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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-170

No. COA21-94

Filed 15 March 2022

Transylvania County, No. 18 CVS 352

BEAR WALLOW SPRINGS AT LAKE TOXAWAY PROPERTY OWNERS ASSOCIATION, Plaintiff,

v.

LAKE TOXAWAY COMMUNITY ASSOCIATION, f/k/a LAKE TOXAWAY PROPERTY OWNERS ASSOCIATION, INC., Defendant.

Appeal by plaintiff from order entered 8 May 2019 by Judge William H. Coward and judgment entered 17 September 2020 by Judge Casey Viser in Transylvania County Superior Court. Heard in the Court of Appeals 30 November 2021.

Whitfield-Cargle Law, PLLC, by Davis A. Whitfield-Cargile, for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, Jonathan H. Dunlap, and Brian D. Gulden, for defendant-appellee.

DIETZ, Judge.

¶ 1 Plaintiff Bear Wallow Springs at Lake Toxaway Property Owners Association is a homeowners' association for a community in the scenic mountains of our State. The Bear Wallow Springs community adjoins the greater Lake Toxaway community,

which itself surrounds the private lake from which its name is derived.

¶ 2 When the Bear Wallow Springs community first was created two decades ago, out of property owned by the developer of Lake Toxaway, the parties recorded restrictive covenants requiring Bear Wallow Springs property owners to join the Lake Toxaway property owners' association and pay assessments to the association. Over the years, the Lake Toxaway property owners' association collected those assessments from Bear Wallow Springs property owners and spent them largely or exclusively on the upkeep of roads and other elements of the Lake Toxaway community, not the Bear Wallow Springs community.

¶ 3 In this declaratory judgment action, Bear Wallow Springs asked the trial court to declare whether its property owners must pay those assessments to the Lake Toxaway property owners' association and, if so, how those assessments must be used by the association. The trial court granted summary judgment in favor of the Lake Toxaway property owners' association, effectively ruling that it was entitled to collect assessments from Bear Wallow Springs property owners but that it had no duty to use those assessments on upkeep within Bear Wallow Springs.

¶ 4 As explained below, the trial court properly determined that the Lake Toxaway

property owners' association may impose assessments on property owners in Bear Wallow Springs. But under the terms of the applicable covenants, at least part of those assessments must be used to maintain portions of the Bear Wallow Springs community. We therefore vacate the trial court's entry of summary judgment and remand for further proceedings on the request for declaratory relief.

Facts and Procedural History

¶ 5 In June 2001, Bear Wallow Springs, Inc. and the Lake Toxaway Company entered into a Site Development Agreement involving 386 acres of land. That land would be used to create a gated residential development in the greater Lake Toxaway area to be known as Bear Wallow Springs. The agreement included covenants that were recorded with the deed.

¶ 6 Both Bear Wallow Springs, Inc. and the Lake Toxaway Company have corresponding property owners' associations for their respective communities, and they are the plaintiff and defendant in this action: Plaintiff Bear Wallow Springs at Lake Toxaway Property Owners Association and Defendant Lake Toxaway Community Association. For ease of reference, we refer to these two property owners' associations as "Bear Wallow Springs" and "Lake Toxaway" respectively.

¶ 7 In 2002, Bear Wallow Springs prepared and recorded another set of covenants for its community. In 2005, the parties signed a maintenance agreement that stated, in relevant part, that "Bear Wallow Springs and the Bear Wallow Springs Property Owner's Association will continue to maintain the road surfaces, utilities and gates independently and at its own costs."

¶ 8 Around 2010, Bear Wallow Springs began collecting an assessment from its property owners, separate from the assessments its owners paid to Lake Toxaway, to provide upkeep within Bear Wallow Springs. From this point forward, Bear Wallow Springs property owners paid two assessments, one to Bear Wallow Springs and one to Lake Toxaway.

¶ 9 Over time, these two property owners' associations began to disagree about whether Lake Toxaway must use the funds from assessments paid by Bear Wallow Springs residents to provide upkeep within the Bear Wallow Springs community, as opposed to the Lake Toxaway community. In particular, Bear Wallow Springs asserted that Lake Toxaway was responsible for using those assessments to maintain roads and other common elements within Bear Wallow Springs.

¶ 10 In 2018, Bear Wallow Springs brought this action seeking a declaratory

judgment and other, accompanying relief. Bear Wallow Springs asked the court for two declarations: first, a declaration as to the rights of Lake Toxaway to "collect annual assessments from Bear Wallow Springs property owners pursuant to Section 3.27 of the Site Development Agreement" and then, if the court determined that Lake Toxaway "has the right to collect assessments" under the provision, "a declaration regarding the purposes for which said assessments can be used by Lake Toxaway, including but not limited to a declaration as to whether said assessments must be used to maintain the common elements and roadways within Bear Wallow Springs development."

¶ 11 After some claims were resolved on a motion to dismiss, both parties moved for summary judgment on the declaratory judgment claim. The trial court entered an order granting Lake Toxaway's motion for summary judgment on the request for declaratory relief, effectively holding that Bear Wallow Springs residents must pay assessments to Lake Toxaway and that Lake Toxaway had no responsibility to use those funds for upkeep within Bear Wallow Springs. Bear Wallow Springs appealed.

Analysis

¶ 12 Summary judgment is proper when "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. R. Civ. P. 56(c). We review the trial court's grant of summary judgment de novo. *Murillo v. Daly*, 169 N.C. App. 223, 225, 609 S.E.2d 478, 480 (2005).

¶ 13 The central issue in this case is whether Lake Toxaway may collect property owners' assessments from Bear Wallow Springs property owners and, if so, how those funds must be spent. Bear Wallow Springs contends that the Site Development Agreement does not permit Lake Toxaway to collect assessments from its residents and, if it does, that those assessments must be used exclusively for maintenance of the roads and other common elements within Bear Wallow Springs.

¶ 14 Lake Toxaway, by contrast, argues that the Site Development Agreement permits it to collect assessments and that those assessments must be spent on common elements within the greater Lake Toxaway community—not on common elements within Bear Wallow Springs, which is a gated community not accessible to all residents of the greater Lake Toxaway community.

¶ 15 We thus begin by examining the text of the Site Development Agreement,

which is the central document governing the parties' relationship.

¶ 16 The Site Development Agreement is a real property contract between the Lake Toxaway Company and Bear Wallow Springs, Inc. The contract identifies and defines Lake Toxaway Company as the "Seller" and Bear Wallow Springs, Inc. as the "Buyer." It provides that "Seller is herewith conveying to Buyer a 386 acre, more or less, tract of land which is adjacent to Seller's Property" and that "Seller and Buyer agree that the development by Buyer of Buyer's Property will be enhanced by conformity with certain restrictive and protective covenants similar to those pertaining to Seller's Property and jointly desire to restrict Buyer's Property as provided in Section 3 hereof."

¶ 17 The agreement then provides that Bear Wallow Springs, Inc. may subdivide the 386 acres into individual lots. The agreement required purchasers of these lots to join the Lake Toxaway property owners' association and stated that they "will be entitled to all rights and responsibilities, including but not limited to the right to use all facilities, roadways and rights of way maintained by" the Lake Toxaway property owners' association.

¶ 18 Section 3 of the Site Development Agreement is titled "Declaration of

Restrictive and Protective Covenants" and provides that all lots within the Bear Wallow Springs development must be conveyed subject to a series of covenants. It defines both the Lake Toxaway Company and Bear Wallow Springs, Inc. as the "Declarants" and provides that both companies "must approve of any matter requiring approval by the Declarants."

¶ 19 This portion of the Site Development Agreement also repeatedly references the term "the Development" but does not define this term as it does the other proper nouns in the contract. The parties concede that, in this section, the term "the Development" refers to the future Bear Wallow Springs development, not the greater, existing Lake Toxaway community.

¶ 20 The relevant covenant is contained in Section 3.27, which provides criteria for the Bear Wallow Springs property owners' membership in the Lake Toxaway property owners' association and corresponding rights and responsibilities. The pertinent text of this subsection is set out below, with key portions emphasized:

> Section 3.27 Membership in Association; *Assessments for Road Maintenance and Other Purposes*.
>
> a. Membership in Association. Every person (or entity) who/which is a record owner of a fee or undivided fee interest in any lot that is subject hereto shall be deemed to

> have a membership in Lake Toxaway Property Owners Association, Inc. (sometimes hereinafter referred to as "the Association"). . . .
>
> b. Assessments. *The owner of each lot, with the exception of the Declarants, shall, by the acceptance of a deed or other conveyance for such lot, be deemed obligated to pay to the Declarants or to the Association, as the case may be, an annual assessment or charge for the purposes stated within these Articles* to be fixed, established and collected on a lot by lot basis as hereinafter provided. . . .
>
> Such assessment or charge shall be an amount to be fixed from year to year by the Declarants or Association, which may establish different rates from year to year as it may deem necessary and may establish different rates for various general classifications of lots according to the use or location of said lots. *The Declarants or Association may, from time to time, levy additional assessments as it deems necessary to meet the needs of the Development.*
>
> *The funds arising from said assessment or charge or additional assessment or charge may be used for any or all of the following purposes: maintaining, operating, improving and replacing roads; protection of property from erosion; maintenance, improvement and lighting of common areas and facilities including recreational facilities within the Development; employing watchmen and security personnel; enforcement of these Restrictions; paying taxes, indebtedness of the Association; insurance premiums, governmental charges of all kinds and descriptions; legal and or accounting fees; and, in addition, doing any other things necessary or desirable in the opinion of the Declarants or Association to maintain the property in neat*

> *and good order and to provide for the health, welfare, and safety of owners and residents. . . .*
>
> The moneys collected by virtue of the assessments or charges or additional assessments, of the lien provided by this section, shall be paid to the Declarants or the Association as the case may be *to be used in such manner and to the extent as the Declarants or Association may determine, in accordance with the provisions of these Articles for the benefit of the lot owners in the Development*.

(Emphasis added).

¶ 21 In this action, Bear Wallow Springs sought a declaratory judgment from the trial court on two specific issues. First, Bear Wallow Springs sought a declaration "as to the rights of [Lake Toxaway] to collect annual assessments from Bear Wallow Springs property owners pursuant to Section 3.27 of the Site Development Agreement." Second, if the trial court determined that Lake Toxaway had a right to collect these assessments, Bear Wallow Springs further sought "a declaration regarding the purposes for which said assessments can be used by Lake Toxaway, including but not limited to a declaration as to whether said assessments must be used to maintain the common elements and roadways within Bear Wallow Springs development."

¶ 22 The trial court entered summary judgment in favor of Lake Toxaway on these

two requests for declaratory relief, effectively holding that Lake Toxaway had the right to collect assessments from Bear Wallow Springs property owners and that Lake Toxaway was not obligated to use those assessments to maintain any common elements within the Bear Wallow Springs community and instead could use those assessments solely to maintain common elements of the separate Lake Toxaway community.

¶ 23 We begin by addressing the trial court's ruling on the first request for declaratory relief. Bear Wallow Springs argues that its own 386-acre community "is the only property identified in the Site Development Agreement Declaration to be maintained by the assessments." Thus, it argues, Lake Toxaway must use the assessments paid by its property owners solely for maintenance of common elements and facilities within Bear Wallow Springs. Any other interpretation, Bear Wallow Springs argues, would render the agreement "ambiguous as to what property is to be maintained, making it void and unenforceable."

¶ 24 We reject this argument. Covenants imposing affirmative obligations on property owners, such as the payment of assessments, must contain some "ascertainable standard" by which a court can objectively determine both that the

amount of the assessment and the purpose for which it is levied fall within the covenant's terms. *Willow Bend Homeowners Ass'n, Inc. v. Robinson*, 192 N.C. App. 405, 414, 665 S.E.2d 570, 575 (2008). Our Supreme Court has applied a three-part test to assess whether a covenant contains the necessary ascertainable standard: (1) the covenant must contain sufficient standards by which to measure liability for assessments; (2) the covenant must identify with particularity the property to be maintained; and (3) the covenant must provide guidance to a reviewing court as to which facilities and properties the association will maintain. *Se. Jurisdictional Admin. Council, Inc. v. Emerson*, 363 N.C. 590, 599, 683 S.E.2d 366, 371 (2009).

¶ 25 The trial court properly determined that Section 3.27 of the Site Development Agreement satisfies this three-part test and obligates Bear Wallow Springs property owners to pay assessments levied by Lake Toxaway for use in maintaining the Lake Toxaway community. The Site Development Agreement provides that Bear Wallow Springs property owners "will be required to join" the Lake Toxaway property owners' association. The agreement further provides that, as a result of their compulsory membership in the association, Bear Wallow Springs property owners "will be entitled to all rights and responsibilities, including but not limited to the right to use

all facilities, roadways and rights of way maintained by" the Lake Toxaway property owners' association. The Site Development Agreement, in Section 3.27, provides ascertainable standards for imposing assessments to maintain these facilities, roadways, and other common elements that are the responsibility of the Lake Toxaway property owners' association and that are accessible to members of the association.

¶ 26 Bear Wallow Springs also contends that, if this provision requires its property owners to pay assessments to maintain these roads, facilities, and other common elements outside its own community, the provision "would not run with the land" and is not binding on its property owners.

¶ 27 A real covenant that "runs with the land"—meaning one that remains in force upon a change in ownership of the property—requires the covenant to "be so closely connected with the real property that it touches and concerns the land." *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 669, 248 S.E.2d 904, 908 (1978). This standard is satisfied here. The rights that Bear Wallow Springs property owners receive through their membership in the Lake Toxaway property owners' association include real property rights—in particular, the right of access to the roads and common elements

that connect Bear Wallow Springs to the neighboring Lake Toxaway community, which is a scenic, private community with many desirable destinations including an inn offering fine dining, recreation areas, and views of the picturesque lake that is the namesake of the community. The Bear Wallow Springs community adjoins the greater Lake Toxaway community and the covenants granting Bear Wallow Springs property owners the right to access these roadways and other common elements afford them greater rights to this neighboring community than the general public. Thus, the covenants sufficiently touch and concern the land and thus run with the land. *Id.*

¶ 28 Accordingly, we hold that the trial court properly determined that Section 3.27 of the Site Development Agreement obligates Bear Wallow Springs property owners to pay assessments levied by Lake Toxaway to be used for the purposes described in that agreement.

¶ 29 We next turn to the second request for declaratory relief, in which Bear Wallow Springs sought "a declaration regarding the purposes for which said assessments can be used by Lake Toxaway, including but not limited to a declaration as to whether said assessments must be used to maintain the common elements and roadways

within Bear Wallow Springs development."

¶ 30 As we noted above, the trial court also entered summary judgment against Bear Wallow Springs on this claim, effectively ruling that Lake Toxaway did not have any obligation to use the assessments to maintain common elements within Bear Wallow Springs. That ruling is not supported by the language of the Site Development Agreement. Among the purposes for the assessments listed in Section 3.27 is the following: "maintenance, improvement and lighting of common areas and facilities including recreational facilities within the Development." Again, as we noted above, the parties acknowledge that the term "the Development" refers solely to the 386-acre property that comprises the Bear Wallow Springs community. Thus, the Site Development Agreement unambiguously authorizes Lake Toxaway to use the assessments for maintenance within Bear Wallow Springs.

¶ 31 The extent to which Lake Toxaway must use some portion of the assessment for this purpose is a matter suitable for resolution through a declaratory judgment. *See Tanglewood Prop. Owners' Ass'n, Inc. v. Isenhour*, 254 N.C. App. 823, 834–35, 803 S.E.2d 453, 461–62 (2017); *Miesch v. Ocean Dunes Homeowners Ass'n*, 120 N.C. App. 559, 464 S.E.2d 64 (1995). Accordingly, we vacate the trial court's order and remand

for the trial court to examine this provision in Section 3.27 of the Site Development Agreement and declare the parties' rights and obligations with respect to it. On remand, the trial court may enter a new order on the existing record or conduct any further proceedings it deems necessary in the interests of justice.

¶ 32 Because we vacate the order on this basis, we need not address Bear Wallow Springs' arguments with respect to its remaining claims. The trial court, upon entering a new order on the second claim for declaratory relief, can assess whether its initial ruling with respect to these additional claims is impacted.

Conclusion

¶ 33 For the reasons stated above, we vacate the trial court's order and remand for further proceedings.

VACATED AND REMANDED.

Judges MURPHY and WOOD concur.

Report per Rule 30(e).