NO. COA12-611

NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

PROPERTIES OF SOUTHERN WAKE, LLC,
Plaintiff,

v. Wake County
No. 11 CVS 6373

THE FIDELITY BANK, BRANCH BANKING AND TRUST COMPANY, and NC PROPERTIES I, LLC,
Defendants.

Appeal by Plaintiff from orders and judgments entered 29 September 2011 in favor of Defendants The Fidelity Bank and Branch Banking and Trust Company by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 11 October 2012.

Boxley, Bolton, Garber & Haywood, L.L.P., by Ronald H. Garber, for Plaintiff.

Ward and Smith, P.A., by Michael P. Flanagan and Jason T. Strickland, for Defendant The Fidelity Bank.

Williams Mullen, by John D. Burns, for Defendant Branch Banking & Trust Company.

STEPHENS, Judge.

Procedural History and Factual Background

This appeal arises out of the enforcement of restrictive covenants in the Fleming Fields Subdivision ("Fleming Fields") in Wake County. Plaintiff Properties of Southern Wake, LLC, filed restrictive covenants for the subdivision in the Wake County Registry on 21 November 2006. Those covenants state, in pertinent part:

> 3.1 Time Limits. By acceptance of a deed, each Lot Owner or assigns agrees to have all public or private approvals necessary and shall start physical construction of a dwelling within nine (9) months of acceptance of said deed. In the event construction is not started within nine (9) months of acceptance of deed, the Lot Owner shall, at the Declarant's option, sell the Lot back to the Declarant at the original sales price, exclusive of any other costs incurred by Lot Owner. Declarant may extend the nine (9) months start time by up to three (3) months for any reason deemed acceptable to Declarant. At the end of any time extension the buy out option would then exist again for the Declarant. Time is of the essence. Notification will be by certified mail.
>
> Once construction begins, each Lot Owner will be required to complete construction of any dwelling ready for occupancy within three hundred sixty (360) days. Start date for construction will be the date a Wake County building permit is issued. Completion

> date will be the date Wake County issues a certificate of occupancy. If construction is not completed within the allowed three hundred sixty (360) days then the Lot's Owner will pay to the Declarant fifty (50) dollars a day for each day over the three hundred sixty (360) days until completion. Time is of the essence. Notification will be by certified mail.

Tim C. Johnson General Contractor, Inc. ("Johnson Contracting") took title to four lots[1] in Fleming Fields by general warranty deed on 22 November 2006. Johnson Contracting granted a deed of trust to Defendant The Fidelity Bank ("Fidelity Bank") on 28 December 2006. After Johnson Contracting defaulted on its loan obligations to Fidelity Bank, the lots were conveyed from Johnson Contracting to Fidelity Bank via two substitute trustee's deeds on 28 May 2010.

Dennis McLaurin and Charlene J. McLaurin took title to Lots 70 and 74 of Fleming Fields and granted two deeds of trust in the lots to Branch Banking and Trust ("BB&T") on 11 February 2008. BB&T took ownership of Lots 70 and 74 through trustee's deeds in foreclosure on 12 November 2010. Construction of a detached, single family home was commenced on Lot 28 by Johnson Contracting and was completed by Fidelity Bank on 12 August

[1]The text of the deed of trust lists the lots as numbers 19, 21, 28, and 31, but Exhibit "A" attached to the deed describes the property as "Lots 17, 21, 28[,] and 31[.]" Allegations in Plaintiff's complaint also refer to lot 17 rather than lot 19.

2010. Construction has not commenced on any other lots involved in this action.

Plaintiff filed suit against Defendants on 25 April 2011 alleging that it is entitled to recover monetary damages for Defendants' failure to commence or complete construction of residences on the lots within the time period required by the restrictive covenants. Pursuant to Rule 12(b)(6), Fidelity Bank filed a motion to dismiss on 27 June 2011, and BB&T filed a motion to dismiss on 1 July 2011. Defendants' motions relied largely on the text of the covenants, arguing (1) that the covenants do not run with the land and are thus inapplicable to Defendants, and (2) that the covenants do not provide for the remedy sought by Plaintiff. After a hearing, the court granted the motions to dismiss as to both Defendants in separate orders and judgments entered 29 September 2011.[2] Plaintiff appeals.

Standard of Review

A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of the complaint." *Castle Worldwide, Inc. v. SouthTrust Bank,* 157 N.C. App. 518, 521, 579 S.E.2d 478, 480 (2003). In considering a Rule 12(b)(6) motion to dismiss,

[2]Plaintiff and Defendant NC Properties I, LLC, have settled all issues between them, and Plaintiff filed a notice of voluntary dismissal with prejudice on 21 June 2012. Accordingly, NC Properties I, LLC, is not a party to this appeal.

"[t]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Id.* at 521, 579 S.E.2d at 480-81. A Rule 12(b)(6) motion to dismiss is properly granted "when the complaint on its face reveals that no law supports the plaintiff's claim, that some fact essential to the plaintiff's claim is missing or when some fact disclosed in the complaint defeats the plaintiff's claim." *Hare v. Butler*, 99 N.C. App. 693, 696, 394 S.E.2d 231, 234, *disc. review denied,* 327 N.C. 634, 399 S.E.2d 121 (1990). We review the dismissal of a case on the basis of Rule 12(b)(6) *de novo*. *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008), *disc. review denied,* 363 N.C. 372, 678 S.E.2d 234 (2009).

Discussion

Plaintiff's sole argument on appeal is that the trial court erred by granting Defendants' motions to dismiss. We disagree.

Covenants originate in contract and are thus subject to the same rules of interpretation applied to any other contract. *Armstrong v. Ledges Homeowners Ass'n, Inc.* 360 N.C. 547, 554, 633 S.E.2d 78, 85 (2006). "Where the language of a contract is plain and unambiguous, construction of the agreement is a matter

of law[,]" *First Citizens Bank & Trust Co. v. McLamb*, 112 N.C. App. 645, 649-50, 439 S.E.2d 166, 169 (1993), and "a contract is to be construed as a whole with each clause and word being considered with reference to its other provisions." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 319, 411 S.E.2d 133, 136 (1991). When the language of a contract is ambiguous, the ambiguity is construed against the drafting party. *See Reichhold Chems., Inc. v. Goel*, 146 N.C. App. 137, 153, 555 S.E.2d 281, 291 (2001). Further, when interpreting contracts, a court's primary purpose "is to give effect to the *original* intent of the parties," but "covenants are strictly construed in favor of the *free use of land* whenever strict construction does not contradict the plain and obvious purpose of the contracting parties." *Armstrong*, 360 N.C. at 555, 633 S.E.2d at 85 (emphasis in original).

Here, the plain language of the protective covenants requires that lot owners "start physical construction of a dwelling within nine (9) months of acceptance of said deed." The covenants further provide the sole remedy for non-compliance with this provision, stating "[i]n the event construction is not started within nine (9) months of acceptance of deed, the Lot Owner shall, at the Declarant's option, *sell the Lot back to the*

Declarant at the original sales price, exclusive of any other costs incurred by Lot Owner." (Emphasis added). In this regard, the language of the protective covenants is unambiguous, barring Plaintiff from seeking monetary damages in lieu of the provided remedy of repurchase.

Section 3.1, which provides for the assessment of damages for construction not completed within 360 days, begins with the language "[o]nce construction begins[.]" Construction was never commenced on lots 17, 31, 70, and 74. Thus, as to these lots, the explicit pre-requisite for monetary damages under the protective covenants, that construction on the lot be commenced, was never met.

Construction of a single family home was commenced on Lot 28 by Johnson Contracting and was completed by Fidelity Bank on 12 August 2010. While the foreclosure situation presented by this case is not directly addressed in the covenants, the definition of "Owner" in Section 1.2 explicitly excludes "the mortgage[e], its successors or assigns, unless and until such mortgagee has acquired title pursuant to foreclosure or a proceeding in lieu of foreclosure[.]" Therefore, the language of the protective covenants does not allow Plaintiff to obtain damages against Fidelity Bank for actions taken before Fidelity

Bank became the lot owner. Once Fidelity Bank took title on 28 May 2010, construction on Lot 28 was completed on 12 August 2010, well within the prescribed 360-day time period.[3]

Plaintiff argues further, however, that the protective covenants at issue run with the land and thus "dictate[] that a house will be built . . . within a certain period of time." We are not persuaded.

> A restrictive covenant . . . runs with the land only if (1) the subject of the covenant touches and concerns the land, (2) there is privity of estate between the party enforcing the covenant and the party against whom the covenant is being enforced, and (3) the original covenanting parties intended the benefits and the burdens of the covenant to run with the land.

Runyon v. Paley, 331 N.C. 293, 299-300, 416 S.E.2d 177, 183 (1992). This Court has held that a covenant creating an affirmative obligation to pay assessments runs with the land only when "the assessments are for the maintenance of property that is located within the subdivision for the benefit of the lot owners." *Claremont Prop. Owners Ass'n v. Gilboy*, 142 N.C.

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[3]Even in the event Plaintiff could establish some ambiguity in this portion of the protective covenants, any ambiguity would be construed against Plaintiff as the drafting party and would thus preclude damages against Fidelity Bank for breach of this covenant. *See Reichhold Chems., Inc.*, 146 N.C. App. at 153, 555 S.E.2d at 291 (holding that ambiguity in contract language is construed against the drafting party).

App. 282, 287, 542 S.E.2d 324, 327 (2001). Additionally, in regard to the "touch and concern" requirement, this Court has generally held that "covenants to pay money do not touch and concern the land" unless assessed homeowners have a right to use amenities improved or maintained by the assessed fee. *Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n*, 187 N.C. App. 22, 33, 652 S.E.2d 378, 386 (2007).

Plaintiff argues that the covenants at issue here run with the land, but our review of the record indicates that they do not meet any of the three criteria specified in *Runyon*. First, the language of the covenants does not indicate that the penalties assessed under Section 3.1 are to be used to maintain property within the subdivision, nor that property owners have a right to use amenities maintained or improved by the penalties imposed. Thus, the subject of these covenants to pay money does not touch and concern the land. *Runyon*, 331 N.C. at 299-300, 416 S.E.2d at 183. Second, because Defendants did not take title directly from Plaintiff, there is no "privity of estate between the party enforcing the covenant and the party against whom the covenant is being enforced[.]" *Id.* at 300, 416 S.E.2d at 183. Third, there is no suggestion in the protective covenants that "the original covenanting parties intended the

benefits and the burdens of the covenant to run with the land." *Id.* Accordingly, the covenants at issue do not run with the land and cannot be asserted by Plaintiff against Defendants.

Finally, Plaintiff contends the trial court erred by granting Defendants' Rule 12(b)(6) motions to dismiss when matters outside the complaint were considered, thus purportedly converting the motions to dismiss into motions for summary judgment, and by refusing to accept and consider Plaintiff's tendered affidavit. We disagree.

The trial court's reference to documents that are "the subject of the action and specifically referred to in the complaint[]" does not convert a Rule 12(b)(6) motion to a summary judgment motion. *Coley v. North Carolina Nat'l Bank*, 41 N.C. App. 121, 126, 254 S.E.2d 217, 220 (1979). A court may also consider documents that form the basis of the suit without converting a motion to dismiss into a motion for summary judgment. *Brackett v. SGL Carbon Corp.*, 158 N.C. App. 252, 255, 580 S.E.2d 757, 759 (2003).

Here, the trial court considered two documents in addition to the complaint in granting Defendants' motions to dismiss: the protective covenants at issue as filed with the Register of Deeds of Wake County and certified copies of the trustee deeds

under which Defendants took title to the lots. The trial court properly considered these documents under Rule 12(b)(6). Paragraph five of Plaintiff's complaint specifically refers to the protective covenants. Additionally, under *Brackett,* the court properly considered the deeds which established the date of Defendants' ownership and their responsibility under the covenants, the very basis of this suit.

Similarly, Plaintiff's allegation that the trial court committed reversible error by refusing to accept and consider Plaintiff's tendered affidavit in considering Defendants' motions to dismiss is without merit. The affidavit in question was not referenced in the complaint and there is no indication that anything regarding the affidavit was a basis for the suit.

Further, Rule 10 of the North Carolina Rules of Appellate Procedure requires that:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C.R. App. P. 10. Here, Plaintiff did not make a motion *in limine* or raise an objection at the hearing on the motions to

dismiss as to either of the documents considered by the trial court in granting the motions. Moreover, because the motions to dismiss were not converted into motions for summary judgment, no evidence beyond the pleadings should have been considered. The affidavit in question was not served prior to hearing, did not address matters relevant to the motions to dismiss, and was not referenced in the amended complaint. Thus, the affidavit was untimely and the trial court's failure to consider the affidavit was proper. Accordingly, the order of the trial court is

AFFIRMED.

Judges GEER and MCCULLOUGH concur.

Report Rule 30(e).