

NO. COA14-658

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

CHARLOTTE PAVILION ROAD RETAIL
INVESTMENT, L.L.C., and WLA
ENTERPRISES, INC.,
Plaintiffs,

v.

Mecklenburg County
No. 13 CVS 14685

NORTH CAROLINA CVS PHARMACY, LLC;
JEFFREY CARPENTER; CARPENTER
INVESTMENT PROPERTIES, LLC;
SUBURBAN GARDENS INCORPORATED; and
SONNY BOY PROPERTIES, LLC,
Defendants.

Appeal by defendants from order entered 11 March 2014 by
Judge Linwood O. Foust in Mecklenburg County Superior Court.
Heard in the Court of Appeals 22 October 2014.

*ELLIS & WINTERS LLP, by Matthew W. Sawchak, Thomas D. Blue,
Jr., Jeremy M. Falcone, Emily E. Reardon, for North
Carolina CVS Pharmacy, L.L.C. and Sonny Boy Properties,
LLC.*

*FERGUSON, SCARBROUGH, HAYES, HAWKINS & DEMAY, PLLC, by
James R. DeMay, for Jeffrey Carpenter, Carpenter Investment
Properties, LLC, and Suburban Gardens Incorporated.*

*MULLEN HOLLAND & COOPER, P.A., by John H. Hasty and Justin
N. Davis, for Charlotte Pavilion Road Retail Investment,
LLC, and WLA Enterprises, Inc.*

ELMORE, Judge.

In 2013, Charlotte Pavilion Road Retail Investment, L.L.C. and WAL Enterprises (collectively "developers") filed a declaratory judgment action against North Carolina CVS Pharmacy, L.L.C., Jeffrey Carpenter, Carpenter Investment Properties, LLC, Suburban Garden Incorporated, and Sonny Boy Properties, LLC (collectively "CVS"). The developers sought a declaration that their proposed use of the land at issue did not violate a restrictive covenant. The developers moved for offensive summary judgment and Judge Linwood O. Foust granted the motion. CVS timely appealed. After careful consideration, we affirm.

I. Background

The facts in this case are not in dispute. Jeffrey Carpenter, principal member of Carpenter Investment Properties, LLC, owned a fifteen acre tract of land ("the Carpenter tract") in north Charlotte. In 2006, Mr. Carpenter conveyed approximately two acres of the Carpenter tract to an entity that he controlled, Pavilion at Twenty Nine, LLC ("Pavilion"). Pavilion leased the two acres to CVS Pharmacy ("CVS tract"), which is still operating a pharmacy on the land today. Mr. Carpenter/Pavillion agreed to place a restriction in the CVS lease on the future use of the Carpenter tract to entice CVS to enter the lease agreement.

On 18 August 2008, Mr. Carpenter sold the CVS tract to Sonny Boy Properties, LLC. As part of the sale, Mr. Carpenter implemented the restriction outlined in the CVS lease by encumbering his adjoining land, the Carpenter tract, with a restrictive covenant. The restrictive covenant is recorded and runs with the land. The recorded covenant mirrors the restriction that appears in the CVS lease. It states:

During the term of the existing CVS lease . . . no owner of any portion of the Carpenter Tract shall allow its parcel to be leased or to be used for the purpose of a health and beauty aids store, a drug store, a vitamin store, and/or a pharmacy. A "pharmacy" shall include the dispensing of prescription drugs by physicians, dentists, or other health care practitioners, or entities such as health maintenance organizations, where such dispensing is for profit or a facility which accepts prescriptions which are filled elsewhere and delivered to the customer. A "health and beauty aids store" shall mean a store which devotes more than 10% of its retail selling space to the display and sale of health and beauty aids.

In 2012, Mr. Carpenter contracted to sell the restricted Carpenter track to the developers. The developers also contracted to purchase an adjacent tract of land ("the Charter tract") from Charter Properties. The Charter tract is unrestricted. The developers intend to construct a shopping center to be located on both the Carpenter and Charter tracts.

Specifically, the developers intend to lease a portion of the Charter tract to Walmart, and Walmart proposes to build a store that would sell, *inter alia*, health and beauty aids, drugs and vitamins, and operate a pharmacy. On the Carpenter tract, the developers intend to build a parking lot and access easement to be used by the shopping center customers and tenants. Although Walmart would share the parking lot with other retail establishments, its customers would be expected to park on the Carpenter tract to access the Walmart store.

When CVS learned that the developers intended to construct a parking lot on the Carpenter tract for Walmart's use, it informed the developers that, in its opinion, such use would violate the restrictive covenant. To be certain, the developers filed a declaratory judgment action against CVS. The developers sought a declaration by the trial court that the proposed use of the land would not violate the restrictive covenant. After a 27 January 2014 summary judgment hearing, Judge Foust granted the developers' motion for summary judgment, concluding that the construction of a parking lot would not violate the terms of the restrictive covenant. CVS and Sonny Boy filed a timely notice of appeal.

II. Analysis

On appeal, CVS argues that the trial court erred in granting the developers' motion for summary judgment since the trial court should have held that the proposed use of the Carpenter tract as a parking lot and access easement for Walmart would violate the restrictive covenant. We disagree and hold that the parking lot is a permitted use and does not violate the particular restrictive covenant.

Summary judgment is proper "if 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. Gen. Stat. § 1A-1, Rule 56(c) (2013). In the instant case, the parties agree that there is no genuine issue of material fact because the facts themselves are not in dispute. Instead, the parties disagree on the legal significance of the established facts. See, e.g., *Alchemy Communications Corp. v. Preston Dev. Co.*, 148 N.C. App. 219, 222, 558 S.E.2d 231, 233 (2002) (Plaintiff's claim that whether defendant violated a lease presented "a matter of contract interpretation and thus, a question of law."). We must only consider whether the trial court correctly determined that plaintiffs are entitled to a judgment as a matter of law.

North Carolina courts employ a strict construction rule when interpreting restrictive covenants:

[W]hile 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. The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent.

The law looks with disfavor upon covenants restricting the free use of property. As a consequence, the law declares that *nothing can be read into a restrictive covenant enlarging its meaning beyond what its language plainly and unmistakably imports.*

[C]ovenants restricting the use of property are to be strictly construed against limitation on use, and will not be enforced unless clear and unambiguous[.] This is in accord with general principles of contract law, that the terms of a contract must be sufficiently definite that a court can enforce them. Accordingly, *courts will not enforce restrictive covenants that are so vague that they do not provide guidance to the court.*

Wein II, LLC v. Porter, 198 N.C. App. 472, 480, 683 S.E.2d 707, 712-13 (2009) (quotations and citations omitted) (emphasis added). "The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and

obvious purposes of a restriction." *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967). "Restricted property cannot be made to serve a forbidden use even though the enterprise is situated on adjacent or restricted land." *Id.* at 269, 156 S.E.2d at 239.

The covenant at issue provides that the Carpenter tract shall not "be used for the purpose of a health and beauty aids store, a drug store, a vitamin store or a pharmacy." This covenant must be construed according to the plain ordinary meaning of its words. CVS argues that the restrictive covenant on the Carpenter track prohibits the construction of a parking lot that would serve Walmart. It is CVS's position that the purpose of the restrictive covenant is to prohibit the construction of a pharmacy on the restricted parcel that would compete with CVS—this includes the prohibition of a parking lot which would serve a prohibited use. CVS notes that because the city of Charlotte's ordinance requires Walmart to provide parking for its customers, parking is integral to the store's operation and therefore falls within the purview of the restrictive covenant.

To support its position, CVS primarily relies on case law from jurisdictions outside of North Carolina. For example, in

H.E. Butt Grocery Co. v. Justice, 484 S.W.2d 628 (Tx. Civ. App. 1972), appellee Coleridge sold appellant Butt (HEB) a parcel of land and at the same time placed a restriction on adjacent land owned by Coleridge "against the use of any portion thereof for the purpose of conducting thereon a foodstore [sic] or food department for the storage or sale for off-premises consumption of groceries, meats, produce, dairy products, frozen foods, [or] baking products[.]" *Id.* at 629. Thereafter, Coleridge sold the adjacent land to plaintiff Justice, who proposed to erect a grocery store on the land not covered by the restriction, and proposed to use the restricted parcel for parking and access to the grocery and other stores in the shopping center. *Id.* Justice sued HEB for declaratory judgment and sought a declaration that a use restriction upon the property encumbered by the restrictive covenant would not preclude the property's use for parking, ingress and egress for a grocery store to be located on unrestricted land, adjacent to the restricted tract. *Id.* In construing the restriction, the Texas court gave effect to the express language, together with that which was necessarily implied, to ascertain the intention of the parties. *Id.* at 630. The Texas Court noted that any ambiguity was to be resolved against favoring the restriction. *Id.* Ultimately, the

Texas court determined that constructing a parking lot on the restricted lot to benefit the grocery store violated the restrictive covenant because the parking lot is "an integral part of the proposed operation. The foodstore cannot be conducted without it." *Id.* at 631.

CVS contends that the factual situation presented in *Justice* is analogous to the situation at bar and therefore we should adopt the Texas court's holding.

We agree that the factual situation in *Justice* is similar to the situation at issue. However, the express language of the restrictive covenant in this case differs from the restriction in *Justice* such that we cannot adopt the Texas court's holding. Here, the restrictive covenant prohibits the building of a health and beauty aids store, a drug store, a vitamin store or a pharmacy. The covenant goes so far as to describe what constitutes each type of prohibited use store. A "store" is defined as a "place where goods are deposited for purchase or sale." BLACK'S LAW DICTIONARY 1460 (8th ed. 2004). Alternatively, the restrictive covenant in *Justice* prohibited potential buyers from using the property "for the purpose of conducting thereon a foodstore or food department[.]" Thus, the restrictive covenant in *Justice* contemplated and banned the business activity of

operating a food store, which, as mandated by ordinance, included providing consumer parking.

In the instant case, we interpret the restrictive covenant to prohibit exactly what it purports to ban on the face of the restriction—the erection of a *structure* on the Carpenter tract that operates as a prohibited type of retail store, namely a pharmacy. Thus, a developer may not build a store—four walls and a roof—that constitutes a vitamin store, beauty aid store, or pharmacy. We do not believe that the intent of the grantor, Mr. Carpenter, was to outlaw the construction of those things which are integral or essential to the *operation* of a retail business. If such prohibition was intended, the drafter could have said as much by incorporating phrases such as “used for store purposes” or “used for purposes incidental to a store.” However, without more, we conclude the construction of a parking lot and access easement on the restricted property is not a prohibited use. Accordingly, this Court must affirm the trial court’s decision to grant the developer’s motion for offensive summary judgment.

Affirmed.

Judges BRYANT and ERVIN concur.