Third District Court of Appeal

State of Florida

Opinion filed August 28, 2019.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-1837 & 3D18-2168
Lower Tribunal No. 16-4547

Beach Towing Services, Inc., et al.,
Appellants,

vs.

Sunset Land Associates, LLC, et al.,
Appellees.

Appeals from the Circuit Court for Miami-Dade County, Rodolfo A. Ruiz, Judge.

Levine & Partners, P.A., and Allan S. Reiss, for appellants.

Buckner + Miles, and David M. Buckner and Brett E. von Borke; Podhurst Orseck, P.A., and Stephen F. Rosenthal, for appellee Sunset Land Associates, LLC.

Before SALTER, LINDSEY and MILLER, JJ.

PER CURIAM.

Beach Towing Services, Inc. and other defendants appeal a final declaratory judgment regarding the language of a restrictive covenant within a 2003 warranty

deed. The plaintiff seeking declaratory relief is Sunset Land Associates, LLC, and the affected property is located on Purdy Avenue and Bay Road in Miami Beach, Florida.

Declaratory relief was granted via an order granting partial summary judgment and a partial final declaratory judgment, and this appeal followed. We agree with the carefully-reasoned, ten-page order granting in part and denying in part the motion for partial summary judgment filed by the appellee, Sunset Land Associates, LLC. Finding no error in that order, we affirm and incorporate it here:

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This Cause came before the Court upon Plaintiff, Sunset Land Associates, LLC's, Motion for Partial Summary Judgment, filed May 29, 2018, seeking partial summary judgment on Counts X (meaning), XI (duration), and XII (ambiguity) of the Second Amended Complaint ("SAC") as to all Defendants.[1] Plaintiff filed this action to obtain declaratory relief as to its rights with regard to a covenant on certain specific parcels of real property.

BACKGROUND

Plaintiff owns three parcels of land located at 1759 Purdy Avenue 1747 Purdy Avenue, and 1738 Bay Road, Miami Beach, more specifically described as Lot 6 and the West ½ of Lot 5, Block 16, ISLAND VIEW SUBDIVISION, according to the map or plat thereof, recorded in Plat Book 6, Page(s) 115, of the Public Records of Miami-

[1] Plaintiff's Motion for Partial Summary Judgment also sought summary judgment against certain Defendants as to Count XVI (standing) of the Second Amended Complaint. Plaintiff's motion as to that count will be resolved by separate order.

Dade County, Florida ("Property"). On July 3, 2003, Defendants Mark Festa, individually and as trustee, and Maureen Festa, conveyed the Property to Gert Elfering by warranty deed, recorded in Official Records Book 21412, Page 1665 of Official Records of Miami-Dade County. That warranty deed included a restrictive covenant ("Covenant"), which states:

> This property is being conveyed by the Grantor to the Grantee subject to the Grantee agreeing that the property will not be used as a parking lot, storage yard facility or for a garage or tow truck company. This covenant shall run with the land.

After the Property changed hands several times, Plaintiff acquired it on April 23, 2014. Plaintiff intends to improve the Property and would like to be able to include a parking garage as part of any such improvement. Defendants take the position that the Covenant prohibits the construction of a parking garage on the Property. Defendants accordingly created doubt about Plaintiff's rights, and in particular its rights under the deed to the Property, and Plaintiff brought this action to remove that doubt.

With regard to the specific terms used in the Covenant, the Code of the City of Miami Beach defines "parking lot" as "an at-grade, level area used for the parking of motor vehicles." Code of the City of Miami Beach, Florida ("City Code"), § 114-1.[2] Moreover, there is no dispute among the parties that the term "parking lot" as used in the Covenant means a surface parking lot. Deposition of Ralph Andrade ("Andrade Dep.") at 134:20-25. There is also no dispute among the parties that the term "storage yard facility" as used in the Covenant means a property used to store delinquent vehicles, towed vehicles, box trucks, and the like. Deposition of Mark Festa ("Mark Festa Dep.") at 149:12-15,

[2] Defendants requested that the Court take judicial notice of the City Code, including specifically § 114-1. See Defendants' Request for Judicial Notice (June 9, 2016), item 9. And the parties stipulated that certain City of Miami Beach documents are admissible for purposes of the trial of the Covenant counts, including the City Code. See Stipulation Regarding City of Miami Beach Documents (July 18, 2018).

150:14-21. There is similarly no dispute among the parties that the term "tow truck company" as used in the Covenant means a company that provides towing services. Andrade Dep. at 139:13-18.

Therefore, the dispute in this case turns on the meaning of the term "garage" as used in the Covenant. Plaintiff contends that the term "garage" as used in the Covenant, when properly read in context, is actually "garage company," and means a business where vehicles are mechanically repaired, rebuilt, or constructed for compensation. Defendants contend that the Covenant's prohibition of a "garage" on the Property means a parking garage.

The American Heritage Dictionary defines "garage" as:

> 1. A building or indoor space in which to park or keep a motor vehicle.
>
> 2. A commercial establishment where cars are repaired, serviced, or parked.

American Heritage Dictionary, https: //www.ahdictionary.com, last accessed August 4, 2018. The City Code contains three different definitions for uses that contain the word "garage," to wit:

> Garage, accessory means an accessory building designed or used for parking for the main permitted structure.
>
> Garage, commercial means a building or a portion thereof, used primarily for indoor parking of vehicles for compensation.
>
> Garage, mechanical means any premise where vehicles are mechanically repaired, rebuilt or constructed for compensation.

City Code, § 114-1.

ANALYSIS

Florida's Declaratory Judgment Act provides in pertinent part that "[a]ny person claiming to be interested or who may be in doubt about his rights under a deed . . . may have determined any question of construction or validity arising [thereunder] . . .'"). Fla. Stat. § 86.021; see also Fla. Stat. § 86.011; Lambert v. Justus, 335 So. 2d 818, 820 (Fla. 1976) (declaratory judgment is the appropriate method for determining the "construction of certain restrictions on . . . property and a declaration that these restrictions are invalid and unenforceable"), receded from on other grounds in Higgins v. State Farm Fire and Casualty Co., 894 So. 2d 5 (Fla. 2004). Defendants' insistence that the Covenant's inclusion of the word "garage" prevents Plaintiff from constructing a parking garage on its Property created "doubt as to the existence or nonexistence of some right or status, and [Plaintiff] is entitled to have such doubt removed." Flagship Real Estate Corp. v. Flagship Banks, Inc., 374 So. 2d 1020, 1021 (Fla. 2d DCA 1979). That is all that is required to invoke this Court's jurisdiction under the Declaratory Judgment Act. Id. A declaratory judgment action is the proper vehicle for a party to seek a determination of its developmental rights. See 19650 NE 18th Avenue, LLC v. Presidential Estates Homeowners Assoc., Inc., 103 So. 3d 191 (Fla. 3d DCA 2012). Therefore, this Court has subject matter jurisdiction over this controversy.

"When interpreting a contract, the court must first examine the plain language of the contract for evidence of the parties' intent." Perez-Gurri Corp. v. McLeod, 238 So. 3d 347, 350 (Fla. 3d DCA 2017) (citation omitted).[3] "The expressed intent of the parties is the controlling factor. Intent unexpressed will be unavailing, and substantial ambiguity or doubt must be resolved against the person claiming the right to enforce the covenant." Moore v. Stevens, 106 So. 901, 903 (Fla. 1925), quoted in McInerney v. Klovstad, 935 So. 2d 529, 532 (Fla. 5th DCA 2006). Expressed intent is that found on the face of the covenant "as shown by the language of the entire instrument in which the covenant appears." Moore, 106 So. at 903, see also Wilson v. Rex Quality Corp., 839 So. 2d 928, 930 (Fla. 2d DCA 2003) ("In

[3] Deeds are analyzed in the same manner as contracts. Branscombe v. Jupiter Harbour, LLC, 76 So.3d 942, 947 (Fla. 4th DCA 2011).

construing restrictive covenants the question is primarily one of intention, and the fundamental rule is that the intention of the parties as shown by the agreement governs, being determined by a fair interpretation of the entire text of the covenant"). Moreover, it is well settled that a single contractual term must not be read in isolation. Id. Rather, the goal is to arrive at a reasonable interpretation of the entire agreement, and to construe contractual terms "in such a manner as to give them a meaning consistent with the apparent object of the parties in entering into the contract." Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Fin. Corp., 302 So. 2d 404, 407 (Fla. 1974).

The Court's first task in construing the Covenant is to determine whether it is unambiguous or ambiguous on its face. See Team Development Land, Inc. v. Anzac Contractors, 811 So. 2d 698, 699-700 (Fla. 3d DCA 2002) (the initial determination of whether a contractual term is ambiguous is a question of law for the court) (citations omitted). In so doing, the Court applies the pertinent rules of construction.

First, '"[a]s a general proposition, the use of different language in different contractual provisions strongly implies that a different meaning was intended.'" Fowler v. Gartner, 89 So. 3d 1047, 1048 (Fla. 3d DCA 2012) (quoting Kel Homes, LLC v. Burris, 933 So. 2d 699, 703 (Fla. 2d DCA 2006)). With regard to the specific connectors contained in the Covenant, "the Florida Supreme Court has explained that . . . . 'the word 'or' is a disjunctive participle that marks an alternative.'" Blue Heron Beach Resort Developer, LLC v. Branch Banking & Tr. Co., 6:13-CV-372-ORL-36, 2014 WL 2625255, at *7 (M.D. Fla. June 12, 2014) (quoting Rudd v. State ex rel. Christian, 310 So. 2d 295, 298 (Fla. 1975)). In addition, the series-qualifier canon provides that, "when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series. A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts § 19, at 147-51 (2012). Therefore, in the absence of some other indication, such as a determiner, the modifier reaches the entire enumeration. Id. at 147-48. So, for example, in the phrase "a wall or fence that is solid," the postpositive modifier "that is solid" should be read as modifying both "wall" and "fence" to mean that both the wall as well as the fence must

be solid. Id. at 148.[4] Also pertinent here, under the canon of *noscitur a sociis*, which means "it is known by its associates," words that are grouped in a list should be given related meanings. Id. at § 31, p. 195. So again, for example, if a phrase reads '''tacks, staples, nails, brads, screws, and fasteners,' it is clear from the words with which they are associated that the word nails does not denote fingernails and that staples does not mean reliable and customary food items." Id. at 196.

Here, the Covenant provides that the Property "will not be used **as** a parking lot, storage yard facility or **for** a garage or tow truck company." (emphasis added). The Court must presume that separate use of the prepositions "as" and "for" indicates a distinction between "parking lot, storage yard facility" and "garage or tow truck company" as used in the Covenant. Fowler, 89 So. 3d 1048. And when giving the words "as" and "for" their plain meaning and reading them in context, the "as" clearly and unambiguously refers to physical structures (i.e., "**as** a parking lot, storage yard facility") (emphasis added), whereas the "for" clearly and unambiguously refers to business activities (i.e., "**for** a garage or tow truck company") (emphasis added). Indeed, if "garage" was meant to be a physical structure, as opposed to a business activity, the Covenant would read that the Property "will not be used **as** a parking lot, storage yard facility, garage, **or for** a tow truck company." But it does not. Clearly then, "a parking lot, storage yard facility" is intended to be something different in kind than "a garage or tow truck company." See Blue Heron Beach Resort Developer, 2014 WL 2625255, at *7.

The question thus becomes how to construe the words "for a garage or tow truck company," since the parties agree that the only dispute in this case is whether the word "garage" as used in the Covenant prohibits Plaintiff from construction of a parking garage on the Property. Applying the series-qualifier, the Court must read the term "company" as modifying both the term "garage," as well as the term, "tow truck," and the Covenant must therefore be read to mean that the Property cannot be used for either a "garage company" or a

[4] The ejusdem generis canon does not apply to the Covenant, because here there is no "catchall" phrase at the end of the listed prohibited uses that would indicate that other uses similar in kind to those listed are also prohibited. See Reading Law, at 199.

"tow truck company." Reading Law, at 148; see also Sch. Bd. of Broward County v. Pierce Goodwin Alexander & Linville, 137 So. 3d 1059, 1068 (Fla. 4th DCA 2014) (terms "negligent, reckless or intentional wrongful" modified the term "acts" in the phrase "negligent, reckless or intentional wrongful acts"). Indeed, there is no determiner before the words "tow truck" that would indicate that the term "company" modifies only "tow truck" and not "garage" (i.e., the Covenant does not say "for use as a garage or **a** tow truck company"). See Reading Law, at 149. Moreover, when reading the Covenant's prohibition on a "garage company" in context, as the Court must do, "garage company" is clearly associated with "tow truck company." The canon of *noscitur a sociis* thus mandates that "garage company" and "tow truck company" be given related meanings. Id. § 31 at 195. A "tow truck company" is a business enterprise that is involved with the mechanical operations of vehicles. Therefore, a "garage company" must be construed to mean a business enterprise that is involved with the mechanica1 operations or repair of vehicles. See id. When read this way after applying the aforementioned rules of construction, the plain language of the Covenant clearly and unambiguously evidences that the parties' intent was to prohibit a "garage company" where vehicles are mechanically repaired, rebuilt or constructed for compensation. See Perez-Gurri Corp., 238 So. 3d at 350; Blackhawk Heating & Plumbing Co., Inc., 302 So. 2d at 407; Wilson, 839 So. 2d at 930.[5]

In sum, the Court holds that the language of the Covenant is clear and unambiguous. And based on the plain language of the Covenant, the term "garage" is properly read as "garage company" and refers to a business activity, not a physical structure. In the context in which this phrase appears, that business activity can only reasonably be construed to mean a company where vehicles are mechanically repaired, rebuilt, or constructed for compensation. Specifically, "for" as used in the Covenant indicates an intent to prohibit specific business activities, as opposed to physical structures, which are preceded by "as." "Company" must be read as modifying "garage" so as to prohibit "a garage company," as opposed to simply "a garage." And the

[5] Defendants note that Mark Festa testified that he meant a garage related to parking. Opp. at 7. But as the case law discussed above makes clear, it is the expressed intent found on the face of the Covenant that controls.

prohibition on a "garage company," when read in context and given a related meaning to the associated prohibition on a "tow truck company," can only be read as evidencing an intent to prohibit the use of the Property for a company where vehicles are mechanically repaired, rebuilt or constructed for compensation.[6] As such the clear and unambiguous language of the Covenant does not prohibit Plaintiff from building or operating any kind of a parking garage on the Property, and the Court so holds.

Alternatively, the Court holds that the Covenant is ambiguous with regard to what the terms "garage" or ''garage company" prohibit. These terms are reasonably susceptible to more than one interpretation. Real Estate Value Co., Inc. v. Carnival Corp., 92 So. 3d 255, 260 (Fla. 3d DCA 2012) (quoting Pan Am. W., Ltd. v. Cardinal Commercial Dev., LLC, 50 So. 3d 68, 71 (Fla. 3d DCA 2010)) ("A contract is ambiguous when its language is reasonably susceptible to more than one interpretation, or is subject to conflicting interests.").[7] For example,

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[6] This reading of the Covenant also aligns with the fact that Defendants at various times had or operated everything set forth in the Covenant on the adjacent property where Defendant Beach Towing Services, Inc., conducts business, and the fact that they never had a parking garage there. (See Deposition of Vincent Festa at 31:13-25, 33:19-23; Mark Festa Dep., Ex. 4, at 12:20-23, 48:7-10, 151:16-152:5, 153:14-154:5, 154:11-22, 159:1-6; Deposition of Michael Festa Dep. at 25:1-l 5, 87:1-6; Andrade Dep. at 139:13-25, 153:21-154:5).

[7] Defendants assert that Heleski v. Harrell, 119 So.3d 1271, 1273 (Fla. 2d DCA 2013), stands for the proposition that, under Florida law, a garage is defined as "a building or indoor space in which to park or keep a motor vehicle." That is a misreading of that decision. The Second District noted in *dicta* that the American Heritage Dictionary of the English Language (5th ed. 2011) provided that definition of "garage" but concluded that, although the property owners referred to the structure as a "garage," it was unclear what use they actually intended to use it for. Id. at 1273. There was no dispute among the parties about the meaning of the term "garage" in the deed restriction, and the court made no finding on it. Thus,

the American Heritage Dictionary defines the term "garage" as both a building in which to park a motor vehicle and a commercial establishment where cars are repaired. American Heritage Dictionary, https://www.ahdictionary.com, last accessed August 4, 2018. And the City Code, as to which Defendants asked this Court to take judicial notice, has three different defined uses containing the word "garage," each of which necessarily contains a modifier to make the actual use clear. City Code § 114-1. Moreover, a "garage company" could be reasonably read to include a business that repairs cars or a business that operates a valet service.

Where a restrictive covenant is ambiguous, it must be construed against the party seeking to enforce it. Boyce v. Simpson, 746 So. 2d 507 (Fla. 4th DCA 1999). Moreover, restrictive covenants must be strictly construed in favor of the free and unrestricted use of real property. See 19650 NE 18th Avenue, LLC v. Presidential Estates Homeowners Assoc., Inc., 103 So. 3d 191, 195 (Fla. 3d DCA 2012). Here, Defendants are the parties seeking to enforce the Covenant. Therefore, it must be construed against them. Boyce, 746 So. 2d at 508. In addition, because the Covenant restricts the use of real property, it must be construed in favor of the free and unrestricted use of the Property. 19650 NE 18th Avenue, LLC, 103 So. 3d at 195. Accordingly, the Covenant must be construed to prohibit only the use of the Property for a company where vehicles are mechanically repaired, rebuilt or constructed for compensation. See McInerney v. Klovstad, 935 So. 2d 529, 532 (Fla. 5th DCA 2006) (concluding that disputed phrase "any conflict" in restrictive covenant was ambiguous because it was undefined and thus fairly susceptible to more than one interpretation, and holding that "based on our conclusion that [the covenant] is ambiguous, the rules of construction require that it be construed against the [neighbors] who seek to enforce the restriction"). The Covenant cannot be read to prohibit a parking garage on the Property. Any other construction would run counter to the well settled rules that a restrictive covenant must be strictly construed against the party seeking to enforce it, and in favor of the free and unrestricted use of the Property. See Presidential Estates, 103 So. 3d at 195. Moreover, the construction advanced by Defendants would impermissibly result

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the court had no reason to consider the other meanings of the word "garage" found in the American Heritage Dictionary.

> in the forfeiture of Plaintiff's substantial development rights, in violation of these long-standing principles of real property law. Id.

Following our de novo review of the appellants' alternative arguments for the interpretation of the Covenant, we find no error in the final declaratory decree as entered by the trial court.

Affirmed.