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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-854

Filed: 7 April 2020

Jackson County, No. 17 CVS 301

STEVEN ANTHONY SCIARA and wife, NANCY JEAN SCIARA, Plaintiffs,

v.

GWEN L. EDWARDS and ALANE SIEM, Defendants.

Appeal by plaintiffs from order entered 1 April 2019 by Judge R. Greg Horne in Jackson County Superior Court. Heard in the Court of Appeals 3 March 2020.

*Yates, McLamb & Weyher, L.L.P., by Allison J. Becker and Kristina M. Wilson, for plaintiffs-appellants.*

*Frank G. Queen, PLLC, by Frank G. Queen, for defendant-appellee Alane Siem.*

YOUNG, Judge.

Where the developer/declarant did not reserve the authority to revoke the covenants with respect to one lot, the trial court erred in granting judgment on the pleadings. We affirm in part and reverse in part the decision of the trial court and remand.

I. Factual and Procedural Background

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Gwen L. Edwards (Edwards), and her husband William K. Edwards, were the developers/declarants of Ban Branch Development (Ban Branch), a residential development. The protective covenants and declaration were made on 1 December 2005.

On 15 February 2013, Edwards and her husband conveyed Lot B of the development to Randy and Donna Walser. Subsequently, on 12 December 2014, the Walsers conveyed this property to Steven Anthony Sciara and Nancy Jean Sciara (plaintiffs).

After Edwards' husband died, she became sole developer and declarant. In 2017, she filed an amendment to the protective covenants. Also in 2017, Edwards conveyed Lot A in the development to Alane Siem (Siem).

On 3 May 2017, plaintiffs filed a complaint for declaratory judgment against Edwards and Siem. Plaintiffs alleged that “[a]pproximately one minute before Edwards conveyed [Lot] A to Siem, she caused to be recorded” the amendment to the covenants, which granted Lot A a “variance from adhering to” the covenants. Plaintiffs alleged that, pursuant to the covenants, they would have a right to enter Siem’s property to take water from a well, and would be entitled to a septic easement on Siem’s property, and that this purported variance would deprive them of their rights under the covenants. Plaintiffs therefore raised claims seeking declaratory

judgment as to their septic easement and water rights, and the legal status of the amendment to the covenants.

On 28 March 2018, plaintiffs filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. Plaintiffs alleged that there were no genuine issues of material fact, and sought declaratory judgments that (1) plaintiffs possessed a valid septic easement and water rights affecting Siem's property; (2) the amendment to the covenants was invalid; and (3) Siem's property was subject to the protective covenants and easements initially established in the declaration. In response, on 4 May 2018, Siem filed a motion for judgment on the pleadings, seeking declaratory judgments that (1) the amendment to the covenants was valid; and (2) Siem's property was not subject to the protective covenants and easements established in the declaration.

On 1 April 2019, the trial court entered an order allowing Siem's motion. The court specifically ordered that (1) the amendment to the covenants was valid and enforceable; and (2) Siem's property was not subject to the protective covenants and easements; but (3) plaintiffs possessed valid septic and water rights which were not dependent upon Siem's permission.

Plaintiffs appeal.

## II. Standard of Review

We review a trial court's ruling on judgment on the pleadings *de novo*. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005). In considering a motion for judgment on the pleadings, "all allegations in the non-movant's pleadings are deemed admitted." *Bridgestone/Firestone, Inc. v. Ogden Plant Maint. Co. of N.C.*, 144 N.C. App. 503, 505, 548 S.E.2d 807, 809 (2001), *aff'd per curiam*, 355 N.C. 274, 559 S.E.2d 786 (2002). The motion is properly granted when the movant has shown that "no material issue of facts exists and that he is clearly entitled to judgment." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974).

### III. Judgment on the Pleadings

Plaintiffs contend that the trial court erred in granting judgment on the pleadings in favor of Siem. Plaintiffs also contend that the protective covenants "were intended to enhance the value of the development," and that it was improper for Edwards, as developer, to "unilaterally revoke[] all restrictive covenants as to only" Siem's property.

In support of their arguments, plaintiffs cite the original declaration and protective covenants, which reserved for Edwards "the right to grant variances, to amend or add additional covenants and restrictions" concerning the development. The declaration further notes that the "intent here is to grant variances and add terms, restrictions and covenants which may not have been included in this document

that may protect and enhance the quality and value of the development or which may cause undue hardship to a lot owner.”

Plaintiffs contend that removing the restrictions on Siem’s property was not permitted by this document, in that it did not constitute an amendment or variance, and that it did not benefit the development, but may hypothetically diminish the value of the development based upon actions Siem may take with this unrestricted lot.

Plaintiffs further assert that even if the declaration did permit Edwards to grant Siem a total variance from the covenants, it was not reasonable to do so. Our Supreme Court has held that “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.” *Armstrong v. Ledges Homeowners Ass’n, Inc.*, 360 N.C. 547, 559, 633 S.E.2d 78, 87 (2006); *see also Wallach v. Linville Owners Ass’n, Inc.*, 234 N.C. App. 632, 642, 760 S.E.2d 23, 29 (2014).

While our Courts have indeed held that a homeowners’ association may only amend a declaration of covenants inasmuch as those amendments comport with the original intent of the declaration, this case is distinguishable in that the amendment was made not by the homeowners’ association, but by the developer/declarant herself.

Instead, we turn to the guiding authority of our Supreme Court in its decision in *Rosi v. McCoy*, 319 N.C. 589, 356 S.E.2d 568 (1987).

In *Rosi*, the plaintiffs and defendants were adjoining lot owners in a development. The covenants in the development included a paragraph providing that no structure could be erected within fifteen feet of the lot line. Despite this, the defendants' home was placed within 12.5 feet of the plaintiffs' lot. The defendants, however, had secured from the developer an amendment to the set-back requirement, specific to their lot, pursuant to Paragraph Fifteen of the covenants, which granted the developers "the right to amend, modify, or vacate any restriction herein contained whenever the circumstances, in the opinion of the Developers, their successors or assigns, warrant such amendment, modification or vacation as being necessary or desirable." *Id.* at 591, 356 S.E.2d at 569. The amendment, filed pursuant to this paragraph, was recorded.

The plaintiffs therefore brought action against the defendants, as well as the developers, and all parties moved for summary judgment. The trial court granted summary judgment to the plaintiffs, and the defendants appealed. This Court reversed the decision of the trial court, and the plaintiffs sought discretionary review. *Id.*

On discretionary review, our Supreme Court held that Paragraph Fifteen gave the developers “the right to amend the restrictive covenants unilaterally.” *Id.* at 592, 356 S.E.2d 569. The Court went on to observe:

The record before this Court establishes, and plaintiffs do not contest, that defendants secured an amendment from the developers pursuant to paragraph “Fifteenth,” that the developers still owned lots in the subdivision at that time, that the amendment was duly recorded, that defendants are not in violation of the amendment, and that plaintiffs took title to their property with notice of the contents of paragraph “Fifteenth.” Plaintiffs contested only the interpretation of paragraph “Fifteenth,” contending that the paragraph mandated their consent before a valid amendment could issue. With this question decided against them, the Court of Appeals was clearly correct in reversing the trial judge’s order of summary judgment for the plaintiffs.

*Id.* at 597, 356 S.E.2d at 572.

Implicit in the court’s ruling is that, where the developer/declarant specifically reserved a right to unilaterally amend or vary the covenants in their discretion, even with regard to individual lots, that right is interpreted broadly. Unlike the rights of a homeowners’ association to amend, wherein such amendment must comport with the desires of the original declaration, a declarant who has specifically reserved the right retains the authority to change the declaration, and by extension the nature of the development, as needed. To hold otherwise would be to bind a developer to an otherwise potentially unmarketable development, and preclude the developer from changing plans in order to render the property more marketable.

In the instant case, notwithstanding the language in the purported amendment, this was no mere variance from the covenants. Unlike in *Rosi*, where the developer merely waived a setback requirement, Edwards completely revoked the covenants and restrictions with respect to Lot A. We therefore hold that this was not an amendment, but a revocation. This is a distinction with a difference.

While the declaration reserved to Edwards “the right to grant variances, to amend or add additional covenants and restrictions[,]” it did not reserve the right to completely revoke them. Nor are we inclined to read such a right into the four corners of the document. As Edwards did not reserve the right to completely revoke the covenants and restrictions with respect to a single lot in the declaration, we hold that such action was beyond her authority as developer/declarant. Because this action was beyond Edwards’ authority, the purported amendment was void. It was therefore error for the trial court to grant judgment on the pleadings, and specifically to hold that the purported amendment was valid and that Lot A was not subject to the covenants and restrictions.

We note that our decision does not reach the issue of whether a developer/declarant may explicitly reserve the right to totally revoke the covenants and restrictions with respect to a single lot after lots have been sold subject to the covenants. Our ruling in this matter is strictly limited to the decision that Edwards could not exercise a power that was not properly reserved in the declarations, and

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that the trial court erred in holding otherwise. We also hold the trial court's ruling that plaintiffs possessed valid septic and water rights not subject to Lot A's owner's permission is affirmed.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Chief Judge McGEE and Judge TYSON concur.

Report per Rule 30(e).