IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-668

No. COA21-147

Filed 7 December 2021

Johnston County, No. 20 CVD 2479

FLOWERS PLANTATION FOUNDATION, INC., Plaintiff,

v.

CARE OF CLAYTON, LLC, Defendant.

Appeal by plaintiff from order entered 17 November 2020 by Judge Addie Harris Rawls in Johnston County District Court. Heard in the Court of Appeals 3 November 2021.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, for plaintiff-appellant.

Hewett Law Group, P.A., by Alan B. Hewett and Marcus C. Burrell, for defendant-appellee.

ARROWOOD, Judge.

¶ 1 Flowers Plantation Foundation, Inc. ("plaintiff") appeals from the trial court's order granting Care of Clayton, LLC's ("defendant") motion to dismiss pursuant to Rule 12(b)(6). Plaintiff argues the trial court erred in dismissing its claim seeking unpaid contributions from defendant. For the following reasons, we affirm.

I. Background

¶ 2 On 11 August 2020, plaintiff, a non-profit corporation in Johnston County, filed suit against defendant, a limited liability company also in Johnston County. In its complaint, plaintiff alleged it "was established to administer and enforce that certain Declaration of Easements and Covenant to Share Costs" (the "Declaration"); a copy of the Declaration was attached to the complaint as plaintiff's Exhibit A. Plaintiff explained:

> 5. On or about July 11, 1997, [d]efendant's predecessor in interest, Grand Step, L.L.C., purchased a certain tract of commercial real property consisting of 5.495 acres (the "Property") as more properly described in that certain deed . . . a copy of which is attached hereto as Exhibit B ("[t]he Grand Step Deed").
> 6. The Grand Step Deed recites that the Property is subject to the Declaration. However, it also contains an exemption from annual contributions "for so long as Grantee owns such property for use as a day care facility[.]"

Specifically, the Grand Step Deed stated, in pertinent part:

> The designation of Grantor and Grantee as used herein shall include said parties, their heirs, successors, and assigns[.]
>
> . . . .
>
> This conveyance shall be subject to that certain Declaration of Easements and Covenant to Share Cost for Flowers' Plantation ("Declaration"), . . . provided, however, for so long as Grantee owns such property for use as a day care facility, Grantee shall be exempt from payment of Contributions as set forth in Section 3.3 of the Declaration, provided that Grantee maintains the landscape buffer, fences and other portions of the Joint Property adjacent to

> such property, as defined in the Declaration, in a manner consistent with the standards established for Flowers' Plantation.

¶ 3 Plaintiff's complaint continued:

> 7. On or about January 29, 2004, [d]efendant's predecessor entity, Care Limited . . . purchased the "Property" from Grand Step, L.L.C. by deed . . . a copy of which is attached hereto as Exhibit C (the "Care Limited Deed").
>
> [8]. As acknowledged in the Care Limited Deed, the Property is subject to the Declaration.
>
> [9]. The Care Limited Deed does not repeat the exemption from contributions contained in the Grand Step Deed, nor could it because that exception was only applicable so long as Grand Step, L.L.C. owned the Property.
>
> [10]. On or about October 3, 2012, Care Limited converted itself to [d]efendant Care of Clayton, LLC . . . .
>
> [11]. As the successor entity to Care Limited, [d]efendant is now the record owner of the Property.[1]

¶ 4 Plaintiff claimed, because the exemption contained in the Grand Step Deed (the "Contributions Exemption") was absent in the Care Limited Deed, "[i]n accordance with Section 3.1 of the Declaration, [d]efendant is obligated to pay an annual contribution to [p]laintiff for its share of maintenance of common property." According to plaintiff, "[d]efendant ha[d] failed to pay annual contributions for each of calendar years 2018, 2019 and 2020[,]" resulting in a "total principal amount of

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[1] Plaintiff's complaint included two allegations marked as "7." The allegations following have been renumbered for ease of reading.

unpaid dues [of] $10,520.00 . . . ." Following an unsuccessful written demand from plaintiff to defendant for payment of unpaid contributions dated 11 March 2020, plaintiff argued it was now "entitled to file suit to collect any contributions which are more than 90 days delinquent, plus late fees, interest and costs of collection including attorney fees."

¶ 5 On 25 August 2020, defendant moved to dismiss plaintiff's complaint, with prejudice, pursuant to Rule 12(b)(6) "for failure to state a claim upon which relief can be granted based upon the lack of sufficiency and evidentiary support of the factual allegations and claims set forth in [p]laintiff's [c]omplaint." The motion came on for hearing on 16 November 2020 before the Johnston County District Court, Judge Rawls presiding.

¶ 6 At the hearing, defendant's trial counsel noted that plaintiff's exhibits reflected that the property in question was still being used as a daycare facility, which plaintiff did not dispute in its allegations; thus, defendant claimed the issue in question was solely one of change in grantee, and not in use. After plaintiff had the opportunity to argue, the trial court, having "read the covenants" and "considered arguments of counsel[,]" entered an order granting defendant's motion to dismiss pursuant to Rule 12(b)(6). In so doing, the trial court stated: "The document in and of itself is pretty plain language as it relates to the use of the property and the use continues." The trial court then filed a written order on 17 November 2020 dismissing plaintiff's claim with prejudice.

¶ 7 Plaintiff gave timely written notice of appeal on 11 December 2020. This appeal is properly before us pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2019).

II. Discussion

¶ 8 Plaintiff argues the trial court erred in dismissing its claim pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. We disagree.

¶ 9 "We review appeals from dismissals under Rule 12(b)(6) de novo." *Taube v. Hooper*, 270 N.C. App. 604, 608, 840 S.E.2d 313, 317 (2020) (quotation marks omitted) (quoting *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 8 (2015)).

> Dismissal of an action under Rule 12(b)(6) is appropriate when the complaint fail[s] to state a claim upon which relief can be granted. [T]he well-pleaded material allegations of the complaint are taken as true; but conclusions of law or unwarranted deductions of fact are not admitted. When the complaint on its face reveals that no law supports the claim, reveals an absence of facts sufficient to make a valid claim, or discloses facts that necessarily defeat the claim, dismissal is proper.

Id. (alterations in original) (quoting *Arnesen*, 368 N.C. at 448, 781 S.E.2d at 7-8).

¶ 10 Here, we must determine whether defendant possesses the right, obtained by Grand Step in the Grand Step Deed, to be exempt from contribution payments. Plaintiff argues "[t]he four corners of the Care Limited Deed reveal no intent to apply the Contributions Exemption (or any exception) to [defendant] Care Limited";

specifically, plaintiff contends the Contributions Exemption is not a covenant (or, alternatively, is a personal covenant) and the "heirs, successors, and assigns" language in the Grand Step Deed "does not indicate any intention that the Contributions Exemption runs with the land." Again, we disagree.

A. Real or Personal Covenant

¶ 11 "Covenants accompanying the purchase of real property are contracts which create private incorporeal rights, meaning non-possessory rights held by the seller, a third-party, or a group of people, to use or limit the use of the purchased property." *Terres Bend Homeowners Ass'n v. Overcash*, 185 N.C. App. 45, 49, 647 S.E.2d 465, 469 (2007) (quotation marks omitted) (quoting *Armstrong v. The Ledges Homeowners Ass'n, Inc.,* 360 N.C. 547, 554, 633 S.E.2d 78, 85 (2006)). "A covenant is either real or personal. Covenants that run with the land are real as distinguished from personal covenants that do not run with the land." *Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n, Inc.*, 187 N.C. App. 22, 30, 652 S.E.2d 378, 384 (2007) (citation and quotation marks omitted), *writ denied*, *disc. review denied*, 666 S.E.2d 123 (N.C. 2008).

¶ 12 "A covenant is a real covenant 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 burdens of the covenant to run with the land." *Terres Bend Homeowner Ass'n*, 185 N.C. App. at 49-50, 647 S.E.2d at 469 (quotation marks omitted; emphasis added) (quoting *Runyon v. Paley,* 331 N.C. 293, 299-300, 416 S.E.2d 177, 182-83 (1992)). "A covenant that 'runs with the land' is enforceable at law or in equity by the owner of the dominant estate against the owner of the servient estate, whether the owners are the original covenanting parties or successors in interest." *Id.* at 50, 647 S.E.2d at 469 (citation and some quotations marks omitted). "However, a personal covenant creates an obligation or right enforceable at law only between the original covenanting parties." *Id.* (citation and quotation marks omitted).

i. Touch and Concern

¶ 13 "For a covenant to touch and concern the land, it is not necessary that the covenant have a physical effect on the land. It is sufficient that the covenant have some economic impact on the parties' ownership rights by, for example, enhancing the value of the dominant estate and decreasing the value of the servient estate." *Runyon*, 331 N.C. at 300, 416 S.E.2d at 183 (citations omitted). "It is essential, however, that the covenant in some way affect the legal rights of the covenanting parties as landowners." *Id.*

¶ 14 Here, the Declaration states that:

> Declarant desires to provide the maintenance of certain Joint Property described in Section 2.2 *benefiting* Flowers' Plantation.

> . . . .
>
> The covenants, conditions, and easements contained herein *shall run with the titl*e to Flowers' Plantation and bind all parties having any right, title, or interest in any portion of the Flowers' Plantation, *their heirs, successors, successors-in-title, and assigns*, and shall inure to the *benefit* of the Foundation, the Association Entities, Other Owners, and each owner of all or any portion of the Flowers' Plantation.

(Emphasis added.) The Grand Step Deed itself—specifically, the Contributions Exemption therein—in turn, states that:

> This conveyance shall be subject to that certain Declaration . . . provided, however, for as long as Grantee owns such property for use as a day care facility, Grantee shall be exempt from payment of Contributions as set forth in . . . the Declaration provided that Grantee maintains the landscape buffer, fences and other portions of the Joint Property adjacent to such property, as defined in the Declaration, in a manner consistent with the standards established for Flowers' Plantation. The maintenance must be approved and acceptable to Flowers' Plantation Foundation and/or Declarant.

¶ 15 Defendant claims the Grand Step Deed constitutes a real covenant, arguing that, under *Runyon*, because plaintiff "restrict[ed] the use of the land to the operation of a day care facility, the legal rights of Grantee are affected by Grantor" and "Grantor affects [its] own legal right of collecting dues from Grantee, so long as the intended use is maintained[,] [t]he essential nature of the legal rights of the parties being affected by the covenant is clearly met, therefore satisfying the first prong of *Runyon*." We agree with defendant.

¶ 16 First, here, the commercial property operated by defendant comprises a portion of the greater property owned by plaintiff.[2] *See Runyon*, 331 N.C. at 301, 416 S.E.2d at 184 ("The properties owned by defendants, plaintiff Williams, and plaintiffs Runyon comprise only a portion of what was at one time a four-acre tract bounded on one side by the Pamlico Sound and on the other by Silver Lake.") Then, in addition to the Declaration stating that the "covenants, conditions, and easements . . . shall run with the title to Flowers' Plantation[,]" which is not wholly dispositive on its own, *Midsouth Golf*, 187 N.C. App. at 31, 652 S.E.2d at 384, the Declaration expressly states that the same covenants, conditions, and easements are for the "benefit[]" of plaintiff.

¶ 17 Furthermore, via the Contributions Exemption, plaintiff "restrict[s] the use of defendant[']s[ ] property to uses that accord with the restrictive covenants[,]" *see Runyon*, 331 N.C. at 301, 416 S.E.2d at 184, in two ways: by using the property only as a day care facility, and by "maintain[ing] the landscape buffer, fences and other portions of the Joint Property adjacent to [its] property, as defined in the Declaration, in a manner consistent with the standards established for Flowers' Plantation." Thus, "we conclude that the right to restrict the use of defendant[']s[ ]

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[2] As the Declaration provides: "Flowers' Plantation is a 3,500-plus acre mixed use, master planned community. The Master Plan for Flowers' Plantation anticipates the development of residential, commercial and recreational elements within the community with multiple community associations and property owner association entities . . . ."

property . . . affect[s] plaintiff[']s[ ] ownership interests in the property owned by [it], and therefore the covenants touch and concern the[ ] land[ ]." *See id.*

ii. Privity of Estate

¶ 18 "In order to enforce a restrictive covenant as one running with the land at law, the party seeking to enforce the covenant must also show that [it] is in privity of estate with the party against whom [it] seeks to enforce the covenant." *Id.* at 301-302, 416 S.E.2d at 184 (citations omitted). "[T]he party seeking to enforce the covenant must show that [it] has a sufficient legal relationship with the party against whom enforcement is sought to be entitled to enforce the covenant." *Id.* at 302, 416 S.E.2d at 184. Our courts also require a showing of two forms of privity: horizontal privity, which is "between the covenantor and covenantee at the time the covenant was created[,]" and vertical privity, a "privity of estate between the covenanting part[y] and [its] successors in interest . . . ." *Id.* (citation omitted).

¶ 19 Plaintiff's exhibits paint a clear picture: the Grand Step Deed and Declaration show the existence of privity of estate between plaintiff and Grand Step, whereas the Care Limited Deed and the Articles of Organization including Articles of Conversion establish vertical privity between Grand Step and defendant. Thus, we conclude plaintiff and defendant are in privity of estate.

iii. Intent

¶ 20 "[T]he parties' intent must be ascertained from the deed or other instrument creating restriction." *Id.* at 305, 416 S.E.2d at 186 (citation omitted). "[T]he effect to be given unambiguous language contained in a written instrument is a question of law[.]" *Id.* (citation omitted; emphasis omitted).

¶ 21 Here, again, the Declaration states that all "covenants, conditions, and easements herein shall run with the title to Flowers' Plantation and bind all parties having any right, title, or interest in any portion of Flowers' Plantation, their heirs, successors, successors-in-title, and assigns[.]" Furthermore, the Grand Step Deed states that "[t]he designation Grantor and Grantee as used herein shall include said parties, their heirs, successors, and assigns," and that the "conveyance shall be subject to that certain Declaration . . . ."

¶ 22 This language is unambiguous in that it is indicative that the original parties intended for the covenants associated with the Grand Step Deed to run with the land. *See Midsouth Golf*, 187 N.C. App. at 31-32, 652 S.E.2d at 385 (holding the same, where the declaration at issue "state[d] that all restrictions 'shall be deemed to be restrictions running with the land and binding on Purchasers, their heirs, successors and assigns[,]' . . . '[t]he power to levy . . . shall inure also to the successors and assigns[,] . . .' " and "the provisions set forth therein 'shall, as to the owner of each such property . . . , his heirs, successors or assigns, operate as covenants running with the land for the benefit of each and all other properties in Fairfield Harbor and their respective owners.' " (second brackets in original)); *see also Terres Bend Homeowners Ass'n*, 185 N.C. App. at 51, 647 S.E.2d at 470 ("Covenant 12 provides that '*John F. Swinson, his heirs, successors and assigns* . . . reserve the right to utilize any lots within said subdivision for the extension of the subdivision to adjoining property.' . . . This is unambiguous language from which the Court concludes that the parties intended the exception contained in Covenant 12 to 'run with the land' and to be enforceable by Swinson, his heirs, his successors, and his assigns." (emphasis in original)).

¶ 23 Accordingly, we conclude that the exemption provision in the Grand Step Deed is a real covenant. *See Terres Bend Homeowners Ass'n*, 185 N.C. App. at 51, 647 S.E.2d at 470.

B. Successors

¶ 24 "[T]he North Carolina Supreme Court has defined the term 'successor' to mean '[o]ne that succeeds or follows; one who takes the place that another has left, and sustains the like part or character; one who takes the place of another by succession.' " *Id.*, 647 S.E.2d at 470 (citation omitted). " '[S]uccessor' does not invariably refer to a successor in title; rather, the reader must consider the nature of the 'part or character' to be taken." *Id.* at 51-52, 647 S.E.2d at 470 (citation and some quotation marks omitted)

¶ 25 Here, in plaintiff's own words, Grand Step, "[d]efendant's predecessor in interest," sold the property in question to Care Limited, "[d]efendant's predecessor entity[.]" In turn, defendant came about possessing the property in question when Care Limited "converted itself" to defendant. Now, defendant is in the very same "part or character" as Grand Step, as it has continued to maintain the property in question as a day care facility, and plaintiff has not otherwise alleged that defendant has not maintained the property as instructed in the Contributions Exemption. *See id.* Thus, here, defendant is Grand Step's successor for the purpose of the Contributions Exemption. *See id.* at 52, 647 S.E.2d at 471.

¶ 26 The Contributions Exemption contained in the Grand Step Deed applies to defendant, and thus defendant is exempt from payment. Accordingly, the trial court did not err in granting defendant's motion to dismiss pursuant to Rule 12(b)(6), with prejudice, because plaintiff's "complaint on its face . . . discloses facts that necessarily defeat the claim[.]" *Taube*, 270 N.C. App. at 608, 840 S.E.2d at 317 (citation omitted).

III. Conclusion

¶ 27 For the foregoing reasons, we hold that the trial court did not err in granting defendant's motion to dismiss.

AFFIRMED.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).