IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-379

Filed: 16 June 2020

Jackson County, No. 16-CVS-112

THE MOUNTAIN CLUB ASSOCIATION, INC., Plaintiff,

v.

THE MOUNTAIN CLUB AT CASHIERS, LLC, a North Carolina limited liability company; JOSEPH C. PARKS; DAVID C. PARKS; ROBERT M. DUSSAULT, SR.; GARRET BOEKEL and wife, GAIL BOEKEL; ARTHUR V. STROCK, Trustee for the Arthur V. Strock and Frances E. Strock Family Revocable Trust Dated March 24, 1998; SLC INVESTMENTS, LLC, a North Carolina limited liability company; VERNON SANDERS; JIMMY S. LOVELL; and nominal defendant SPRINGS WAY, LLC, Defendants.

Appeal by Plaintiff from order entered 3 December 2018 by Judge Alan Z. Thornburg in Superior Court, Jackson County. Heard in the Court of Appeals 3 December 2019.

Higgins Benjamin, PLLC, by John F. Bloss, Margaret M. Chase, and Robert N. Hunter, Jr., for Plaintiff-Appellant.

Horack, Talley, Pharr & Lowndes, P.A., by Amy P. Hunt and Robert B. McNeill, for Defendants-Appellees Garret Boekel and wife, Gail Boekel, and Arthur V. Strock, as Trustee of the Arthur V. Strock and Frances E. Strock Revocable Trust.

McGEE, Chief Judge.

The Mountain Club Association, Inc. (the "Association"), a homeowners' association, appeals from an order granting summary judgement in favor of Defendants Garret Boekel, Gail Boekel, and Arthur V. Strock, Trustee of the Arthur V. Strock and Frances E. Strock Family Revocable Trust Dated March 24, 1998 (the "Lenders"). The Association argues the trial court erred by granting summary judgment in favor of the Lenders on the Association's claims for declaratory judgment and claim for equitable lien and/or easement. We affirm the trial court's order.

I. Factual and Procedural Background

This appeal involves The Mountain Club at Cashiers (the "Development"), a fractional interest planned community in Cashiers, North Carolina. The Development, originally known as the Hidden Springs Development, consisted of twenty-seven fee simple lots that were owned by Hidden Springs, LLC and subject to the Hidden Springs Declaration. In 2002, principals David Parks and Joe Parks decided to convert the fee simple development into a fractional interest ownership development. Accordingly, Hidden Springs, LLC assigned its declarant's rights under the Hidden Springs Declaration to the Mountain Club at Cashiers, LLC (the "Developer") on 10 December 2002.

The Developer's principals were Robert Dussault, Sr., David Parks, Joseph Parks, Vernon Sanders, and SLC Investments, LLC. The Developer recorded an "Amended and Restated Declaration of Protective Covenants, Conditions and

Restrictions for the Mountain Club at Cashiers" (the "Declaration") in Book 1172, Page 606 of the Jackson County Public Registry on 10 December 2002. Pursuant to the Declaration, the Development was "initially comprised of the [p]roperty shown on the Plat" and was formed under the North Carolina Planned Community Act ("PCA"). The Declaration defined "plats" as the "Plats of Lots 1-10, 20-25, and 27-32, and Lots 11-13, and 26," as recorded "in the office of the Register of Deeds for Jackson County," "together with any future Plats of the Development showing numbered lots which Declarant [the Developer] may hereafter cause to be recorded and made subject to this Declaration." The Declaration also provided for the creation of the Association and granted the Developer the authority to appoint the Association's original board members. The Developer appointed Joseph Parks, David Parks, and Robert Dussault, Sr.; thus, three of the Developer's principals served on the Association's board of directors.

The Developer sought to construct a clubhouse within the Development with the intention that, once the "declarant control period" defined in the Declaration ended, the Developer would transfer ownership of the clubhouse to the Association "free and clear." Unable to obtain traditional funding from a bank, the Developer met with the Lenders and discussed the possibility of acquiring a construction loan to finance the construction of the clubhouse. The Lenders agreed to loan the Developer $1.2 million to construct a clubhouse. As security for the loan, the Developer executed

a deed of trust (the "2004 Deed of Trust"), which was recorded on 27 January 2004 in Book 1400, Page 587 of the Jackson County Registry. The collateral for the 2004 Deed of Trust included Lots 35-39, the "Clubhouse Lot," and the "Tennis Court Lot," as depicted in Plat Cabinet 12, Slide 690. The plat in Plat Cabinet 12, Slide 690 (the "Plat") was recorded on 27 January 2004 and was the first plat that identified the Clubhouse Lot and the Tennis Court Lot. At the time, the Developer owned the Clubhouse Lot, the Tennis Court Lot, and the five lots referenced in the 2004 Deed of Trust.

The Lenders loaned the Developer an additional $220,000 to complete and furnish the clubhouse on 15 April 2005. A second deed of trust, which secured the same collateral as the 2004 Deed of Trust, was recorded in Book 1494, Page 325-330 of the Jackson County Public Registry (the "2005 Deed of Trust"). Three years later, Joseph Parks, David Parks, and Robert Dussault Sr., on behalf of the Developer, began borrowing money from the Association. The Association loaned the Developer $75,000 and the Developer paid $15,000 of the $75,000 to the Lenders. Around 2010 or 2011, the Developer approached certain Association members and requested loans in exchange for waiving assessments owed to the Association.

The Developer defaulted on the terms of the promissory notes payable to the Lenders. As a result, the Developer conveyed the collateral properties, including the Clubhouse Lot and Tennis Court Lot, to the Lenders on 27 February 2014 by a deed

in lieu of foreclosure (the "Deed in Lieu of Foreclosure"). The Deed in Lieu of Foreclosure was recorded in Book 2025, Pages 649-652 of the Jackson County Registry. The Developer and the Lenders then entered into a two-year lease agreement with the option to buy (the "Lease Agreement") the Clubhouse Lot and Tennis Court Lot on 1 March 2014. However, the Developer defaulted on the Lease Agreement, resulting in the termination of the Lease Agreement.

The subsequent procedural history of this matter is complex; as a result, we discuss only the procedural history relevant to this appeal. The Association filed a complaint on 29 February 2016 against the Developer, Joseph C. Parks, David C. Parks, Robert M. Dussault, Sr., and the Lenders. The causes of action in the complaint (and amendments thereto) against the Lenders included claims: to quiet title and/or remove a cloud on title to the Clubhouse Lot and Tennis Court Lot; for an easement and/or equitable lien to be placed on the Clubhouse Lot and Tennis Court Lot; and for an injunction prohibiting the Lenders from interfering with the Association's use of the Clubhouse Lot and Tennis Court Lot. The complaint also included other causes of action for monetary damages, including a civil conspiracy claim, against the Lenders, the Developer, Joseph C. Parks, David C. Parks, Robert M. Dussault, Sr., SLC Investments, LLC, Vernon Sanders, Jimmy S. Lovell, and nominal defendant Springs Way, LLC (collectively, "Defendants").

The Association filed a motion for preliminary injunction on 14 March 2016 and a supplemental second amended complaint on 29 January 2018. The Association and several of the Defendants, including the Lenders, filed motions for summary judgment between 25 September 2018 and 1 October 2018. A number of the claims and counterclaims between the Association and certain Defendants were dismissed as a result of settlement agreements. However, the Association's and Lenders' cross-motions for summary judgment were heard in Superior Court, Jackson County on 14 November 2018. The trial court entered an order granting the Lenders' motion for summary judgment on all of the Association's claims with the exception of the civil conspiracy claim. The Association appeals.

II. Analysis

The Association argues the trial court erred by granting summary judgment in favor of the Lenders on the Association's claims for declaratory judgement and equitable lien and/or easement. We disagree.

A. Standard of Review

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019). "The party moving for summary judgment has the burden of showing that either an essential element of

the plaintiff's claim does not exist or that plaintiff cannot produce evidence to support an essential element of the claim." *Intermount Distribution, Inc. v. Pub. Serv. Co. of N.C.*, 150 N.C. App. 539, 541, 563 S.E.2d 626, 629 (2002) (citation omitted). "The evidence presented is viewed in the light most favorable to the non-movant." *Id.*

B. Declaratory Judgment Claims

The Association contends that the trial court erred in granting summary judgment to the Lenders on the Association's claim for a declaratory judgment that the Clubhouse Lot and the Tennis Court Lot are "common elements" as defined by both the statutory PCA and the Declaration. Under the PCA, common elements cannot be conveyed or encumbered by a security interest without the approval of 80 percent of members eligible to vote within a homeowners' association. N.C.G.S. § 47F-3-112(a) (2019). Because 80 percent of the Association's members did not approve the encumbrance of the Clubhouse Lot and Tennis Court Lot, the Association argues that the 2004 Deed of Trust, the 2005 Deed of Trust, and the Deed in Lieu of Foreclosure "are null and void and of no legal effect[.]" However, the Association misinterprets the PCA's and the Declaration's definition of "common elements."

1. PCA's Definition of "Common Elements"

The Association contends that the Clubhouse Lot and Tennis Court Lot are "common elements" under the PCA. The PCA limits a homeowners' association's authority to encumber common elements:

> Portions of the common elements may be conveyed or subjected to a security interest by the association if persons entitled to cast at least eighty percent (80%) of the votes in the association, or any larger percentage the declaration specifies, agree in writing to that action; provided that all the owners of lots to which any limited common element is allocated shall agree in order to convey that limited common element or subject it to a security interest.

N.C.G.S. § 47F-3-112(a). The PCA defines "common elements" as "any real estate within a planned community owned or leased by the association, other than a lot." N.C.G.S. § 47F-1-103(4) (2019).

In the present case, neither the Clubhouse Lot nor the Tennis Court Lot are "common elements" under the plain language of N.C.G.S. § 47F-1-103(4) because the lots are not "owned or leased by the [A]ssociation[.]" The Clubhouse Lot and Tennis Court Lot were owned by the Developer until the date the properties were conveyed to the Lenders, pursuant to the Deed in Lieu of Foreclosure. Thus, because the Clubhouse Lot and the Tennis Court Lot are not common elements under the plain language of N.C.G.S. § 47F-1-103(4), the provision in N.C.G.S. § 47F-3-112(a)—limiting the authority of a homeowners' association to convey common elements—is inapplicable under the facts of the present case.

The Association uses this Court's decision in *Happ v. Creek Pointe Homeowner's Ass'n*, 215 N.C. App. 96, 717 S.E.2d 401 (2011) to argue that "record ownership is not necessarily required" to determine whether real property is a common element, under the PCA. The Association asserts that, under *Happ*, courts

must "look to the substance, rather than the form, of the arrangement to determine whether real property should be deemed common element for PCA purposes." However, the fact pattern in *Happ* is necessarily distinguishable from the case at hand.

In *Happ*, a homeowners' association used assessments paid by its members to construct a security gate, equipped with lights and a camera, at the entrance of its subdivision to deter trespassers from entering. *Id.* at 100, 717 S.E.2d at 404. The plaintiff, a resident of the subdivision, brought an action against the homeowners' association seeking, *inter alia*, a declaration that the association's use of assessments was limited to maintenance of the roads within the subdivision and did not extend to the installation of a gate, light, and camera. *Id.* at 100-01, 717 S.E.2d at 404. On appeal, this Court addressed the authority of the homeowners' association under the PCA to place a security gate, light, and camera at the entrance of the subdivision. *Id.* at 106, 717 S.E.2d at 407.

This Court explained that "section 47F-3-102 allows a homeowners' association to 'regulate the use, maintenance, repair, replacement, and modification of common elements,' which are defined by section 47F-1-103(4) as 'any real estate within a planned community owned or leased by the association, other than a lot.'" *Id.* at 106-07, 717 S.E.2d at 407 (quoting N.C.G.S. §§ 47F-3-102, 47F-1-103(4) (brackets omitted)). We interpreted N.C.G.S. § 47F-1-103(4) to apply to the private roads

within the subdivision, which were owned by the developer, but maintained by the homeowners' association, and held that the roads were "'common elements' subject to 'maintenance, repair, replacement, and modification.'" *Id.* at 107, 717 S.E.2d at 407. This Court then concluded that "even if the [PCA] did not apply in the present situation because the roads are not directly owned or leased by the [homeowners' a]ssociation, common law contract principles would support the [a]ssociation's authority to construct the gate and place a video camera at the entrance in accordance with the [d]eclaration, [articles of incorporation], and by-laws." *Id.*

The Association further contends that "*Happ* instructs an amenity maintained by the homeowners[']association for the subdivision's owners is a common element for PCA purposes, regardless of whether the association holds record title." We disagree with this broad interpretation of *Happ* for two distinct reasons. First, this Court in *Happ* stated, without providing any justification, that "[w]e interpret section 47F-1-103(4) to apply to the private roads in [the subdivision] owned by [the developer] and maintained by the [a]ssociation, and believe the roads are 'common elements'[.]" We cannot interject an explanation as to why the *Happ* Court considered the roads "common elements," when no such rationale was articulated in this Court's decision.

Second, N.C.G.S. § 47F-3-112(a), which mandates that a homeowners' association must obtain the written approval of 80 percent of persons entitled to vote

prior to conveying or subjecting a common element to a security interest, was not at issue in *Happ*. However, the Association insists that its interpretation of "common elements" under *Happ* is equally applicable within the parameters of N.C.G.S. § 47F-3-112(a). Thus, under the Association's interpretation of *Happ*, a homeowners' association would have the authority to convey or subject to a security interest any real property that the association was responsible for maintaining within a planned community, despite having no ownership or leasehold interest in that property. To adopt such an interpretation and to hold that a homeowners' association is authorized to convey or encumber real property it does not own, but merely maintains, would lead to absurd results. Clearly, N.C.G.S. § 47F-3-112(a) contemplates a scenario where a homeowners' association seeks to encumber land it owns and not, as we have here, where a developer seeks to develop land that it owns. Thus, we hold that this Court's interpretation of N.C.G.S. § 47F-1-103(4) in *Happ* is limited to the unique factual scenario presented in that case.

Beyond *Happ*, we are not aware of any other decision from our Courts that has interpreted "common elements," as defined in N.C.G.S. § 47F-1-103(4), to extend to real property that is neither owned nor leased by a homeowners' association. Therefore, because the Clubhouse Lot and Tennis Court Lot do not fall within the PCA's definition of "common elements," we hold that the Developer was not required by N.C.G.S. § 47F-3-112(a) to obtain the written approval of 80 percent of the

Association's members prior to encumbering and ultimately conveying the Clubhouse Lot and Tennis Court Lot.

2. Declaration's Definition of "Common Elements"

The Declaration defines "Mountain Club Common Elements or Common Areas" as

> all real and personal property, including but not limited to the clubhouse, swimming pool, and tennis courts, intended to be devoted exclusively to the common use and enjoyment of Mountain Club Members, which Declarant identifies as Mountain Club Common Areas on the Plats and/or which the Mountain Club Association acquires and accepts as such.

The Declaration also provides the following provisions:

> Designation of Lots and Common Elements. The Declarant does hereby designate the real property as shown on the Plat as separate Lots and Common Elements.
>
> "Lot" means any numbered parcel of land, with delineated boundary lines as shown on the Plat, with the exception of common areas.

The Association asserts that "the Declaration's definition of common elements expressly includes the Clubhouse Lot and Tennis Court Lot." However, only a clubhouse and tennis courts, and not any specific lots, are explicitly included in the Declaration's definition. Additionally, the Declaration defines common elements as real and personal property "identifie[d by the Developer] as Mountain Club Common Areas on the Plats and/or which the Mountain Club Association acquires and accepts as such[;]" however, no recorded plat from the Development *ever* identified the

Clubhouse Lot or Tennis Court Lot as common areas. Indeed, the Clubhouse Lot and Tennis Court Lot first appeared on a recorded plat in 2004 in connection with the 2004 Deed of Trust and, although other areas were identified as "common areas," the Clubhouse Lot and Tennis Court Lot received no such designation.

Nor did the Association ever acquire the Clubhouse Lot or Tennis Court Lot. The Declaration's definition of common elements, which expressly includes a clubhouse and tennis courts, contemplates the Developer's intention that a clubhouse and tennis courts eventually serve as common elements within the Development. It is undisputed that the Developer intended that, once the "declarant control period" defined in the Declaration ended, it would transfer ownership of the clubhouse to the Association "free and clear" and, at that time, the clubhouse and tennis courts would become common elements. The Declaration defines "Declarant Control Period" as

> that period of time from the date of recording of this Declaration through the earlier of 1) January 1, 2025, 2) the date upon which Declarant, its successors or assigns, conveys the last Lot in the Development . . . owned by the Declarant . . . , or (3) the date upon which the Declarant, in Declarant's sole discretion, records a document expressly terminating the Declarant Control Period in the Office of the Register of Deed for Jackson County, North Carolina.

Because there is no evidence that the declarant control period has ended, we must agree with the Lenders that "the time for these lots to become Common Elements never arose, and these lots were never designated as Common Elements or conveyed to the [] Association."

The Association points out that the Declaration divides all real property shown on the plat into either "Lots," which are numbered, or "Common Elements," which are not numbered on the plat. Accordingly, the Association asserts that "[r]esidential lots, but not the Clubhouse Lot or Tennis Court Lot, are numbered on the recorded plats of the Development, further signifying that the Clubhouse Lot and Tennis Court Lot are common elements under the Declaration." However, as discussed above, the Developer provided an explicit definition of "common areas" in the Declaration and, by its own definition, the Clubhouse Lot and Tennis Court Lot are not, and have never been, common areas. Therefore, we hold the Clubhouse Lot and Tennis Court Lot do not fall within the Declaration's definition of common elements.

C. Equitable Lien and/or Easement Claim

1. Preservation

The Association argues that the trial court erred in granting summary judgment in favor of the Lenders on the Association's claim for an equitable lien and/or easement. The Lenders contend that the Association "does not include a specific claim for easement rights in any of the many versions of its complaint[;]" and "[t]o the extent the easement is alleged as a remedy for unjust enrichment, the trial court granted summary judgment in favor of [the Lenders] on the unjust enrichment claim." The Lenders also argue that the Association's motion for summary judgment

does not request an easement and the Association made no easement argument at the summary judgment hearing.

In North Carolina, it is well settled that

> [a] pleading adequately sets forth a claim for relief if it contains: (1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. The general standard for civil pleadings in North Carolina is notice pleading. Pleadings should be construed liberally and are sufficient if they give notice of the events and transactions and allow the adverse party to understand the nature of the claim and to prepare for trial.

Haynie v. Cobb, 207 N.C. App. 143, 148–49, 698 S.E.2d 194, 198 (2010) (internal citations and quotation marks omitted); *see also Fournier v. Haywood Cty. Hosp.*, 95 N.C. App. 652, 654, 383 S.E.2d 227, 228 (1989) ("Pleadings must be liberally construed to do substantial justice, and must be fatally defective before they may be rejected as insufficient."). Additionally, "when the allegations in the complaint give sufficient notice of the wrong complained of[,] an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under some legal theory." *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979), *overruled on other grounds by Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981).

In the present case, in its "supplemental second amended complaint," filed 29 January 2018, under the third cause of action titled "Equitable Estoppel/Unjust Enrichment," the Association alleged:

> Alternatively, an equitable lien and/or easement should be impressed upon the Clubhouse Lot and Tennis Court Lot permitting the Association and its members unfettered rights of use, ingress, and egress use of the Clubhouse Lot, Tennis Court Lot, the clubhouse, tennis courts, and amenities thereto.

Additionally, in the prayer for relief, the Association requested

> a preliminary and permanent injunction enjoining Defendants from prohibiting, obstructing[,] or interfering with the free access to and use and enjoyment of the Clubhouse Lot, Tennis Court Lot and the improvements thereon[.]

The Association also raised its easement argument throughout the proceedings. Following the Lenders' filing of its motion for summary judgment, the Association filed a brief in opposition to the motion and argued that there were "at a minimum, material issues of fact with respect to the [Association's] claims. . . for an easement and for damages, precluding summary judgment in favor of [the Lenders] as to those claims[.]" At the hearing on the cross-motions for summary judgment on 14 November 2018, the Lenders asserted that the Association did not include an easement claim in its complaint. The Association directed the trial court's attention to the aforementioned portions in the complaint and argued that there was at least an issue of material fact as to whether easement rights were created in the Clubhouse

Lot and Tennis Court Lot. After the hearing, the trial court held a phone conference with the parties. The trial court requested that the Lenders file a supplemental memorandum on the issue of potential easement rights and the Lenders complied; subsequently, the Association filed a supplemental memorandum in opposition to the Lenders' motions for summary judgment in regard to the Association's potential easement rights. In its memorandum, the Association asked the trial court to deny the Lenders' motion for summary judgment on the issue of easement rights and grant summary judgment in favor of the Association for the same reasons it now asserts on appeal.

We hold that, under the liberal pleading standard, the allegations in the Association's supplemental second amended complaint sufficiently placed the Lenders on notice of the Association's easement claim. Moreover, contrary to the Lenders' assertion, the Association raised its easement argument before the trial court at the summary judgment stage of the proceeding. As a result, this issue is preserved for appellate review.

2. Summary Judgment in Favor of Lenders Was Proper

The Association argues that "based on the summary judgment facts before the trial court, it is straightforward that an affirmative easement to use and to enjoy the Clubhouse and Tennis Court Lots was granted to the Association and its members." Although the substance of the Association's argument focuses on whether the

Lenders had notice of the Association's easement rights, the operative issue for this Court is the predicate question of whether easement rights were actually ever created in Clubhouse Lot and Tennis Court Lot in the first instance.

"An easement is a right to make some use of land owned by another[.]" *Builders Supplies Co. of Goldsboro, N.C. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972) (citing *Richfield Oil Co. v. Hercules Gasoline Co.*, 112 Cal. App. 431, 297 P. 73 (1931)); James A. Webster, Jr., Webster's Real Estate Law in North Carolina §§ 270, 309; 25 Am. Jur. 2d Easements §§ 2, 4; 28 C.J.S., Easements, Black's Law Dictionary). "An appurtenant easement is an easement created for the purpose of benefiting particular land. This easement attaches to, passes with and is an incident of ownership of the particular land." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 161, 418 S.E.2d 841, 846 (1992) (citing *Gibbs v. Wright*, 17 N.C. App. 495, 195 S.E.2d 40 (1973)). "'In easements, as in deeds generally, the intention of the parties is determined by a fair interpretation of the grant.'" *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 543 (1953) (quoting 17 Am. Jur., Easements, § 25).

The Association contends that there is at least a question of fact as to whether an affirmative easement was granted to the Association and its members for the use of the Clubhouse Lot and Tennis Court Lot by: (1) the application of restrictive covenants in the chain of title (similar to the Declaration); (2) the use of plats of the Development depicting thereon property for the use of owners of property within the

Development; and (3) representations made by the Developer and sales agents to purchasers. We discuss each in turn.

First, the Association argues that express easement rights were created "[b]y the application of restrictive covenants in the chain of title—similar to the Declaration here—imposing servitudes that property will be used and made available for the common use and enjoyment of purchasers." "Restrictive covenants cannot be established except by a[n] instrument of record containing adequate words so unequivocally evincing the party's intention to limit the free use of the land that its ascertainment is not dependent on inference, implication or doubtful construction." *Marrone v. Long*, 7 N.C. App. 451, 454, 173 S.E.2d 21, 23 (1970) (citing *Turner v. Glenn*, 220 N.C. 620, 18 S.E.2d 197 (1942)). It is clear that the Declaration contemplated the construction of a clubhouse that would eventually be available for the use and enjoyment of the Association and its members; however, the Declaration contains no express grant of easement rights in either the Clubhouse Lot or the Tennis Court Lot. Indeed, the Declaration expressly provides for certain easement rights within the Development, but does not directly grant easement rights in the Clubhouse Lot and Tennis Court Lot, evincing that the Developer did not intend to create easement rights in those lots by virtue of the Declaration. Thus, because the Declaration did not "contain[] adequate words so unequivocally evincing the [Developer's] intention to limit the free use of the land that its ascertainment is not

dependent on inference, implication or doubtful construction[,]" *id.*, easement rights were not created in the Clubhouse Lot or the Tennis Court Lot by virtue of the Declaration.

The Association also contends that the Declaration placed the Lenders on "actual and constructive notice that the Clubhouse Lot and Tennis Court Lot are for the exclusive use and benefit of the of the Association and its members[.]" A party takes an interest in real property subject to any easements on the property that he/she has notice of; therefore, in order for a party to be on notice of easements, easement rights must have arisen prior to the taking of interest in the property. *See Yount v. Lowe*, 288 N.C. 90, 95, 215 S.E.2d 563, 566 (1975) ("The purchaser of lands upon which the owner has imposed an easement of any kind takes the title subject to all easements, however created, of which he has notice."). We agree that the Declaration placed the Lenders on notice that the Developer intended to construct a clubhouse and tennis courts for the use and enjoyment of the Association and its members; however, given that the Declaration's language does not expressly create an easement as explained *supra*, the Declaration did not place the Lenders on notice of any prior grant of easement rights in the Clubhouse or Tennis Court Lots. Because the Declaration did not establish easement rights in the Clubhouse Lot or Tennis Court Lot, and because easement rights must be created before a lender is tasked with knowledge of their existence, we reject the Association's argument.

Second, the Association argues that easement rights were created "[b]y the use of plats in the subdivision depicting thereon property for the use of owners of property within the subdivision." "An easement appurtenant in a road of a subdivision may be created through the purchase of a deed referencing the recorded plat of the subdivision." *Barton v. White*, 173 N.C. App. 717, 720, 620 S.E.2d 278, 280 (2005). "The easement areas must be sufficiently identified on the plat in order to establish an easement, although an express grant is not required." *Tanglewood Prop. Owners' Ass'n, Inc. v. Isenhour*, 254 N.C. App. 823, 830, 803 S.E.2d 453, 459 (2017). "Conduct indicating the intention to dedicate may be found where a plat is made showing streets and the land is sold either by express reference to such a plat or by a showing that the plat was used and referred to in negotiations for the sale." *Price v. Walker*, 95 N.C. App. 712, 715, 383 S.E.2d 686, 688 (1989). Our Supreme Court has described appurtenant easement rights arising by reference to a plat map as follows:

> Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks, and playgrounds, a purchaser of a lot or lots acquires the right to have the streets . . . kept open for his reasonable use, and this right is not subject to revocation except by agreement. It is said that such streets . . . are dedicated to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets . . . may not be extinguished, altered or diminished except by agreement or estoppel. This is true because the

> existence of the right was an inducement to and a part of the consideration for the purchase of the lots. Thus, a street . . . may not be reduced in size or put to any use which conflicts with the purpose for which it was dedicated.

Cleveland Realty Co. v. Hobbs, 261 N.C. 414, 421, 135 S.E.2d 30, 35–36 (1964) (internal citations omitted). "Importantly, this type of easement arises only 'when the purchaser whose transaction relies on the plat is conveyed the land.'" *Town of Carrboro v. Slack*, 261 N.C. App. 525, 820 S.E.2d 527, 533–34 (2018) (quoting *Price v. Walker*, 95 N.C. App. 712, 715, 383 S.E.2d 686, 688 (1989)).

Although the Association argues that "there is at least a question of fact as to whether an affirmative easement to use and to enjoy the Clubhouse Lot and Tennis Court Lot was granted to the Association and its members by virtue of . . . the operative plat," the Association does *not* contend that the Developer sold any lot within the Development by reference to the Plat. *Cf. Hinson v. Smith*, 89 N.C. App. 127, 130, 365 S.E.2d 166, 167 (1988) (holding that "when the plat of Crystal Beach Estates was recorded and one lot was sold in reference to the plat, both the street and the 'Beach' became private easements to the individual purchasing the lot"). Indeed, the Association does not argue that individuals purchased lots in the Development by reference to the Plat or that any deed by which a purchaser took title to a lot referenced the Plat. The Association cites cases where our courts have found easements in favor of lot owners who were conveyed property in reference to a plat and argues that an easement by use of the Plat is "undisputedly applicable to the case

at bar." However, because an easement by use of a plat is created by the selling and conveying of lots in reference to a plat—not by the mere existence of a recorded plat—we hold the Association has failed to demonstrate that there is any issue of material fact as to whether easement rights were created in the Clubhouse Lot or Tennis Court Lot by virtue of the Plat.

Assuming, *arguendo*, that the Association had forecasted evidence tending to show that its members purchased lots in reliance on the Plat, under the facts of the present case, the placement of the Clubhouse Lot and Tennis Court Lot on the Plat still does not create easement rights in favor of the Association and its members. "For an easement implied-by-plat to be recognized, the plat must show the developer clearly intended to restrict the use of the land at the time of recording for the benefit of all lot owners." *Friends of Crooked Creek, L.L.C. v. C.C. Partners, Inc.*, 254 N.C. App. 384, 392, 802 S.E.2d 908, 914 (2017). The plat that first depicted the Clubhouse Lot and Tennis Court Lot was filed concurrently with the 2004 Deed of Trust, presumably to identify the collateral for the loan rather than to create easement rights in common elements that would inure to the benefit of the Association.[1] Thus, the Plat does not "show the [D]eveloper clearly intended to restrict the use of the land at the time of recording for the benefit of all lot owners." *Id.* Additionally, because the first plat depicting the Clubhouse Lot and Tennis Court Lot was recorded in 2004,

[1] As noted elsewhere, the Plat map does not identify the Clubhouse Lot or Tennis Court Lot as common elements within the meaning of the Declaration.

no easement rights in the lots could have been created by reference to the Plat prior to that day, and any Association member who purchased a lot in reliance on the Plat after that date would have record notice of the Lenders' security interest in the lots.[2] Therefore, we hold that the Plat does not establish, as a matter of law, the Developer's intention to create easement rights in the Clubhouse Lot and Tennis Court Lot.

The Association further asserts that the depiction of the Clubhouse Lot and Tennis Court Lot on the Plat "provide[s] notice to [the Lenders] of the Developer's clear intent to create an easement in the Clubhouse and Tennis Court Lots." However, easement rights must be created before a lender or purchaser is tasked with notice of such rights, *Yount*, 288 N.C. at 95, 215 S.E.2d at 566, and, as discussed above, the Plat did not indicate a clear intention on behalf of the Developer to create easement rights in the Clubhouse Lot and the Tennis Court Lot.

Third, the Association argues that easement rights were created "[b]y representations of the [D]eveloper and sales agents." The record contains evidence tending to show that the Developer "touted the clubhouse and its amenities, as well as a tennis court" to potential purchasers and includes the Public Offering Statement

[2] At oral argument before this Court, counsel for the Association stated that counsel for the Lenders was arguing for the first time that any buyer who took title to a lot in reliance on the Plat depicting the Tennis Court Lot and Clubhouse Lot would have had record notice of the Lenders' security interest in those lots. In its brief to this Court, however, the Lenders argue that "no individual owner could have taken title to his or her lot by reference to the 12/690 Plat that would not have also taken subject to [the Lenders'] 2004 Deed of Trust." As a result, we reject the Association's assertion that it was not afforded the opportunity to respond to this portion of the Lenders' argument.

that was provided to potential purchasers within the Development. The Public Offering Statement contains a paragraph addressing the "amenities" included in the clubhouse and states that "[t]he clubhouse was completed in September 2005, and will be owned by the Association." This Court has explained in *Friends of Crooked Creek, L.L.C. v. C.C. Partners, Inc.*, 254 N.C. App. 384, 802 S.E.2d 908,

> [w]hile . . . [the] subdivision may have been contemplated and marketed as a golf course community to induce Plaintiffs to purchase lots in the subdivision, no case has recognized an implied easement or restrictive covenants being imposed on undeveloped land, based upon statements in marketing materials. Courts have recognized marketing materials as further demonstrating the expressed intent of the developer, but only where a recorded instrument exists to demonstrate the intent to encumber and restrict the land. That is not the circumstances present in this case.

Id. at 394, 802 S.E.2d at 915 (internal citations omitted). As discussed above, the recorded documents in the present case—the Declaration, the Plat, the 2004 Deed of Trust, the 2005 Deed of Trust, and the Deed in Lieu of Foreclosure—do not "demonstrate the intent to encumber and restrict" the lots consistent with the Declaration and, as such, any marketing materials provided to potential purchasers do not "further demonstrat[e] the expressed intent of the [D]eveloper." *Id.* Moreover, the Association has not forecasted evidence tending to show that any marketing material was either recorded or referred to in any of the recorded documents in the Development's chain of title. *See Cogburn v. Holness*, 34 N.C. App. 253, 259, 237

S.E.2d 905, 908 (1977) (explaining that marketing materials did not create easement rights when "[t]he booklet was never placed on public record in Buncombe County and was in no way referred to in the form deeds and recorded plats, the instruments determining the legal rights created by conveyances of lots in the subdivision"). Therefore, we hold that there is no issue of material fact regarding whether easement rights were created in the Clubhouse Lot or Tennis Court Lot based on the Developer's representations.

III. Conclusion

In sum, for the reasons discussed above, we hold that the Tennis Court Lot and Clubhouse Lot do not fall within the definition of "common elements" as provided by the PCA or the Declaration. Additionally, we hold that easement rights were not created in the Clubhouse Lot or Tennis Court Lot. As a result, the trial court did not err in granting summary judgment in favor of the Lenders.

AFFIRMED.

Judges BRYANT and BERGER concur.

Report per Rule 30(e).