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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-737

No. COA22-318

Filed 1 November 2022

Watauga County, No. 21 CVS 622

SUNALEI PRESERVE PROPERTY OWNERS' ASSOCIATION, INC., Plaintiff,

v.

CHUBBY CUSTARD, LLC, Defendant.

Appeal by defendant from order entered 15 February 2022 by Judge R. Gregory Horne in Watauga County Superior Court. Heard in the Court of Appeals 6 September 2022.

Alexander Ricks, PLLC, by Roy H. Michaux, Jr., for plaintiff-appellee.

Adams, Howell, Sizemore & Adams, P.A., by Jeremy Jackson and Ryan J. Adams, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Chubby Custard, LLC, appeals from the trial court's order denying its motion to dismiss or, in the alternative, for change of venue. After careful review, we affirm.

Background

¶ 2 Plaintiff Sunalei Preserve Property Owners' Association, Inc., manages and maintains Sunalei Preserve, a planned community located in Watauga County, North Carolina and Johnson County, Tennessee. Sunalei Preserve was developed to offer "homeowners the unspoiled and peaceful natural beauty of the area[,]" and has been "marketed and sold to property owners as a pristine and secluded place to create permanent legacy estates for families that could be passed down to future generations."

¶ 3 On 3 November 2004, Sunalei Preserve's developers recorded a Declaration of Restrictions (the "Restrictions"), which provides, *inter alia*, that all homes in Sunalei Preserve "shall be used only for single-family residential purposes" and that "[o]nly one family may occupy a Homestead Lot as a principal residence at any one time." The Restrictions further provide that "[n]o noxious or offensive activity shall be carried on" within the community, "nor shall anything be done thereon tending to cause embarrassment, discomfort, annoyance, or nuisance to the neighborhood." The Restrictions vest Plaintiff with the authority to "promulgate additional rules and regulations governing the use and occupancy of the" homes in the Sunalei Preserve community.

¶ 4 Effective 7 December 2020, Plaintiff's Board of Directors issued rules and regulations regarding the lease or rental of property within Sunalei Preserve (the "Rules and Regulations"). In pertinent part, the Rules and Regulations prohibit

Sunalei Preserve landowners from renting or leasing their property for "any purpose other than single-family residential use[,]" and establish a minimum rental term of three months. They also mandate that any advertisements for rentals "affirmatively state" that the rental period is for a minimum of three months.

¶ 5 On 30 November 2020, Defendant purchased two lots (the "Property") in the Watauga County portion of Sunalei Preserve, on which is situated a 6,400 square foot, six-bedroom home. Beginning in approximately October 2021, Defendant repeatedly rented the Property to unrelated individuals and multiple unrelated families. Defendant advertised the Property as a vacation home on a website named "Carolina Cabin Rentals," describing the Property as "a wonderful place to gather with friends and family[.]" Some of the Property's short-term tenants allegedly hosted "wild parties where the tenants and guests [we]re inebriated and loud music and profanity was heard late into the night and early morning of the following day[.]" Plaintiff notified Defendant that it was violating the provisions of the Rules and Regulations; nevertheless, Defendant continued to advertise and lease the Property to unrelated individuals for short-term visits.

¶ 6 On 13 December 2021, Plaintiff filed a complaint against Defendant in Watauga County Superior Court. Plaintiff asserted that venue was proper in Watauga County pursuant to N.C. Gen. Stat. § 1-76 (2021), and alleged that Defendant violated the Restrictions and the Rules and Regulations by advertising

and renting the Property to unrelated persons for short-term stays. In its complaint, Plaintiff sought a "preliminary and permanent injunction" against Defendant to prevent it from leasing the Property "except as in strict compliance with the [Restrictions] and Rules and Regulations." Plaintiff also requested that it "be awarded its costs and expenses[.]"

¶ 7 On 28 December 2021, Defendant filed a motion to dismiss or, in the alternative, for change of venue. In its motion, Defendant maintained that "Watauga County is an improper venue for this action[,]" and requested that the action be transferred to Wake County, the location of Defendant's principal place of business. Defendant's motion came on for hearing on 7 February 2022 in Watauga County Superior Court.[1] "After considering the pleadings and argument of counsel," the trial court "ruled in open court that . . . [D]efendant's motion should be denied"; the court memorialized its ruling in a written order entered on 15 February 2022.

¶ 8 Defendant timely appealed.

Grounds for Appellate Review

¶ 9 As a preliminary matter, we address this Court's jurisdiction to review Defendant's appeal of the order denying its motion to dismiss or, in the alternative, for change of venue. Defendant recognizes that the instant appeal is interlocutory, as

[1] The record on appeal contains neither a transcript nor a narration of the hearing.

it "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). However, "[a]n interlocutory order changing venue as of right affects a substantial right and thus is immediately appealable." *Stokes v. Stokes*, 371 N.C. 770, 773, 821 S.E.2d 161, 164 (2018); *see also Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) ("Although the initial question of venue is a procedural one, there can be no doubt that a right to venue established by statute is a substantial right. Its grant or denial is immediately appealable." (citation omitted)). Accordingly, this appeal is properly before us.

Discussion

¶ 10 On appeal, Defendant argues that the trial court erred by denying its motion to dismiss or, in the alternative, for change of venue because N.C. Gen. Stat. § 1-76 is inapplicable, in that this matter concerns "contract enforcement" and not "the determination in any form of [a] right or interest" in real property. N.C. Gen. Stat. § 1-76(1). We disagree.

I. Standard of Review

¶ 11 "Issues of statutory construction are questions of law, reviewed de novo on appeal. Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Kirkland's Stores, Inc. v.*

Cleveland Gastonia, LLC, 223 N.C. App. 119, 122, 733 S.E.2d 885, 887 (2012) (citations, internal quotation marks, and italics omitted).

II. Analysis

¶ 12 Section 1-76 of our General Statutes provides, in pertinent part, that

> [a]ctions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by law:
>
> (1) Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

N.C. Gen. Stat. § 1-76(1).

¶ 13 Our Supreme Court has provided a clear method by which to determine whether § 1-76(1) applies to a civil action:

> The test is this: If the judgment to which [the] plaintiff would be entitled upon the allegations of the complaint will affect the title to land, the action is local and must be tried in the county where the land lies unless [the] defendant waives the proper venue; otherwise, the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action.

Thompson v. Horrell, 272 N.C. 503, 504–05, 158 S.E.2d 633, 634–35 (1968). Venue pursuant to § 1-76(1) thus hinges on "whether a cause is local or transitory." *Id.* at 504, 158 S.E.2d at 634 (concluding that § 1-76(1) did not apply where the matter was transitory, in that it concerned "recover[ing] monetary damages for the breach of a contract to construct a house"); *Fox Holdings, Inc. v. Wheatly Oil Co.*, 161 N.C. App.

47, 57, 587 S.E.2d 429, 435 (2003) (concluding that where a judgment affects title to land, the action is local and § 1-76(1) properly applies).

¶ 14 "In determining whether the judgment sought by [a] plaintiff would affect title to land, the court is limited to considering only the allegations of the complaint." *Fox Holdings*, 161 N.C. App. at 52, 587 S.E.2d at 432 (citation omitted). In reviewing the allegations of the complaint, the court must identify "the principal object involved in the action[.]" *Rose's Stores, Inc. v. Tarrytown Ctr., Inc.*, 270 N.C. 201, 206, 154 S.E.2d 320, 323 (1967) (citation omitted). "[I]f title is principally involved or if the judgment or decree operates directly and primarily on the estate or title, and not alone *in personam* against the parties, the action will be held local." *Id.* (citation omitted). However, "an action is not necessarily local because it incidentally involves the title to land or a right or interest therein, or because the judgment that may be rendered may settle the rights of the parties by way of estoppel." *Id.* (citation omitted).

¶ 15 It is well established that restrictive covenants on land use, a type of negative easement, affect a landowner's title to or interest in real property. *See City of Raleigh v. Edwards*, 235 N.C. 671, 679, 71 S.E.2d 396, 402 (1952) ("[T]his Court has adhered unvaryingly to the principle that a negative easement . . . is a *vested interest in land*." (emphasis added)); *Turner v. Glenn*, 220 N.C. 620, 625, 18 S.E.2d 197, 201 (1942) ("The servitude imposed by restrictive covenants is a species of incorporeal right. It restrains the owner of the servient estate from making certain use of his property. *It*

is an interest in land, conveyance of which is within the statute of frauds." (emphasis added)); *Whyburn v. Norwood*, 47 N.C. App. 310, 314, 267 S.E.2d 374, 376 (1980) ("Restrictive and protective covenants are classed as negative easements and *affect title to real estate*." (emphasis added)).

¶ 16 In the instant case, Defendant argues that § 1-76 is inapplicable because "the principal object of the litigation is contract enforcement" rather than any right or interest in real property, as "[t]here are no claims concerning the validity of the covenants or their applicability to the Property." This argument lacks merit.

¶ 17 It is manifest from a review of the allegations of Plaintiff's complaint that the determination of the parties' rights and interests in the Property pursuant to the covenants is "the principal object involved in the action[.]" *Rose's*, 270 N.C. at 206, 154 S.E.2d at 323 (citation omitted). In its complaint, Plaintiff alleges that "[t]he rental activities conducted on the . . . Property constitute clear and flagrant violations of the single[-]family use provisions contained in" the Restrictions and enumerates the ways by which Defendant allegedly violated the Rules and Regulations. Plaintiff's claims thus directly stem from Defendant's alleged violations of the Restrictions and the Rules and Regulations—restrictive covenants which create a vested interest in the Property and affect its title. *See City of Raleigh*, 235 N.C. at 679, 71 S.E.2d at 402; *Whyburn*, 47 N.C. App. at 314, 267 S.E.2d at 376. Therefore, despite Defendant's

assertion to the contrary, the validity and applicability of the restrictive covenants, as well as the parties' rights relative thereto, are vital to this matter.

¶ 18 Defendant next argues that "the relief sought provides further evidence that the principal object of the litigation is contract enforcement[,]" as Defendant would "remain the owner of the Property and the [Restrictions] would still apply" if the trial court awarded all the relief requested by Plaintiff. This argument is unavailing.

¶ 19 Unlike the plaintiff in *Thompson*, Plaintiff does not seek "to recover monetary damages for the breach of a contract[,]" 272 N.C. at 504, 158 S.E.2d at 634; rather, Plaintiff requests enforcement of restrictive covenants, seeking injunctive relief against Defendant and an award for costs and expenses. Because the allegations sufficiently demonstrate that principal subject of the action is "the determination in any form of [the parties'] right or interest" in the Property pursuant to the restrictive covenants, N.C. Gen. Stat. § 1-76(1), the trial court appropriately denied Defendant's motion.

Conclusion

¶ 20 In that the principal object of Plaintiff's action is the determination of its rights pursuant to the restrictive covenants, this lawsuit is local in nature. Thus, Watauga County—the location of the Property at issue—is the proper venue for this action pursuant to N.C. Gen. Stat. § 1-76(1), and the trial court properly denied Defendant's motion to dismiss or, in the alternative, for change of venue. Accordingly, we affirm

the court's order.

AFFIRMED.

Judges GORE and JACKSON concur.

Report per Rule 30(e).