete with, the uses of the properties that are surrounding the Property, and on February 23 2021, followed up the request with a copy of the site plan . . . .

54. On March 8 2021, the Defendants' representative, notified [Appellant] that the Request for Multi-Family Community Development was "met with opposition" and could not be accommodated . . . .

In its declaratory judgment count, Appellant alleged in part:

> 64. Moreover, as Defendants have since conveyed their interest in all properties adjacent to or nearby the Property, the Restrictions provide no benefit to Defendants.
>
> 65. As the Restrictions are not part of a common scheme to development, the Restrictions provide no benefit to property owners adjacent to or nearby the property.
>
> 66. Further, Gate Venture's intended use of the Property for multi-family community development will compliment, and not compete with, the uses of the properties that are surrounding the Property.
>
> 67. Since the Restrictions were recorded, circumstances in the area surrounding the Property have substantially changed.
>
> 68. Defendants have acquiesced to changes of the zoning of the Property which conflict with the Restrictions.
>
> 69. The material changes in character of the area in which the Property is located frustrate the objective(s) of the Restrictions.
>
> 70. There is no property which serves as dominant property with respect to the Restrictions.
>
> 71. The Restrictions are an unlawful restraint on free and fair use of the Property.
>
> 72. The Restrictions serve no purpose or provide any benefit to any party.
>
> 73. The Restrictions are of no actual or substantial benefit to Defendants and Defendants would sustain no harm if the Restrictions were extinguished.

> 74. Defendants have already demonstrated that the Restrictions serve no beneficial purpose to any other property in the area when Defendants offered to remove or revise the Restrictions in exchange for substantial monetary consideration, even though the Restrictions expressly state that the Defendants' "approval or disapproval shall not be unreasonably withheld or delayed <u>or based upon monetary consideration therefor</u>."
>
> . . . .
>
> 75. Moreover, as a result of COVID-19 and What Business Owners Learned, the Restrictions do not permit the Property to be developed in an economically feasible manner, or in a manner that would benefit the Property or adjacent and nearby properties.

Appellant sought a judgment declaring, among other things, that the original purpose and intent of the restrictions were frustrated by the subsequent material changes in the area and requested that the trial court remove and extinguish them.

Appellees moved to dismiss the complaint on the basis that none of the alleged changes prevented Appellant from following the restrictions and carrying out the intent behind them. During the hearing on the motion, the trial court stated in part:

> Everything I'm hearing is it's now more financially advantageous to go to multifamily.
>
> I – frankly, it frightens me that there's some argument that a court might be able to come in here and say, well, I just don't think that's right anymore and strip, you know, real estate restrictions and really just use my magic wand to say what's the best use of the property. I mean, that frightens me to no end.
>
> And then to say COVID can undo every contract for anything because it's a changed circumstance, I'm not there either.

Appellant's counsel explained that he was not asking the court to wave a magic wand, but was "saying the original intent of this restriction was because of the original RPI and future land use map designation [a]nd once that was changed by [Appellees], the purpose for the restriction went away." After the trial court asked what the "road map for all the discovery" was and noted that it did not "hear many factual disputes," Appellant's counsel asserted, "We need to know the original purpose. We need to have an understanding whether that original purpose makes sense in light of the zoning, both at the time the restriction was recorded and the time after."

The trial court ruled as follows:

> I don't blame [Appellant] at all for trying to maximize the monetary benefit of the property, but it's – I have tried to fathom every single route to get there, and it's just not there.
>
> The restriction is clear. It's – this is not – I'd be astonished if it was the rule and the law that in a limitation or a deed restriction like this, that we get to go try to go look for a subjective intent, which really is what [Appellant] is advocating for.
>
> It is clear from the face of the deed restriction what the restriction is and what its purpose is. And I can't see any circumstance other than ignoring reality and what is just plain and obvious to anybody who knows that area, whether, you know, there is some benefit or some purpose or some reason, or whatever you want to call it, to saying it can only be office space over there.
>
> And changing economic circumstances in the pandemic, I – if that works, then basically every contract could be unwound in a heartbeat. So I don't see where there's any viable cause of action here where an amendment would serve any purposes whatsoever, because in the end, it's – and I don't blame them. . . .

> What we're asking for – or what [Appellant] is asking for is the Court to come in, more in equity than anything legal, to take that restriction out because it would be more financially advantageous.
>
> And for that reason, rather than going through – I still don't know the exact scope of what discovery would be required to resolve the – at least questions, because I, frankly – I just – I'm not seeing factual disputes here. I'm seeing changed circumstances that now make it much more lucrative to be multifamily than office.
>
> But I will put it in the position to be reviewed by the higher court. And I've said enough as far as what my reasonings are and how I got there.
>
> Again, there's zero blame. . . . They're trying to increase value. But that deed restriction, I don't see any scenario where a viable claim can be stated to get that deed restriction removed for office use only.
>
> I'll enter an order granting the motions to dismiss. I'll do it with prejudice . . . .

This appeal followed.

Analysis

In determining whether a complaint states a cause of action upon which relief can be granted, courts are confined to the four corners of the complaint and its attachments. *Banks v. Alachua Cnty. Sch. Bd.*, 275 So. 3d 214, 215 (Fla. 1st DCA 2019); *see also Jackson v. Sch. Bd. of Okaloosa Cnty.*, 326 So. 3d 722, 725 (Fla. 1st DCA 2021) (noting that in reviewing a trial court's ruling on a motion to dismiss, an appellate court must accept as true a complaint's well-pleaded factual allegations and must draw all reasonable inferences from the allegations in the plaintiff's favor); *Wells Fargo Bank, N.A. v. Bohatka*, 112 So. 3d 596, 600 (Fla. 1st DCA 2013) (noting that courts must confine themselves to the allegations contained in the complaint and must not speculate as to what the "true facts may be or what facts will be ultimately

proved in the trial of the cause"). Whether a plaintiff will be able to produce sufficient evidence in a hearing on the merits is irrelevant in ruling on a motion to dismiss. *Id.* On appeal, the question of whether a plaintiff's complaint sufficiently states a cause of action is a question of law that is reviewable de novo. *Malden v. Chase Home Fin., LLC,* 312 So. 3d 553, 554 (Fla. 1st DCA 2021).

Our analysis begins with an examination of Florida's controlling precedent on the test to be applied when a party seeks the removal or cancellation of deed restrictions. In *Allen v. Avondale Co.*, 185 So. 137, 138 (Fla. 1938), the Florida Supreme Court explained, "This Court has repeatedly held that a change in the circumstances and the neighborhood materially affecting the lands will warrant the granting of relief from restrictive covenants . . . ." Later, in *Wahrendorff v. Moore*, 93 So. 2d 720, 722 (Fla. 1957) (en banc), the supreme court set forth:

> We come to the second point as to whether there was an adequate showing of changed conditions that would justify cancelling these contractual restrictive covenants. In *Dade County v. Thompson*, 146 Fla. 66, 200 So. 212, we held in substance that to justify the removal of restrictive covenants such as those before us, it must be alleged and proved that conditions and circumstances existing at the time the restrictions were placed on the land have changed to the extent that the effect of the covenants has been brought to nought. We there stated that the test to be applied is whether or not the original intent of the parties to the restrictive covenants can be reasonably carried out or whether the changed conditions are such as to make ineffective the original purpose of the restrictions. . . .

Our Court affirmed the removal of restrictions in *Crissman v. Dedakis*, 330 So. 2d 103 (Fla. 1st DCA 1976). The trial court there removed restrictions after finding that although there had been no changes in the conditions within the subdivision at issue that materially affected it, "r[a]dical changes" had occurred outside the subdivision in the general area and in close proximity "which were sufficient to neutralize the protection of the restrictive covenants."

Id. at 103. We found the evidence "more than ample" to support the trial court's findings, and we agreed that in order to warrant the granting of relief from restrictive covenants, it is only necessary that the change in circumstances materially affecting the lands for which relief is sought be in the immediate neighborhood of those lands, but not necessarily within the same subdivision. *Id.*; *see also Dozier v. Wood*, 431 So. 2d 184, 186 (Fla. 1st DCA 1983) ("[T]he party seeking relief from the restrictions must show, and the court must find, that *material* changes have occurred which so frustrate the object of the restriction that the original purpose and intent of the grantor cannot be reasonably carried out.").

In *Marco Island Civic Association, Inc. v. Mazzini*, 881 So. 2d 99, 103 (Fla. 2d DCA 2004), the Second District reversed a trial court's cancellation of deed restrictions based upon its determination that the evidence was legally insufficient for the trial court to conclude that enforcement of the deed restrictions would no longer substantially benefit the dominant estate. The Second District referenced its prior decision in *AC Associates v. First National Bank*, 453 So. 2d 1121, 1127 (Fla. 2d DCA 1984), and its declaration that in an action to cancel a restrictive covenant, the test is "whether or not the covenant is valid on the basis that the intention of the parties can be carried out despite alleged materially changed conditions or, on the other hand, whether the covenant is invalid because changed conditions have frustrated the object of the covenant without fault or neglect on the part of the party who seeks to be relieved from the restrictions." *Id.*

Appellant argues that the trial court refused to recognize a cause of action for the removal of deed restrictions. Indeed, the trial court's characterization of Appellant's desire for it to use its magic wand to say what the best use of the property is supports this argument. The same can be said of the court's statement that it would "be astounded if it was the rule and the law that in a limitation or a deed restriction like this, that we get to go try to go look for a subjective intent." On appeal, Appellees acknowledge *Wahrendorff's* test for the removal of restrictive covenants or deed restrictions. They also acknowledge that Appellant "alleged several reasons why it contends that changed circumstances no

longer justify the [r]estrictions." They assert, however, that because Appellant is not prevented from abiding by the restrictions as a result of the change in circumstances, it failed to state a cause of action for their removal. In support of their prevention argument, Appellees cite *Essenson v. Polo Club Associates,* 688 So. 2d 981 (Fla. 2d DCA 1997) and *Victorville West Limited Partnership v. Inverrary Association, Inc.*, 226 So. 3d 888 (Fla. 4th DCA 2017). Yet, neither opinion states that a party must be prevented from adhering to a restrictive covenant in order for the party to seek the removal or cancellation of such. In *Essenson*, the Second District reversed a summary judgment in part on the basis that the covenant at issue continued to provide benefits to the dominant estate. 688 So. 2d at 984. Similarly, in *Victorville West Limited Partnership*, the Fourth District focused on the restrictive covenant's benefit to the dominant estate when reviewing the trial court's determination that the covenant could not be cancelled. 226 So. 3d at 891.

In this case, Appellant alleged that the restrictions provide no benefit to current adjacent or nearby property owners or to Appellees given that they conveyed their interest in those properties. Appellant also alleged "material" and "substantial" changes in its complaint, including zoning changes and the decreased need for more office space in the area. The trial court focused heavily on what it considered to be Appellant's financial motivation in seeking the removal of the restrictions. Clearly, whether some use of a party's property is the highest and best use "is not the correct test in determining continued validity of restrictive covenants." *See Acopian v. Haley*, 387 So. 2d 999, 1002 (Fla. 5th DCA 1980). Had Appellant alleged only that the restrictions should be removed because it would be more financially advantageous for it to develop the property as a multi-family community, the trial court's focus may have been appropriate. As the complaint stands, however, the court's focus at this stage of the proceedings should have been on whether Appellant sufficiently alleged that a change in circumstances made the original purpose of the restrictions ineffective. We believe Appellant satisfied that test.

Appellant is also correct when it argues that the trial court improperly focused on the merits of the action rather than on its

allegations. At one point, the court said, "I'm not seeing factual disputes here." Yet, the case was not before the court on a summary judgment motion. *See Carolina Cas. Ins. Co. v. Spicer*, 323 So. 3d 350, 352 (Fla. 1st DCA 2021) (noting that summary judgment is appropriate when the material facts are not in dispute and only legal questions remain). At another point, the court found that it was "plain and obvious to anybody who knows that area . . . there is some benefit or some purpose or some reason, or whatever you want to call it, to saying it can only be office space over there." Be that as it may, the purpose behind the restrictions permitting only office space on the property is the crux of the case and should not have been determined at the motion-to-dismiss stage. *See Bohatka*, 112 So. 3d at 600 (noting that the sufficiency of the evidence is irrelevant in ruling on a motion to dismiss).

For these reasons, we agree with Appellant that the trial court erred in dismissing its complaint and reverse the order of dismissal.

REVERSED.

MAKAR and BILBREY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Richard R. Thames of Thames Markey, Jacksonville; S. Hunter Malin of Hunter Malin Law, P.A., Jacksonville, for Appellant.

Cristine M. Russell and Scott J. Kennelly of Rogers Towers, P.A., Jacksonville for Appellees Arthur Chester Skinner, III, David Godfrey Skinner, Katherine Skinner Newton, Christopher Forrest Skinner, Patricia Skinner Campbell, Randall Thomas Skinner, Leslie Jones, Edward Skinner Jones, and Virginia Jones Charest.

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