

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000089-MR

NUNAMAKER FAMILY LIMITED
PARTNERSHIP, II; AND
RMH FRANCHISE CORPORATION

APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 17-CI-00355

WINCHESTER PLAZA, LLC

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: MAZE AND NICKELL, JUDGES; HENRY,¹ SPECIAL JUDGE.

MAZE, JUDGE: Nunamaker Family Limited Partnership, II (Nunamaker), and RMH Franchise Corporation (RMH) appeal from a declaratory judgment by the

¹ Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Clark Circuit Court interpreting a Restrictive Covenant in favor of Winchester Plaza LLC (Winchester Plaza). Nunamaker and RMH argue that the terms of the Restrictive Covenant clearly prohibit Winchester Plaza's proposed use of its retail property. We find that the unambiguous terms of the Restrictive Covenant do not prohibit the proposed use. Hence, we affirm.

The relevant facts of this appeal are not in dispute. Winchester Plaza is the owner of a tract of real property located near Exit 94 adjacent to I-64 in Winchester, Clark County, Kentucky, upon which a retail shopping center is located ("the Shopping Center Property"). Nunamaker is the owner of an adjacent tract of real property upon which a restaurant is operated ("the Restaurant Property"). RMH leases the Restaurant Property from Nunamaker and operates an Applebee's Grill and Bar thereon. The Applebee's has been in continuous operation since 1995.

On August 17, 1995, Winchester Plaza's predecessor-in-title sold the Restaurant Property to Nunamaker's predecessor-in-title. As part of the conveyance, the parties to the sale also executed a Restrictive Covenant, which provided as follows:

THEREFORE, in consideration of the terms and conditions contained in that Real Estate Purchase Contract, Grantor promises and declares, with respect to that property described on Exhibit B attached hereto and made a part thereof [the Shopping Center property], that the [Shopping Center property] will not be used for a

casual dining restaurant and bar serving food and alcoholic beverages as long as the [Restaurant Property] is being operated as a casual dining restaurant and bar serving food and alcoholic beverages. This Restrictive Covenant shall in no way prohibit [i] a casual dining restaurant or any other restaurant which, in each case does not also serve alcoholic beverages, from operating on the [Shopping Center Property], or [ii] a bar serving alcoholic beverages but not also being operated as a casual dining restaurant from operating on the [Shopping Center Property].

The terms of the Restrictive Covenant further provided that the restrictions “shall run with and bind the [Shopping Center Property] and shall inure to the benefit of the Grantee and be binding upon the Grantor and the successors and assigns of the Grantor.”

On July 26, 2017, Winchester Plaza brought this declaratory judgment action pursuant to KRS² 418.045 to determine whether its lease to Cattleman’s Roadhouse would violate the Restrictive Covenant. Nunamaker and RMH filed cross-petitions for declaratory judgment. The proposed Cattleman’s Roadhouse would serve both food and alcoholic beverages, but the alcohol would be prepared for service in an area of the restaurant not in view to the public. Nunamaker and RMH took the position that the proposed use would violate the terms of the Restrictive Covenant. Winchester Plaza disagreed with that interpretation of the

² Kentucky Revised Statutes.

Restrictive Covenant, and further argued that Nunamaker and RMH had waived their rights to enforce the Restrictive Covenant by failing to object to other restaurant tenants in the Shopping Center property.

Following briefing by all the parties, the trial court entered a judgment for Winchester Plaza on December 15, 2017. The court found that the Restrictive Covenant did not preclude the use of the Shopping Center Property from

Use as a business/restaurant building in which both food and alcohol are served where there is not a public bar area within the building and the alcohol is prepared for service in an area of the building not in view of or open to the public and that specifically the property May be used as a “Cattleman’s Restaurant” which would serve food and alcohol but all alcohol would be prepared for service outside the presence of patrons, and where the Cattleman’s Restaurant would not have or operate a separate public bar space open to the public within the building.

Subsequently, the trial court entered an amended judgment to correct a clerical error.

On appeal, Nunamaker and RMH argue that the trial court failed to construe the Restrictive Covenant in accord with its plain and unambiguous language. The construction and interpretation of a contract is a matter of law and is reviewed under the *de novo* standard. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998). The fundamental rule in construing restrictive covenants is that the intention of the parties governs. *Colliver v. Stonewall Equestrian Estates*

Ass'n, Inc., 139 S.W.3d 521, 522 (Ky. App. 2003). See also *Triple Crown Subdivision Homeowners Ass'n, Inc. v. Oberst*, 279 S.W.3d 138, 140 (Ky. 2008). Words which have no technical meaning in law must be interpreted in light of the usage and understanding of the common person. See *Fryman v. Pilot Life Ins. Co.*, 704 S.W.2d 205, 206 (Ky. 1986). But in the absence of ambiguity, a written instrument will be enforced strictly according to its terms, and a court will interpret the contracts terms by assigning language its ordinary meaning and without resort to extrinsic evidence. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003). See also *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002).

Nunamaker and RMH first argue that the trial court improperly considered extrinsic evidence even though the terms of the Restrictive Covenant were not ambiguous. The trial court allowed discovery of extrinsic evidence to determine the original parties' intent regarding the scope of the Restrictive Covenant. However, the court did not specifically address that evidence in its Declaratory Judgment order, only stating that its reached its conclusions "for the reasons specified in [Winchester Plaza's] motion."

Winchester Plaza's motion focused mainly on the plain wording of the Restrictive Covenant. The motion discussed the extrinsic evidence only to the extent that it was relevant to its secondary argument that Nunamaker and RMH

waived the Restrictive Covenant through their failure to object to prior violations. Since Winchester Plaza raised the latter issue in its petition for declaratory judgment, we conclude that the trial court properly allowed discovery regarding the parties' intent and prior enforcement of the Restrictive Covenant.

In support of its interpretation, Winchester Plaza focuses on the language of the Restrictive Covenant stating that the Shopping Center Property “will not be used for a casual dining restaurant *and* bar serving food and alcoholic beverages”[.] (Emphasis added). Winchester Plaza argues that the use of the term “restaurant *and* bar serving food and alcoholic beverages” clearly means a restaurant with a bar serving both food and alcoholic beverages. In response, Nunamaker and RMH focus on the subsequent sentence, which permits either a “restaurant which . . . does not also serve alcoholic beverages, . . .” or “a bar serving alcohol but also not being operated as a casual dining restaurant.” Nunamaker contends that the second sentence would exclude any restaurant that serves alcoholic beverages, even if it does not have a public bar.

Despite these differing interpretations, we conclude that the Restrictive Covenant is not ambiguous. “A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations.” *Kentucky Shakespeare Festival, Inc. v. Dunaway*, 490 S.W.3d 691, 694-95 (Ky. 2016) (quoting *Hazard Coal Corporation v. Knight*, 325 S.W.3d 290, 298 (Ky.

2010)). But the fact that one party may have intended different results is insufficient to construe a contract at variance with its plain and unambiguous terms. *Cantrell, supra* at 385.

As Winchester Plaza correctly notes, the first sentence does not prohibit the operation of any restaurant that also serves alcoholic beverages, but only a “casual dining restaurant and bar” serving both food and alcoholic beverages. The term “casual dining restaurant and bar” refers to a particular type of restaurant that also includes a public bar. Furthermore, the following sentence does not render the prior sentence ambiguous. Instead, it clarifies the permitted uses of the Shopping Center Property but does not add to or explain the restrictions.

Consequently, we agree with the trial court that the Restrictive Covenant does not preclude a restaurant serving alcohol from operating in the Shopping Center Property. Rather, the Restrictive Covenant only prohibits a casual dining restaurant with a public bar. Consequently, we agree with the trial court that the proposed use by Cattleman’s Roadhouse would not violate the Restrictive Covenant. Therefore, the trial court properly granted the declaratory judgment in favor of Winchester Plaza.

Accordingly, we affirm the declaratory judgment by the Clark Circuit Court.

ALL CONCUR.

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