IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-756

Filed 6 August 2024

Buncombe County, No. 20-CVS-4519

ELLEN HEGNER MCDOUGALD, JASON DONALD MCDOUGALD, GREGORY LAVIGNE, and MARTHA LAVIGNE, Plaintiffs,

v.

WHITE OAK PLANTATION HOMEOWNERS ASSOCIATION, INC., ET AL., Defendants.

Appeal by defendants from order entered 3 November 2022 by Judge Daniel A. Kuehnert in Buncombe County Superior Court. Heard in the Court of Appeals 9 January 2024.

Allen Stahl & Kilbourne, PLLC, by James W. Kilbourne, Jr. and Jeffrey K. Stahl, for the plaintiffs-appellees.

McAngus Goudelock & Courie, PLLC, by Zephyr Jost Sullivan and Jeffrey B. Kuykendal, for the defendants-appellants.

STADING, Judge.

Defendants White Oak Plantation Homeowners Association, Inc., et al., appeal the trial court's finding that an amendment to a restrictive covenant that barred

short-term rentals was unreasonable as applied to Plaintiffs or their properties. For the reasons below, we affirm.

I. Background

This case relates to the short-term rental of residential properties in Buncombe County, specifically within the White Oak Plantation subdivision, governed by Defendant White Oak Plantation Homeowners Association, Inc. ("the Association"). The neighborhood, developed as a quiet residential area with large lots, limited entry, and privately maintained narrow roads, was initially governed by restrictive covenants ("Restrictive Agreement") recorded in 1992. This agreement, pre-dating modern rental platforms like Airbnb and Vrbo, established a comprehensive framework of covenants and restrictions to preserve the character of the subdivision, including the type, location, and number of dwellings, minimum square footage, and prohibitions on various commercial and disruptive activities. The Restrictive Agreement also prohibited "commercial, business, or trade venture, manufacturing establishment, factory, apartment house, multi-unit dwelling or house or building to be used for a sanatorium or hospital of any kind, or at any time, use or suffer to be used, any house or building erected thereon for any such purpose." Additionally, it stated that "[n]o office serving the public may be maintained within the Subdivision" and expressly prohibited "noxious, obnoxious, noisy, unsightly, or otherwise offensive objects or activities."

In 2005, Defendants recorded an "Amendment and Restatement of the Restrictive Agreement," maintaining the spirit of the original covenants. Several members believed these documents prohibited short-term rentals. Still, Plaintiffs Jason and Ellen McDougald, and Gregory and Martha Lavigne, owners of two lots in the subdivision, purchased their properties with the understanding that short-term rentals were allowed. In 2016, the Lavignes purchased their residence with the understanding that they could rent it on a short-term basis. They have not rented their residence but believe they have the right to do so.

In 2018, Plaintiffs purchased their residence with the intent to rent it on a short-term basis occasionally. While Plaintiffs never contacted Defendants about using their residence as a short-term rental, they researched whether any restrictions limited the use of their residence for such purpose. They conducted extensive research into the permissibility of such rentals and found no restrictions.

So, in June 2019, Plaintiffs began renting their residence. Other non-parties also rented out their residences, which caused increased noise, litter, and traffic in the subdivision. Consequently, on 20 December 2019, Defendants passed an "Amendment to the Restrictive Agreement" ("2019 Amendment") to clarify and enforce rental policies, requiring rentals to be no less than ninety days unless part of an owner-occupied lot, where thirty-day rentals were permitted. The Amendment defined "Leasing" as "regular occupancy of a Lot by any person other than the Owner

for which the Owner receives any consideration or benefit, including a fee, gratuity, or emolument." It also provided that:

> Lots that are not the primary residence of a homeowner may be rented only in their entirety; no fraction or portion of the Lot may be rented. No transient tenants may be permitted. No Lots may be subleased. All leases must be for a term of at least ninety (90) days.
> . . .
> If a Lot is owner-occupied, a portion of the Lot may be rented (for example- a room, a basement, or another portion of the home). All leases must be for a term of at least thirty (30) days.

Around 29 July 2020, Defendants contacted Plaintiffs about their short-term rental in violation of the 2019 Amendment. After a hearing on 3 September 2020, the Association determined that Plaintiffs violated the 2019 Amendment. Following the determination, Plaintiffs sought a declaratory judgment to invalidate the 2019 Amendment. Plaintiffs then moved for summary judgment, and the trial court ruled in their favor on 9 November 2022, declaring the 2019 Amendment was "unreasonable, invalid, unenforceable, and with no binding effect on Plaintiffs or the Plaintiffs' Properties." Defendants then appealed.

On appeal, Defendants contended that the restrictions dating back to the subdivision's outset contain provisions "concerning the type, location, and number of dwellings that could be constructed, the building material that could be used, and a prohibition on 'commercial, business, or trade venture . . . of any kind, or at any time, to use or suffer to be used, any house or building erected thereon for any such purpose.'" In other words, Defendants argued that the covenants barring

"commercial, business, or trade venture" indicated an intent to prohibit short-term rentals. They maintained that the restriction against short-term rentals is compatible with the nature and character of the subdivision, a quiet residential neighborhood with large lots, exclusive for single-family homes. Defendants also challenged the trial court's order granting summary judgment in favor of Plaintiffs, arguing that it could allow future owners of Plaintiffs' properties to conduct short-term rentals despite the recorded amendment that prohibits it.

Plaintiffs countered that the bar on short-term rentals was unreasonable considering the original covenants. They maintained that restrictive covenants should be strictly construed in favor of the free use of land. By strictly construing the bar on short-term rentals, Plaintiffs argued that the restriction is unreasonable considering the subdivision's original declaration. With respect to the future enforcement of the prohibition against subsequent owners, Plaintiffs contended that Defendants never raised the issue before the trial court and, therefore, waived it on appeal. Plaintiffs also argued that future enforcement on a subsequent purchaser does not present a justiciable issue and amounts to the Court issuing an advisory opinion.

II. Jurisdiction

Jurisdiction is proper under N.C. Gen. Stat. § 7A-27(b)(1) (2023) since the trial court's order granting summary judgment is a final judgment.

III. Analysis

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows 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." *Metcalf v. Black Dog Realty, L.L.C.*, 200 N.C. App. 619, 629, 684 S.E.2d 709, 717 (2009). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Id.* This case concerns the interpretation of a restrictive covenant, which is "appropriate at the summary judgment stage unless a material issue of fact exists as to the validity of the contract, the effect of the covenant on the unimpaired enjoyment of the estate, or the existence of a provision that is contrary to the public interest." *Page v. Bald Head Ass'n*, 170 N.C. App. 151, 155, 611 S.E.2d 463, 466 (2005).

Restrictive covenants, which are "restrictions upon real property[,] are not favored. Ambiguities in restrictive covenants will be resolved in favor of the unrestricted use of the land." *Russell v. Donaldson*, 222 N.C. App. 702, 706–07, 731 S.E.2d 535, 539 (2012); *J.T. Hobby & Son, Inc. v. Family Homes of Wake Cnty., Inc.*, 302 N.C. 64, 70, 274 S.E.2d 174, 179 (1981) ("While the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, such covenants are not favored by the law, and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land."). "[N]othing can be read into a restrictive covenant enlarging its meaning beyond what

its language plainly and unmistakably imports." *Wein II, L.L.C. v. Porter*, 198 N.C. App. 472, 480, 683 S.E.2d 707, 713 (2009).

As a preliminary matter, the parties do not dispute that Defendant followed proper procedure required by the North Carolina Planned Community Act, Chapter 47F of the North Carolina General Statutes, in establishing the 2019 Amendment following Plaintiffs' purchase of their homes. N.C. Gen. Stat. § 47F-1-101 (2023). And an amendment that follows proper procedure is "presumed valid and enforceable." *See* N.C. Gen. Stat. § 47F-2-117(d) (2023). To overcome that presumption, the challenger must show the amendment was unreasonable. *See Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 560, 633 S.E.2d 78, 88 (2006). Here, Plaintiffs contend that the 2019 Amendment represents an unreasonable exercise of the Association's authority.

"The fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions." *Danaher v. Joffe*, 184 N.C. App. 642, 645, 646 S.E.2d 783, 785-86 (2007) (cleaned up). "In the same way that the powers of a homeowners' association are limited to those powers granted to it by the original declaration, an amendment should not exceed the purpose of the original declaration." *Armstrong*, 360 N.C. at 558, 633 S.E.2d at 87. "[T]he court may ascertain reasonableness from the language of the original declaration of covenants, deeds, and plats, together with other objective

circumstances surrounding the parties' bargain, including the nature and character of the community." *Id*. at 559, 633 S.E.2d at 88.

"The term amend means to improve, make right, remedy, correct an error, or repair." *Id*. at 558, 633 S.E.2d at 87. Analyzing the general right to amend covenants, "[a]mendment provisions are enforceable; however, such provisions give rise to a serious question about the permissible scope of amendment, which results from a conflict between the legitimate desire of a homeowners' association to respond to new and unanticipated circumstances and the need to protect minority or dissenting homeowners by preserving the original nature of their bargain." *Id.* Ultimately, "a provision authorizing a homeowners' association to amend a declaration of covenants does not permit amendments of unlimited scope; rather, every amendment must be reasonable in light of the contracting parties' original intent." *Id.* at 559, 633 S.E.2d at 87.

The North Carolina Planned Community Act did not abolish the "reasonableness" requirement. *See Poovey v. Vista N.C. Ltd. P'ship*, 271 N.C. App. 453, 465, 843 S.E.2d 336, 344 (2020) ("We agree that North Carolina General Statute § 47F-2-117(d) does not eliminate the reasonableness requirement as set out in *Armstrong*."). In *Armstrong*, the North Carolina Supreme Court held that "amendments to a declaration of restrictive covenants must be reasonable." 360 N.C. at 548, 633 S.E.2d at 81. "Reasonableness may be ascertained from the language of the declaration, deeds, and plats, together with other objective circumstances

surrounding the parties' bargain, including the nature and character of the community." *Id.* The Planned Community Act, in fact, implicitly incorporated the "reasonableness" standard by providing that "principles of law and equity . . . supplement the provisions of [Act]." N.C. Gen. Stat. §47F-1-108 (2023).

Applying the *Armstrong* determination of reasonableness here, White Oak Plantation's original governing documents did not preclude short-term rentals. *See Armstrong*, 360 N.C. at 560, 633 S.E.2d at 88 ("Correspondingly, restrictions are generally enforceable when clearly set forth in the original declaration. Thus, rentals may be prohibited by the original declaration."). In particular, the original intent of the community is found in the 1992 Restrictive Agreement: "All of the Lots in the Subdivision shall be used solely for the development of one detached single-family residences and shall not be used for other purposes." The 2005 Restatement—which was in place when Plaintiffs purchased their properties—repeated the residential character: "All lots will be used, improved and devoted exclusively to residential use." These agreements and restatements do not prohibit, limit, or regulate the rental of residential lots for either short or long-term periods; they contain no restriction on the rental of single-family residences.

While the covenants do not bar short-term rentals, Defendants nonetheless contend that the Restrictive Agreement's bar on "commercial, business, or trade venture" indicates an intent to prohibit short-term rentals. In support, Defendants point to our decision in *McElveen-Hunter v. Fountain Manor Ass'n Inc.*, which related

to the enforceability of a condominium declaration amendment that restricted the leasing of units. 96 N.C. App. 627, 628, 386 S.E.2d 435, 435 (1989), *aff'd*, 328 N.C. 84, 399 S.E.2d 112 (1991). This Court held that condominium declarations could be amended when "the designated percentage of owners sees fit, and make such amendments binding upon all unit owners without regard to when the units were acquired." 96 N.C. App. at 630, 386 S.E.2d at 436. Conversely, Plaintiff's cite *Russell v. Donaldson*, which addresses Defendants' argument with greater precision. In that case, this Court determined that "prohibiting business and commercial uses of the property, does not bar short-term residential vacation rentals." 222 N.C. App. at 706-07, 731 S.E.2d at 539.

Lastly, Defendants raise a new issue on appeal, suggesting that the 2019 Amendment should apply to Plaintiffs rather than their properties in perpetuity. Because Defendants did not raise this issue to the trial court, we will not consider it. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) ("[I]ssues and theories of a case not raised below will not be considered on appeal."). Furthermore, this matter is nonjusticiable as it has not happened. "The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, . . . deal with theoretical problems, give advisory opinions, . . . , provide for contingencies which may hereafter arise, or give abstract opinions." *In re Wash. Cnty. Sheriff's Off.*, 271 N.C. App. 204, 208, 843 S.E.2d 720, 723 (2020) (cleaned up).

IV. Conclusion

For the reasons above and considering the original declaration, the trial court correctly ruled that the 2019 Amendment was unreasonable. We discern no error by the trial court and affirm its grant of summary judgment for Plaintiffs.

AFFIRMED.

Judges WOOD and FLOOD concur.

Report per Rule 30(e).