DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

DANIEL W. DAVIS and MELINDA M. DAVIS,

Appellants,

v.

VERANDAH AT LAKE GRADY HOMEOWNERS ASSOCIATION, INC.; DAVID A. FREIDMAN; JONATHAN P. WARD; ELVER SENA SOSA, as trustee of the Sena Family Trust dated March 15, 2018; KATY SENA LATESSA, as trustee of the Sena Family Trust dated March 15, 2018; JENNIFER A. ZIOLKOWSKI; MICHAEL R. ZIOLKOWSKI; DAVID BAILEY; CRYSTAL BAILEY; THERESA BLANCHARD; KENNETH BLANCHARD; KEVIN REEVES; TRINA R. REEVES; ANDREA H. WILT, as trustee of Andrea H. Wilt and Glenn T. Wilt Joint Revocable Living Trust dated May 15, 2003; GLENN T. WILT, as trustee of Andrea H. Wilt and Glenn T. Wilt Joint Revocable Living Trust dated May 15, 2003; AARON WALTER NIEC; and BETHANY RUTH NIEC,

Appellees.

No. 2D21-1387

January 13, 2023

Appeal from the Circuit Court for Hillsborough County; Christopher C. Nash, Judge.

Steven L. Brannock, Thomas J. Seider, and Torri D. Macarages (withdrew after briefing), of Brannock Humphries & Berman, Tampa, for Appellants.

Chance Lyman, Joshua Smith, and Steven Cline of Buchanan Ingersoll & Rooney, PC, Tampa, for Appellee.

SLEET, Judge.

Daniel and Melinda Davis challenge the trial court's order granting final summary judgment entered in favor of Verandah at Lake Grady Homeowners Association, Inc. (the Association). In April 2018, after living in the Verandah at Lake Grady subdivision for ten years, the Davises sought to disencumber themselves from the Declaration of Covenants, Conditions, and Restrictions (CCRs) burdening their lot by bringing an action seeking declaratory relief and seeking to quiet title. Because the trial court did not err in entering summary judgment against the Davises, we affirm.

I. BACKGROUND

In 2007, the plat for the Verandah at Lake Grady subdivision was recorded by the developer, Carter Home Development, LLC. In 2008, Carter advertised the property online, identifying it as a deed-restricted community. In February 2008, the Davises began searching for property within a secure, deed-restricted community. Mr. Davis contacted Carter to inquire about purchasing a lot in the subdivision, and Carter confirmed that the community would be deed-restricted. In response to his request for "any restrictions" upon the lots, Mr. Davis was sent a form copy of the CCRs that Carter intended to execute and record. On March 4, 2008, Mr. Davis signed a homeowner's association summary disclosure acknowledging that he received the CCRs, that all property owners would be obligated to be a member of the Association, and that all lots would be subject to the CCRs. The Association's summary disclosure indicated that "there have been or will be recorded restrictive

covenants governing the use and occupancy of properties in this community." The Davises also received a land sale contract for the property which expressly noted that the property was subject to the same CCRs.

In May 2008, Carter and the Davises convened to close the sale of the property. When the title agent noticed that the CCRs had not been recorded, Carter informed her that the CCRs would be recorded and showed her the Association disclosure signed and acknowledged by Mr. Davis. The title agent confirmed with Mr. Davis that he had received the CCRs for the community and asked the Davises whether they wanted to postpone the closing until the CCRs were recorded. The Davises declined and proceeded to close on the sale of the lot, expressly agreeing that Carter would record the CCRs after the closing. Upon closing the sale, the Davises received a warranty deed that represented that the property was conveyed "subject to covenants, restrictions, easements of record and taxes for the current year." The CCRs were recorded May 22, 2008, encumbering all properties, including the Davises' lot.

The Davises joined the Association, paid their assessments, and lived on their property for ten years without challenging the CCRs' application or attachment to their property. In 2013, Carter sold the lots in Verandah to Sunrise Homes. Sunrise asked Carter, and Carter agreed, to revise the CCRs to conform to the restrictions that Sunrise applied to other subdivisions. Before filing the revised CCRs, Carter sent Mr. Davis a copy of the proposed amendments to the CCRs with a proposed joinder and consent for his signature. Mr. Davis responded that Carter could amend the CCRs without his consent. He also told Carter that he would not sign the joinder and that he intended to

preserve "[his] rights under the restrictions [he had] executed" when the Davises purchased the property.

In 2018, when the Davises decided to sell their lot, they asked the Association to remove the CCRs from their lot, asserting for the first time that the lack of recordation prior to sale invalidated the CCRs with respect to their lot. The Association rejected their request because the Davises had actual and constructive notice of the CCRs before they purchased the lot and agreed to be members of the Association. The Davises responded by filing a complaint asserting two causes of action: (1) declaratory judgment declaring that the CCRs were unenforceable against their lot and (2) a quiet title action to obtain title free and clear of any restrictions. The Association filed a counterclaim seeking to enforce the restrictions.

After conducting discovery, both parties filed competing motions for summary judgment. The Association filed documents, correspondence, affidavits, and deposition transcripts in support of its motion. The Davises did not file anything that established a genuine issue of material fact. Instead, they argued that pursuant to the merger doctrine, any previous discussion, negotiations, or agreements about the state of title merged into the deed and that the deed language—which said that they purchased the property free from encumbrances except those that were "of record"—controlled over the sales contract. The trial court denied the Davises' motion and granted the Association's motion, determining that the Davises agreed that their property was bound by the CCRs at the closing and that the merger doctrine did not apply because "[t]he language of the deed indicate[d] the parties' intent for the CCRs"—which the Davises received, reviewed, and acknowledged—to bind the Davises' property. This appeal followed.

II. ANALYSIS

We review de novo the trial court's grant of summary judgment. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Summary judgment is proper only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510(a) (2018). Here, the Davises do not argue that there were any genuine issues of material fact that remained; rather they contend that the Association was not entitled to judgment as a matter of law.

"An action to quiet title is an equitable proceeding." *Price v. Tyler*, 890 So. 2d 246, 252 (Fla. 2004). Having come to this court in search of equity, the Davises must abide by the rules governing equitable relief—that "he who seeks equity must do equity." *See Engebretsen v. Engebretsen*, 11 So. 2d 322, 329 (Fla. 1942) ("One maxim of equity is that a litigant going into equity must go with clean hands, and another is that he who seeks equity must do equity.").

Based upon the record before us, the Davises do not come to the table with clean hands where they fail to acknowledge that the 2008 deed conveying the property to the Davises clearly indicates that the property would be burdened by the CCRs. In his deposition, Mr. Davis testified that before he and his wife purchased their lot, they acknowledged that the subdivision was to be deed-restricted and that their property had CCRs attached to it. He admitted to receiving the CCRs unsigned and stated that his "expectation was that the draft covenants [he] reviewed encumbered the property at the time of closing." Until early 2018, he believed the CCRs encumbered his lot and ran with the land, and therefore he accepted them when he received the deed. He acknowledged that he received the Association disclosure form stating his lot was

subject to the CCRs. He was never told the CCRs were recorded before closing, and he could not "recall" his title agent asking him if he wanted to delay the closing. Against this backdrop, we focus upon the Davises' arguments.

The Davises argue that the trial court erred in determining that the merger doctrine does not apply. Specifically, they contend that the merger doctrine blocked enforcement of restrictive covenants contained in a purchase contract but not contained in a subsequent deed. We disagree.

The merger doctrine provides that any prior agreements, negotiations, and understandings concerning the sale of property merge into the deed pursuant to the sale. *Morton v. Attorneys' Title Ins. Fund, Inc.*, 32 So. 3d 68, 72 n.3 (Fla. 2d DCA 2009). The application of the merger doctrine to deeds is "an extension of the general principle of integration in written contracts," and "our guiding principle is the intent of the parties." *Harkless v. Laubhan*, 219 So. 3d 900, 905 (Fla. 2d DCA 2016) (citing *Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 53 (Fla. 1st DCA 2005)).

The Davises claim that the purchase contract they signed stated that their property would be "subject to covenants, restrictions, easements of record and taxes for the current year." Notwithstanding the overwhelming evidence establishing that the Davises acknowledged and agreed to the CCRs and that for ten years they lived on the property that was encumbered by the CCRs, the Davises argue that only CCRs "of record" bound their lot. The Davises contend that since the CCRs were not recorded until after the sale, they are entitled to sell their lot free and clear of any encumbrances.

The main infirmity with this argument is that the deed clearly indicates the property was bound by CCRs. The deed states, in relevant part, that Carter conveyed the lot "subject to covenants, restrictions, easements of record and taxes for the current year." The language is clear. Only the word "easements" is modified by the phrase "of record." The Davises' attempt to apply the series qualifier canon of construction fails because "the series-qualifier canon generally applies when a modifier precedes or follows a list, not when the modifier appears in the middle." *Wong v. Minn. Dep't of Human Servs.*, 820 F.3d 922, 928 (8th Cir. 2016). Since "of record" appears in the middle of the list, the series qualifier canon does not apply here. Consequently, the deed clearly indicates that the CCRs bind the property.

The fact that the CCRs were recorded after the sale is immaterial because the parties intended for the lot to be encumbered by the CCRs that were to be recorded. The property was conveyed subject to the same CCRs discussed by the parties for two months prior to the sale, and the Davises have not cited any precedent that requires CCRs to be recorded prior to sale in order to bind the parties. *See Romak v. Naples Mobile Ests. Cmty. Ass'n*, 373 So. 2d 693, 695 (Fla. 2d DCA 1979) ("The reference to the unrecorded declaration [in the deed] was implied actual notice of [a] restriction, and [buyers] are bound by that notice as much as if they had been expressly informed of the restriction.").

Linguistic exercise aside, even if the phrase "of record" applies to the covenants and restrictions, the merger doctrine still is not applicable because an exception to the merger rule applies. Specifically, when the parties to a real estate transaction do not intend for certain provisions of their real estate sales contract to merge into a subsequent deed, the merger doctrine does not apply. *Harkless*, 219 So. 3d at 905; *see also*

Milu, Inc. v. Duke, 204 So. 2d 31, 33 (Fla. 3d DCA 1967) ("The rule that acceptance of a deed tendered in performance of a contract to convey land merges or extinguishes the covenants and stipulations contained in the contract does not apply to those provisions of the antecedent contract which the parties do not intend to be incorporated in the deed . . . .").

Here, the parties did not intend for any purchase agreement language implying that the Davises' lot is subject only to restrictions of record to merge into the subsequent deed. It is clear that Carter and the Davises intended for the Davises' lot to be encumbered by the CCRs. The subdivision plat was recorded before the Davises' first visit to the property. The Davises visited the subdivision because the deed restrictions enhanced the value of the property. When they asked for a copy of the restrictions, the Davises were provided with the declarations of covenants containing the exact CCRs that were recorded May 22, 2008. The sales contract and the deed referenced covenants and restrictions along with "easements of record." Furthermore, the Davises did not hesitate to close on the sale after being informed that the CCRs had not been recorded. As such, the merger doctrine does not apply. *Cf. Fraser v. Schoenfeld*, 364 So. 2d 533, 534 (Fla. 3d DCA 1978) ("[W]here, as here, the purchaser has knowledge of claimed violations and, thereafter, closes the deal, he is precluded by the doctrine of merger from a subsequent suit on a covenant contained in the contract of sale.").

Furthermore, the Davises' reliance upon *Volunteer Security Co. v. Dowl*, 33 So. 2d 150 (Fla. 1947), is misplaced because it involved constructive notice to a subsequent purchaser and restrictions contained only in the sales contract. In that case, the Florida Supreme Court quashed the trial court's order denying a developer's motion to dismiss

an action by subsequent purchasers to compel the developer to sell the lots with restrictive covenants. A key factor in *Dowl* that the Davises fail to mention is that the supreme court expressly found that "[t]here were *no restrictions indicated by the plat* or otherwise by *anything in the record showing that the promoters and owners of the sub-division intended a general plan to burden the sub-division with restrictions*." *Id.* at 150 (emphasis added). To the contrary, in the instant case, the Verandah at Lake Grady subdivision plat had already been recorded prior to the sale, and the record before us abounds with documentation and evidence showing that Carter and the Davises intended for and agreed to their property being subject to the CCRs.

The Davises also argue that the trial court erred in determining that notice of the CCRs would bind their property. We disagree.

Courts will enforce restrictive covenants against those who have notice of such restrictions. *Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302, 311 (Fla. 2d DCA 1966). Not only did the Davises have notice, but it was also the existence and guarantee of CCRs that attracted them to this new subdivision. To be clear, the Davises filed this action seeking equity without first bringing equity. The Davises were the first to visit the undeveloped, deed-restricted community of Verandah at Lake Grady. The Davises complimented Carter on the restrictive nature of the subdivision and readily agreed that the CCRs were both reasonable and mutually desired. The Davises signed all documents acknowledging the application of the CCRs to their lot, and despite learning the CCRs had not been recorded by the closing date, they proceeded with the closing, joined the Association, and lived on their lot believing it was encumbered by the CCRs for ten years. In 2013, instead of disputing the CCRs, Mr. Davis told Carter that he would rely upon it to preserve his rights "under

the restrictions [he] executed." But in 2018, the Davises attempted to rewrite history to disentangle their property from the very CCRs that attracted them to the property. If we were to sustain the Davises' position, it would be on the theory that the Davises were able to disavow the CCRs should they prove detrimental or accept and insist upon the CCRs if they proved beneficial. Equity will not tolerate any such position.

Accordingly, we affirm the trial court's order granting final summary judgment entered in favor of the Association.

Affirmed.

KELLY and KHOUZAM, JJ., Concur.

Opinion subject to revision prior to official publication.