

RENDERED: AUGUST 28, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001474-MR

SCOTT HYATT;
SUSAN HYATT

APPELLANTS

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 07-CI-00002

IVA COURT

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, STUMBO, AND VANMETER, JUDGES.

KELLER, JUDGE: This is an appeal from an order of the Marshall Circuit Court which enjoined the appellants, Scott and Susan Hyatt, (hereinafter the Hyatts), from renting their vacation home, located on Kentucky Lake. The court found that the Hyatts were in violation of a restrictive covenant contained in the deed prohibiting commercial or manufacturing activity. In the appeal, the Hyatts argue they have not violated the restrictive covenant as the rental of their vacation home

does not rise to the level of a commercial purpose. Alternatively, the Hyatts assert that even if their behavior violates the deed, the character of the subdivision has so changed that to do equity, the restriction should be nullified. We disagree with the Hyatt's contentions, and therefore affirm the Marshall Circuit Court's judgment due to the reasons set forth below.

FACTS

A bench trial was held in June of 2008. As the parties do not dispute the facts found by the court, we will reiterate those facts which are pertinent below. In the trial court, the appellant, Iva Court, and ten others¹ (hereinafter the owners), owned homes located in the Sherwood Shores Subdivision. Citing various complaints against renters of the Hyatt's home, including blocking access to driveways, trash, and vulgar language, the owners sought to enforce a restrictive covenant found in their collective deeds. The relevant portions of the restrictions are set out as follows:

1. No building shall be erected or maintained on any lot in Sherwood Shores other than a private residence and a private garage for the sole use of the owner or occupant, except those lots designated as commercial on the plat.

2. No part of said premises shall be used for commercial or manufacturing purposes, except those lots designated as commercial on the plat map.

The court found that the Hyatts had created a copyrighted website at

www.bestkylakevacation.com advertising the rental of their fully-furnished home

¹ Due to the appellee's failure to name the additional parties in the notice of appeal, the additional persons associated with the case in the trial court are not per se parties to this appeal, however, we shall refer to them in the plural so as to avoid confusion.

for up to three (3) couples or two (2) families. The rental included the use of their home and private dock for periods of two (2) nights up to one (1) week. The Hyatt's charged a security deposit, a cleaning fee, an additional amount for pets, and included a charge of 10% Kentucky sales tax. Tenants entered into a written rental agreement, which included a specific check-in and check-out time, a \$300.00 damage deposit, and a \$10.00 per person charge for each additional person over the age of ten (10). The Hyatts provided linens, paper products, and other amenities for which there were other fees. The form specifically designated that the "rental is for vacation purposes only."

In addition to producing a witness who testified that he also advertised his Sherwood Shores property for rent, the Hyatts testified that there were five (5) to six (6) other properties, possibly in Sherwood Shores, that they believed likewise rented on substantially the same basis as their own. The court found that the Hyatt's tax returns for 2006 and 2007 listed the rents paid as income, and deducted as expenses the cleaning, maintenance, repairs, supplies, utilities, insurance, legal and professional fees, as well as depreciation of the property. Additionally, the Hyatts paid the required Marshall County tourist and convention commission monthly transient room tax, and the Kentucky sales use and transient room tax, as is required of motels, hotels, and persons renting their property.

When analyzing the restrictive covenant, the court found that the phrase "commercial or manufacturing purposes" was not ambiguous and therefore there was no need to scrutinize it further. The court stated, "[r]enting or leasing a

home on a daily or weekly basis, paying business taxes, and depreciating the asset for income tax purposes are all characteristics of a 'commercial purpose.' The court further found that the fact that other residents may be renting their property in the same way that the Hyatts were, did not make the phrase ambiguous. Lastly, the court found that the subdivision's character had not changed sufficiently to warrant waiver of the restrictive covenant pursuant to Kentucky law. Therefore, the court enjoined the Hyatts from continuing to rent their property in violation of the restrictions.

As stated above, the Hyatts argue to this Court that their behavior in renting their property does not constitute commercial activity, but that even if it did, the restriction should not be enforced as there has been a change in the character of the neighborhood such that it is no longer possible to accomplish the purpose intended by the covenant.

STANDARD OF REVIEW

We agree with both parties that interpretation of the restrictive covenant is a question of law appropriate for *de novo* review by this Court. *Colliver v. Stonewall Equestrian Estates Ass'n, Inc.*, 139 S.W.3d 521, 522-23 (Ky. App. 2004). Furthermore, as the parties agree that there are no factual disputes, we will concentrate our evaluation as to whether the Hyatts were entitled to a judgment in their favor as a matter of law.

ANALYSIS

The Hyatts urge us to look to other jurisdictions for our analysis of this matter, as they believe that there is not a Kentucky case that resolves the specific question of whether short-term rental of property is a “commercial purpose.” While we believe the cases from Oregon and Virginia cited by the Hyatts are noteworthy, we do not agree that they reflect the state of the law in our Commonwealth. Therefore, we look to our precedent, where the essential rule when attempting to construe ambiguous restrictive covenants is that the party’s intention governs. *See Glenmore Distilleries v. Fiorella*, 273 Ky. 549, 554, 117 S.W.2d 173, 176 (1938). If known, the surrounding circumstances of the development are likewise an important consideration when ambiguous language creates a doubt as to what the creators intended to be prohibited. *Brandon v. Price*, 314 S.W.2d 521, 523 (Ky. 1958). Thus, the construction may not be used to defeat the obvious intention of the parties though that intention be not precisely expressed. *Connor v. Clemons*, 308 Ky. 9, 213 S.W.2d 438 (1948).

Kentucky has approached restrictive covenants from the viewpoint that they are to be regarded more as a protection to the property owner and the public rather than as a restriction on the use of property, and that the old-time doctrine of strict construction no longer applies. *Highbaugh Enterprises Inc. v. Deatruck and James Construction Co.*, 554 S.W.2d 878, 879 (Ky. App. 1977).

Colliver v. Stonewall Equestrian Estates Ass'n, Inc., 139 S.W.3d 521, 523 (Ky. App. 2003).

Indeed, in 1952, our Supreme Court noted:

[W]e are among the jurisdictions which adhere to the concept that such restrictions constitute mutual, reciprocal, equitable easements of the nature of servitudes in favor of owners of other lots of a plot of which all were once a part; that they constitute property rights which run with the land so as to entitle beneficiaries or the owners to enforce the restrictions, and if it be inequitable to have injunctive relief, to recover damages. *Crutcher v. Moffett*, 205 Ky. 444, 266 S.W. 6; *Starck v. Foley*, 209 Ky. 332, 272 S.W. 890, 41 A.L.R. 756; *Doll v. Moise*, 214 Ky. 123, 282 S.W. 763; *Bennett v. Consolidated Realty Co.*, 226 Ky. 747, 11 S.W.2d 910, 61 A.L.R. 453.

Ashland-Boyd County City-County Health Dept. v. Riggs, 252 S.W.2d 922, 924-25 (Ky. 1952).

In *Ashland-Boyd* the question presented was whether or not a governmental health clinic for indigents violated a restriction against the erection of a “business house of any kind.” The Supreme Court sought first to define business prior to holding that a health clinic is not a business:

The term ‘business’ has a broad meaning and significance and may be used with many different connotations. It refers generally to a trade or occupation

or to commercial, industrial and professional engagements.

Id. at 925-26.

In *Connor v. Clemons*, 308 Ky. 9, 213 S.W.2d 438 (1948), the construction of a church was proposed on land where the deeds prohibited a “building or structure to be used for business purposes” and provided that “[n]ot more than one structure to be used for residential purposes shall be erected on any one lot.” *Id.*, 308 Ky. at 10, 213 S.W.2d at 439. Holding that the two restrictions when read together raised an ambiguity, the Supreme Court reasoned:

When the grantor specifically prohibits the use of property for a particular purpose, the more reasonable construction would be that no other uses are prohibited. At least an intention to further extend the limitations is very doubtful. It is at this point that we must apply the rule of strict construction against a restraint on the free use of land.

Id., 308 Ky. at 12, 213 S.W.2d at 440.

Only then, when faced with an ambiguity, did the Supreme Court opine that a church was not a business, and that its erection did not violate the restriction. Such is what we must do in the instant matter; that is, decide if the restriction and/or its language are ambiguous, define what is prohibited, and then decide if the actions of the Hyatts rise to the level of behavior sought to be prohibited.

The trial court found that the restriction is unambiguous and that it clearly sought to prevent any commercial or manufacturing activity within the

subdivision, except where originally authorized. While we agree with the trial court on this issue, we nevertheless undertake to further define the term commercial as it is ordinarily used in legal documents. Black's Law Dictionary, 7th edition, 1999, does not define commercial, but does use the term within its definition of business:

Business. A commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain.

BLACK'S LAW DICTIONARY, 7th edition, 1999.

Merriam-Webster's 2009 Online Dictionary defines commercial as of or relating to commerce, which is defined as the exchange or buying or selling of commodities on a large scale involving transportation from place to place, and is synonymous with business. There can be no doubt that the Hyatts define their rental enterprise as a business. The Hyatts cannot label the rental of their vacation home one thing to the Internal Revenue Service and characterize it to the contrary to this Court.

The Hyatts urge us to note that the people who rent their property engage in the very same recreational activities as do the owners or their guests who reside in the dwellings within the Sherwood Shores subdivision. While this may indeed be the case, it is not what the tenants do to occupy their time while on the property that is forbidden, it is the fact that the property is being held out for remuneration in much the same manner as a hotel or motel that is restricted. The creators of the subdivision plainly intended to restrain deed-holders from engaging

in anything more than recreation while using their property. Such is the privilege of the creators. That the other property owners seek to enforce the protections of the restrictive covenants is their right.

What is equally clear is that the Hyatts have gone to a great deal of trouble to treat their vacation property as a business. The rental agreement, copyrighted web-site,² check-in and check-out times, and the supply of various sundries to tenants, underscore the appropriateness of this commercial classification. Further, the fact that the Hyatts are required to pay the same taxes as is required of motels and hotels only emphasizes the business-related nature of their endeavor. It is unmistakable that the Hyatts have violated the restrictive covenant as the trial court found.

Our analysis cannot stop here however; as the Hyatts have alleged that the neighborhood's character has so changed that to enforce the covenants as written would violate equity. Kentucky case law simply does not support their argument. Before enforcement is prevented in equity, change in the character of a neighborhood intended to be created by restrictions must be so drastic as to render the original purpose or intent impossible:

The fact and circumstances must be examined to determine whether the change of the character of the neighborhood is sufficient to vitiate the restrictions; or, to state the question in other terms, whether the 'scheme of development' contemplated by the restrictions has been abandoned sufficiently to operate ipso facto as a vitiation of the restrictions.

² Presumably the Hyatts are attempting to prevent competition from other businesses by the use of copyright laws.

Logan v. Logan, 409 S.W.2d 531, 534 (Ky. 1966); *see also Goodwin Bros. v. Combs Lumber Co.*, 275 Ky. 114, 120 S.W.2d 1024 (1938).

Despite the other witnesses for the Hyatts, who testified that they are also engaged in renting property in Sherwood Shores, the trial court did not find evidence of such an abandonment of purpose as to render the restrictions obsolete. We discern no abuse of discretion in this finding. The neighborhood has not abandoned the original intention of a purely residential area, which is evident by simply counting the parties involved on either side of this lawsuit.

For the foregoing reasons, we affirm the Marshall Circuit Court's judgment enjoining the appellant's from any further commercial activity, including the rental of their home.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Dennis L. Null, Jr.
Mayfield, Kentucky

BRIEF FOR APPELLEE:

G. Eric Long
Benton, Kentucky