

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00495-CV

**ARCHITECTURAL CONTROL COMMITTEE OF OAK TERRACE ESTATES,
Appellant**

V.

**RONALD D. McCORMICK AND JERALDINE POLLARD McCORMICK,
Appellees**

**On Appeal from the 411th District Court
Polk County, Texas
Trial Cause No. CIV22033**

MEMORANDUM OPINION

The Architectural Control Committee of Oak Terrace Estates appeals a take-nothing judgment in favor of Ronald D. McCormick and Jeraldine Pollard McCormick. The Committee challenges the legal and factual sufficiency of the evidence supporting the jury's finding that deed restrictions have been abandoned. The Committee also asserts that the trial court erred in overruling the Committee's motion for judgment notwithstanding the verdict, because there is no legally sufficient evidence to support the jury's finding of abandonment.

Although the evidence is legally insufficient to establish a complete abandonment of all the deed restrictions, the evidence establishes the Committee's waiver of the right to enforce the construction requirements concerning the McCormicks' building at issue here. We modify the judgment to reflect that waiver, and not the complete abandonment of all the deed restrictions. We affirm the trial court's judgment as modified.

BACKGROUND

The McCormicks purchased a single-family residence in Section 4 of the Oak Terrace Estates subdivision in Polk County, Texas. Restrictive covenants for Section 4 were in the county deed records. In 1999, the McCormicks purchased an undeveloped lot in that section behind their residence. The McCormicks planned to erect a building with livable space for Ronald's father. The building would also be used to store Ronald's equipment and tools. Ronald testified that prior to purchasing the lot, he received verbal permission from a member of the Architectural Control Committee to construct the building. Over the next several years the McCormicks cleared the land, put in a water well, and built a pump house for the water well. A concrete slab was poured. In 2005, a contractor constructed the 40-by-55-foot metal building.

After the building was substantially completed, and after being served with suit papers, the McCormicks received a letter from the Committee informing them that the "large metal building that is of a commercial type" violated items 4 and 10 of the deed restrictions. Item 4 requires that, prior to the erection, placement, or alteration of a

building on a lot in the subdivision, specifications and plot plans showing the location of the building must be approved in writing by the Committee. Item 10 requires that a lot be used only for residential purposes unless the lot is designated on the official plot as a commercial lot.

The Committee alleged the deed restrictions were violated. The Committee requested injunctive relief. The McCormicks denied the allegations and asserted the affirmative defenses of waiver and estoppel. The McCormicks presented evidence of restrictive covenant violations by other landowners. The jury found that all the deed restrictions for Section 4 had been abandoned. The trial court signed a final judgment in favor of the McCormicks.

ABANDONMENT STANDARD

A court may refuse to enforce a deed restriction because of the acquiescence by the landowners in violations so substantial that the acquiescence amounts to an abandonment of the restriction. *Cowling v. Colligan*, 158 Tex. 458, 312 S.W.2d 943, 945 (1958). The acquiescence may simply amount to a waiver of the right to enforce the restriction. *Id.* In determining waiver or abandonment in a deed restriction case, the factors to be considered include the number, nature, and severity of the existing violations, any prior enforcements of the restriction, and whether it is still possible to realize to a substantial degree of the benefits of the restriction despite the violations. *Finkelstein v. Southhampton Civic Club*, 675 S.W.2d 271, 278 (Tex. App.—Houston [1st

Dist.] 1984, writ ref'd n.r.e.). Trivial violations do not amount to abandonment, nor do they preclude enforcement of the restriction. *Cowling*, 312 S.W.2d at 946.

VIOLATIONS

Ronald McCormick testified that at the time he began construction on the building there were twenty-four houses in Section 4. The McCormicks proved deed-restriction violations by other landowners. Photographs of the violations were admitted at trial. McCormick testified that during the time he has lived in the subdivision no owner has been sued for a deed-restriction violation.

Ronald explained that one homeowner in Section 4 violated the deed restrictions by adding a 20-by-24-foot porch and a carport to his house without the Committee's permission. A fence in front of another residence (owned by the same homeowner) violated a deed restriction. One witness testified that the same owner built a screened-in porch without obtaining the Committee's permission. The witness stated that to her knowledge no legal action had been brought against the owner for the violation. The owner of a residence with an added carport testified that he built his carport and porch in 2002, and that he never asked for the Committee's approval. He was not sued.

Ronald testified that another owner's three-car garage constituted a violation of the deed restrictions. No lawsuit was filed against that owner for the violation. Another owner testified that when she built her house it had a three-car garage. The builder obtained a variance and the Committee gave permission to build the three-car garage. She

did not have written documentation of the variance. She converted one of the garage stalls into a bedroom. She also kept a trailer and jet skis in front of her house. She admitted that the trailer was parked in front of her house for more than twenty-four hours in violation of the deed restrictions. She explained she had permission to store it there during Hurricane Rita. She believed the jet skis were not a violation. No lawsuit was filed against her.

Ronald explained that another owner's fence and boat violated the deed restrictions. Ronald also stated that a porch violated the restrictions because this owner did not have the Committee's approval to build it. The owner told Ronald that the Committee had granted him verbal approval to build his carport that was in violation of the deed restrictions. A swimming pool drains in front of Ronald's house, in violation of the restriction which prohibits putting any kind of drainage in the ditch. Ronald testified that another owner's hedges violate the restrictions. Ronald identified another violation in a photograph of a residence with a trailer parked in front.

Robert Relick, a member of the Committee at the time suit was filed, was aware that variances for violations had been granted in the past, that nothing exists in writing concerning how the Committee handles variances, and that it is within the Committee's discretion to grant a variance. Relick testified that a three-car garage constitutes a deed-restriction violation. Robert Mayo, who also served on the Committee at the time the suit was filed, explained that the Committee "might have given a variance on a fence or

something at that time.” Oscar Good, a former member of the Committee and twenty-year resident of Section 3 of the subdivision, testified he did not believe that the subdivision’s deed restrictions had been consistently enforced. He stated that, to his knowledge, the McCormicks were the only residents that were sued. He explained that only if someone did not respond to a request to stop would a lawsuit be considered. While he served on the Committee there was no necessity to sue a resident. Good testified that documents from 1987 through 2006 showed the practices of the Committee in approving plans and sending out demand letters. He was unaware of any deed restriction violations in Section 4. Good explained that in his opinion, building a patio or deck without the Committee’s approval is not a violation, because the addition would not be a dwelling.

ANALYSIS

The Committee alleged that the McCormicks violated the deed restrictions for Section 4 by failing to get prior written approval from the Committee prior to beginning construction, constructing a building that is not a single-family residential dwelling, and constructing a garage that is larger than a two-car garage. All of the allegations relate to the same building and concern the McCormicks’ failure to obtain the Committee’s approval before the building was constructed.

The question submitted to the jury asked whether the deed restrictions in place for Section 4 of the Oak Terrace Estates Subdivision had been abandoned by the Committee.

The court's charge instructed the jury "that the term 'abandonment' means that the violations of the deed restrictions in Section 4 of Oak Terrace Subdivision were so extensive and material as to reasonably lead to the conclusion that the general plan or scheme of development in imposing such restriction for Section 4 of Oak Terrace Subdivision has been abandoned." The court instructed the jury to consider "(1) the number of violations; (2) the nature of the violations; (3) the severity of the violations; (4) any prior acts of enforcement of the restrictions; and (5) whether it is still possible to realize to a substantial degree the benefits intended through the restrictions."

Section 4 is restricted to residential use, with certain exceptions not applicable here. The deed restrictions include a restriction that the lots not be put to commercial use. No evidence supports the jury's finding of a waiver or abandonment of that restriction, or of many of the other deed restrictions intended to assure residential use of the property. The jury's finding, restated in the judgment, must be set aside to the extent it is unsupported by the evidence.

The evidence supports a limited finding that is implicit in the jury's answer: the Committee waived enforcement of any restriction requiring pre-approval of the construction of the McCormicks' building or precluding construction of the specific building at issue here. *See* Tex. R. Civ. P. 278, 279. We may not reverse a judgment because of the "failure to submit other and various phases or different shades of the same question." Tex. R. Civ. P. 278. The waiver of enforcement as to the McCormicks'

building is established by the evidence, and is a sufficient basis for the trial court's judgment in favor of the McCormicks. *See generally Bank of Tex. v. VR Elec., Inc.*, 276 S.W.3d 671, 677 (Tex. App.—Houston [1st Dist.] 2008, pet denied). The evidence establishes that, prior to the filing of suit and during the prior six years, the Committee did not notify the McCormicks that they were in violation of any deed restriction. Ronald testified that he obtained verbal permission from a Committee member to construct the building; the evidence established other landowners built without pre-construction written approval from the Committee. Ronald testified that immediately after he and his wife purchased the lot, they began to clear the lot of trees, stumps, and brush. They brought in approximately ten dump trucks of dirt to level the lot. They installed plumbing and built a pump house around the water well. In January 2005, the McCormicks poured the foundation for the building. The Committee does not dispute that by the time the Committee filed suit against the McCormicks and sent a demand letter, most of the building's exterior had been constructed. The evidence establishes the Committee waived enforcement of the construction requirements in this instance.

The Committee's waiver of enforcement as to the alleged violation by the McCormicks of construction deed restrictions does not defeat the enforceability of all the deed restrictions applicable to Section 4, however, or establish a complete abandonment. *See Schoenhals v. Close*, 451 S.W.2d 597, 599 (Tex. Civ. App.—Amarillo 1970, no writ). The trial court's judgment incorporates the jury answers and provides that the

Committee recover nothing from the McCormicks, but the trial court's judgment does not expressly declare that the Section 4 deed restrictions are no longer in effect. Where there has been a violation of a deed restriction in a neighborhood, the fact that the specific violation is protected by a waiver-of-enforcement defense does not necessarily remove the deed restriction as it applies to the rest of the neighborhood. *Id.* There is no evidence in the record that the McCormicks use the building for commercial purposes, or that any landowner has violated that residential-use restriction. The Section 4 restrictions, including that restriction prohibiting the commercial use of the building, remain in place.

We therefore modify the trial court's judgment to reflect that the limited basis of the judgment is the Committee's waiver of the right to enforce the construction requirements concerning the McCormicks' building construction at issue here, and also to reflect that the deed restrictions for Section 4 have not been abandoned. We sustain the Committee's issues to the extent of the relief granted in this opinion; in all other respects, the issues are overruled. The trial court's take-nothing judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

DAVID GAULTNEY
Justice

Submitted on August 10, 2011
Opinion Delivered November 17, 2011

Before Gaultney, Kreger, and Horton, JJ.