NO. COA08-271

NORTH CAROLINA COURT OF APPEALS

Filed: 3 February 2009

ASPEN INVESTMENT
COMPANY, LLC,
Plaintiff-Appellant,

v. Catawba County
No. 07 CvS 775

RIVER GATE, LLC; and
KENNETH B. CRUMP and wife
CORA S. CRUMP,
Defendants-Appellees.

Appeal by Plaintiff from order entered 29 October 2007 by Judge Jesse B. Caldwell, III in Superior Court, Catawba County. Heard in the Court of Appeals 19 November 2008.

Patrick, Harper & Dixon, L.L.P., by Michael J. Barnett, for Plaintiff-Appellant.

Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by Forrest A. Ferrell and Jason White, for Defendants-Appellees.

McGEE, Judge.

Aspen Investment Company, LLC (Plaintiff) and River Gate, LLC (River Gate) and two of River Gate's members, Kenneth Crump and Cora Crump (the Crumps) (collectively Defendants) entered into a series of transactions involving the purchase of real property in Catawba County and Iredell County, North Carolina in or before March, 2006. The Crumps acquired an option to purchase two parcels of real property totaling approximately 440 acres (the 440-acre

parcel) in Catawba County, North Carolina from Rbm, Inc. and Deer Track, Inc. on 4 March 2005. The Crumps also acquired four separate parcels of real property totaling 71 acres (the 71-acre parcel) in June and December of 2005. The Crumps acquired another 83 acres of real property (the 83-acre parcel) in Iredell County, North Carolina in 2006. The Crumps subsequently assigned their right to purchase the 440-acre parcel to River Gate.

Defendants planned to develop the 440-acre parcel, along with the 71-acre parcel, as a mixed use development at Lake Norman. This development was to be known as River Oaks Village. Defendants also planned to develop the 83-acre parcel as a mixed use development at Lake Norman. This development was to be known as River Oaks Station. (Hereinafter, the two developments are collectively referred to as the River Oaks project.) In order to develop the River Oaks project, Defendants sought zoning map amendments, conditional use permits, and annexation by the Town of Catawba. River Gate filed a zoning map amendment application on 19 December 2005 with the Town of Catawba. River Gate requested that the 440-acre parcel and the 71-acre parcel be re-zoned as Neighborhood Residential (R-1), Highway Business (H-B), and Office and Institutional (O-I) districts. The re-zoning would allow the development of single family housing units as well as commercial space. Single family homes are a use permitted by right in an R-1 zoning district, but multi-family dwelling units such as townhomes and condominiums are permitted only upon issuance of a conditional use permit.

River Gate filed an application for a conditional use permit to allow a density of 416 townhomes and 364 condominiums in River Oaks Village on 19 December 2005. The Town of Catawba issued the requested conditional use permit on 26 January 2006, which allowed for development of 416 townhomes and 364 condominiums subject to the property being annexed by the Town of Catawba. The Town of Catawba approved River Gate's zoning map amendment application on 6 February 2006, which included development of 726 single family units.

As early as March 2005, Plaintiff expressed interest in purchasing the 440-acre parcel, the 71-acre parcel, and the 83-acre parcel for the purpose of completing the River Oaks project. Defendants informed Plaintiff that the 440-acre parcel and the 71-acre parcel had been approved for construction of 1,506 residential units: 726 single family units, 416 townhomes, and 364 condominiums, the approval being conditioned upon the annexation of the property by the Town of Catawba. Plaintiff entered into three real estate purchase agreements with Defendants on 14 March 2006 wherein Plaintiff agreed to purchase the 71-acre parcel and the 83-acre parcel, and to acquire and exercise River Gate's option to purchase the 440-acre parcel.

Plaintiff agreed to purchase the 71-acre parcel for the sum of $2,000,000, with the closing to occur on or before 15 November 2006. Plaintiff agreed to purchase the 83-acre parcel for the purchase price of $3,600,000, subject to Plaintiff's closing on the 83-acre parcel within one year of closing on the 71-acre parcel.

Plaintiff purchased the 440-acre parcel on 5 May 2006 for the purchase price of $13,400,000. Plaintiff paid $4,823,087.30 to Deer Track, Inc. and $1,776,912.70 to Rbm, Inc., leaving a remaining balance of $6,800,000. River Gate agreed to finance Plaintiff's payment of the balance by accepting a promissory note in the amount of $6,800,000, secured by a second deed of trust on the 440-acre parcel. Plaintiff agreed to fully satisfy the promissory note on or before 15 November 2006. At a public hearing on 7 August 2006, the Catawba Town Council adopted an ordinance annexing into its corporate limits the portions of the 440-acre parcel and the 71-acre parcel that were not already located within the corporate limits of the Town of Catawba.

Plaintiff claimed that after closing on the 440-acre parcel, and prior to the closing dates for the 71-acre parcel and the 83-acre parcel, Plaintiff learned that although the annexation was completed, the 1,506 residential units had not been approved for the 440-acre parcel and the 71-acre parcel. Plaintiff also claimed that the utilities on the 440-acre parcel and the 71-acre parcel were inadequate for the development of 1,506 residential units. Accordingly, Plaintiff notified Defendants prior to the 15 November 2006 closing deadline for the 71-acre parcel that it was exercising its contractual right to delay the closings on the 71-acre parcel and the 83-acre parcel. Plaintiff asserted this right under the clause in the purchase agreement for the 71-acre parcel which "provided that if the 1,500 residential unit approval contingency was not met, 'the [p]urchase [p]rice shall be adjusted

proportionally and/or the closing may be delayed pending the adjustment or fulfillment of the contingencies.'" Defendants notified Plaintiff on 1 February 2007 that they were terminating the contracts for the purchase of the 71-acre parcel and the 83-acre parcel.

Plaintiff filed a notice of lis pendens on 1 March 2007 as to the 71-acre parcel and the 83-acre parcel. Plaintiff subsequently filed a complaint on 21 March 2007 seeking specific performance of the purchase agreements for the 440-acre parcel, the 71-acre parcel, and the 83-acre parcel. Defendants filed an answer and counterclaim on 3 April 2007 which included a motion to dismiss the notice of lis pendens. The trial court heard Defendants' motion to dismiss the notice of lis pendens on 21 May 2007. The trial court ordered the notice of lis pendens be cancelled of record in an order entered on 29 October 2007. The trial court's findings of fact included the fact that Plaintiff had not paid the promissory note to River Gate, nor had Plaintiff closed on the purchase of the 71-acre parcel. Plaintiff appeals from this order.

Plaintiff argues that the trial court erred in granting Defendants' motion to dismiss the notice of lis pendens because Plaintiff's claim for specific performance is an action affecting title under N.C. Gen. Stat. § 1-116. We disagree.

This Court reviews a trial court's ruling on a motion to dismiss *de novo*. *Lea v. Grier*, 156 N.C. App. 503, 507, 577 S.E.2d 411, 414 (2003). Pursuant to N.C. Gen. Stat. § 1-116, any person desiring the benefit of constructive notice of pending litigation

may file a notice of lis pendens in the following cases: "(1) Actions affecting title to real property; (2) Actions to foreclose any mortgage or deed of trust or to enforce any lien on real property; and (3) Actions in which any order of attachment is issued and real property is attached." N.C. Gen. Stat. § 1-116(a) (2007). Plaintiff argues that its notice of lis pendens is proper because Plaintiff's complaint seeks specific performance of the real estate contracts with Defendants. Our Court has previously held that actions seeking specific performance do fall within the lis pendens statute:

> actions to set aside deeds or other instruments for fraud, to establish a constructive or resulting trust, *to require specific performance*, to correct a deed for mutual mistake and in like cases where there is no record notice and where otherwise a prospective purchaser would be ignorant of the claim.

Massachusetts Bonding & Insurance Co. v. Knox, 220 N.C. 725, 728, 18 S.E.2d 436, 439 (1942) (emphasis added); *see also George v. Administrative Office of Courts*, 142 N.C. App. 479, 483, 542 S.E.2d 699, 702 (2001) (holding that lis pendens applies to actions for specific performance).

We disagree, however, with Plaintiff's contention that its claim against Defendants was an action for specific performance.

> In determining whether a cause of action affects title to real property within the meaning of [N.C. Gen. Stat.] § 1-116(a)(1), the nature of the action must be analyzed by reference to the facts alleged in the body of the complaint rather than by what is contained in the prayer for relief.

George, 142 N.C. App. at 483, 542 S.E.2d at 702. In the present

case, Plaintiff defaulted on the purchase agreements it seeks to specifically perform. Plaintiff's action is thus not for specific performance, but rather for reformation of the purchase agreements to allow Plaintiff additional time to perform.

Plaintiff defaulted on the purchase agreement for the 440-acre parcel when it failed to pay the amount due under the promissory note on 1 March 2007. Plaintiff had already defaulted on the purchase agreement for the 71-acre parcel when it failed to close on 15 November 2006. Because closing on the 71-acre parcel was a condition precedent to satisfying the purchase agreement for the 83-acre parcel, Plaintiff defaulted on the purchase agreement for the 83-acre parcel, as well. Plaintiff's claim is therefore actually a claim for reformation of the purchase agreements to allow Plaintiff additional time to perform, and reformation is not an action affecting title to real property that falls within the lis pendens statute. *George*, 142 N.C. App. at 483, 542 S.E.2d at 702.

Additionally, our Courts have held that the lis pendens statute does not apply to claims that are brought for the purpose of preventing a change in the record. *See Cutter v. Cutter Realty Co.*, 265 N.C. 664, 669, 144 S.E.2d 882, 885 (1965). In the present case, Plaintiff argues on appeal that it is "seeking to prevent any possible conveyance by . . . [Defendants] while [Plaintiff's] claim for specific performance is pending." The filing of a notice of lis pendens to prevent another party from transferring the real property at issue is improper. *Cutter*, 265 N.C. at 669, 144 S.E.2d

at 885. We therefore affirm the trial court's order dismissing Plaintiff's notice of lis pendens.

Affirmed.

Judges BRYANT and GEER concur.

Report per Rule 30(e).