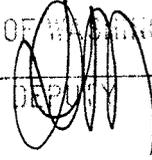


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____



No. 37769-1-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

WOODFIELD NEIGHBORHOOD HOMEOWNERS ASSOCIATION,
D/B/A ENGLISH GARDENS HOMEOWNERS ASSOCIATION

Respondent

v.

RICARDO G. GRAZIANO,

Appellant

BRIEF OF APPELLANT

JAMES V. HANDMACHER, WSBA#8637
Morton McGoldrick, P.S.
820 "A" Street, Suite 600
Post Office Box 1533
Tacoma WA 98401
Attorneys for Appellant

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2. Can an erroneous description of the property in the Treasurer’s Deed describing Tract A as “dedicated to homeowners association for parkc [sic] and recreational uses” create a restrictive covenant on that property in favor of the Association?

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I. INTRODUCTION

The plat of Woodfield Estates – Division I contained numbered lots and a parcel called Tract A. A note on the plat stated that Tract A is to be dedicated to the homeowners association for park and recreational purposes. It is undisputed that this transfer to the homeowners association never occurred. The developer and the respondent homeowners association failed to pay the taxes on Tract A, and it was sold at tax foreclosure to appellant Ricardo Graziano. The legal description on the Treasurer’s Deed erroneously described the property as “Tract A dedicated to homeowners association for parkc [sic] and recreational uses.”

The issue in this case is whether the property purchased by Mr. Graziano at the tax sale is restricted to park and recreational uses. The respondent Association conceded that such a restrictive covenant was not created by the note on the plat. There is no legal basis for the Association’s argument that the erroneous description in the Treasurer’s Deed created a restrictive covenant on the property in favor of the Association. There being no material facts in dispute, the summary judgment in favor of the Association should be reversed, and summary judgment entered in favor of Mr. Graziano.

II. ASSIGNMENTS OF ERROR

The trial court erred in entering the Summary Judgment on May 2, 2008.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was a note on the face of the plat stating that Tract A “is to be” dedicated to the homeowners association for park and recreational uses sufficient to impose a present restrictive covenant on Tract A?
2. Can an erroneous description of the property in the Treasurer’s Deed describing Tract A as “dedicated to homeowners association for parkc [sic] and recreational uses” create a restrictive covenant on that property in favor of the Association?

III. STATEMENT OF THE CASE

The subdivision known as Woodfield Estates – Division I was established in 1995, under Pierce County Recording No. 9506150106, and consisted of residential lots and a parcel described as Tract A. (CP 2-3) On the Plat Map under the heading “NOTES” is the statement, “TRACT ‘A’ IS TO BE DEDICATED TO HOMEOWNERS ASSOCIATION FOR PARK AND RECREATIONAL USES.” (CP 25)

Respondent is the homeowners association formed for Woodfield Estates (hereafter the "Association"). (CP 1-2) Tract A was never transferred to the Association. (CP 3) After the plat was recorded, tax notices were sent to the developer of the subdivision, Schuur Bros., Inc., and/or the former Board of the Association. (CP 3) Because of inadvertence and inactivity by former Board members of the Association, the real property taxes were not paid for 2002 through 2005. (CP 3)

Foreclosure notices were sent by Pierce County to Schuur Bros., Inc. and the Association, but no payment was made to cure the delinquent taxes. (CP 3, 30-36) Tract A was sold to appellant Ricardo Graziano (hereafter Graziano) at a tax foreclosure sale, and a Treasurer's Deed was recorded on December 19, 2005. (CP 37) The Treasurer's Deed described the property as "Tract A dedicated to homeowners association for park [sic] and recreational uses."

The Association filed suit seeking a declaratory judgment that Graziano's property is subject to a restrictive covenant that it can only be used for park and recreational uses. (CP 1) Graziano filed an answer seeking a judgment quieting title in the property free and clear of any interest of the Association, and declaring that the property is not subject to any use restriction arising out of the plat. (CP 7)

Graziano filed a motion for judgment on the pleadings. (CP 12) The Association filed a cross motion for judgment on the pleadings, but attached certain other documents to its cross motion. (CP 18) Graziano then submitted additional documents outside the pleadings. (CP 49) The trial court treated the matter as a summary judgment, granted the Association's motion and denied Graziano's motion. The trial court entered a summary judgment on May 2, 2008, declaring that Graziano's property is subject to a use restriction for park and recreational uses in favor of the Association. (CP 82) This appeal followed.

IV. ARGUMENT

A. Standard of review.

Both parties moved for judgment on the pleadings pursuant to CR 12(c), which states:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

Since the trial court considered materials outside the pleadings, the trial court properly treated the motion as one for summary judgment.

When reviewing an order for summary judgment, the appellate court engages in the same inquiry as the trial court. *Mountain Park Homeowners Association, Inc. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383, 1385 (1994); *Kitsap County v. Smith*, 143 Wn. App. 893, 910, 180 P.3d. 834 (Div. 2, 2008). The appellate court will affirm summary judgment if no genuine issue of any material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* All facts and reasonable inferences are considered in the light most favorable to the non-moving party, and all questions of law are reviewed de novo. *Id.*

Although the reversal of an order granting summary judgment to one party does not necessarily mean that the other party's motion for summary judgment must be granted, that can be an appropriate remedy in a case where the two motions take diametrically opposite positions on the dispositive legal issue, and the material facts are not in dispute. *Weden v. San Juan County*, 135 Wn.2d 678, 710, 958 P.2d 273 (1998); *Spahi v. Hughes-Northwest, Inc.*, 107 Wn. App. 763, 776-777, 27 P.3d 1233 (2001). Both parties in this case acknowledge that the material facts are not in dispute. This case poses a purely legal question, and if the summary judgment in favor of the Association is reversed, summary judgment should be granted in favor of Graziano.

B. The note on the face of the plat map did not create a covenant restricting the use of Tract A.

The Association sought a declaratory judgment that Graziano can only use Tract A for park and recreational purposes. From the complaint it was not clear whether the Association based its argument on the note on the plat map, or upon the property description used in the Treasurer's Deed. At oral argument on the motions on the pleadings, the Association conceded that the note on the plat map did not create a restrictive covenant. (RP 5) This concession was noted in the trial court's summary judgment. (CP 83) This concession is well-supported by the law.

There is no doubt that restrictive covenants can arise from a statement set forth on the face of a plat. In *Hollis v. Garwell*, 137 Wn.2d 683, 691, 974 P.2d 836 (1999), the Court noted that the writing containing the covenant is often recorded as a declaration of covenants, or is set forth as a restriction contained in the deed transferring an interest in the property, but may also be contained on the face of the subdivision plat.

The question in this case was whether the language on the plat map for Woodfield Estates was intended to create a restrictive covenant. The statement, "TRACT 'A' IS TO BE DEDICATED TO THE HOMEOWNERS ASSOCIATION FOR PARK AND RECREATIONAL

USES” was placed on the plat map of Woodfield Estates – Division I under the heading, “NOTES.” This should be contrasted with the restrictive covenants enforced in *Hollis, supra*, which were placed on the face of the plat under the heading “RESTRICTIONS.”

The language used in the note does not express a present intent to dedicate property. Rather, it expresses a future intent – “Tract A is to be dedicated...” [emphasis added] There is no allegation or evidence that Tract A was ever so dedicated. The Association’s complaint alleges that the plat’s developer never conveyed Tract A to the Association, but instead retained title to Tract A until the tax foreclosure sale. As stated in 23 Am.Jur.2d., Deeds, §13:

In order to transfer title, an instrument must contain apt words of grant which manifest the grantor's intent to make a present conveyance of the land by his deed, as distinguished from an intention to convey it at some future time.

Clearly, the plat note did not manifest an intention to make a present conveyance.

A similar issue was addressed in the recent case of *Zunino v. Rajewski*, 140 Wn. App. 215, 165 P.3d 57 (2007). In that case, a property owner recorded documents entitled “Easement and Maintenance Agreement” or “Private Road & Utility Easement” over her own property to qualify for a certificate that she was exempt from the county subdivision

regulations. *Id.*, at 222. In the recitals they stated, “Whereas this Easement was created as a medium of ingress and egress...” [emphasis added] *Id.* The Court of Appeals concluded, “These documents failed to convey an easement because the words do not demonstrate a present intent to grant or reserve an easement.” *Id.*

Since the “Note” on the face of the plat merely indicated an intention to impose a restriction in the future, and since it is undisputed that no such conveyance was thereafter made, the notation on the plat did not create a restrictive covenant limiting the use of Tract A. Any easement or restrictive covenant is extinguished by a tax foreclosure sale unless such easement or restrictive covenant is established of record prior to the year for which the taxes were foreclosed. RCW 36.35.290; *City of Olympia v. Palzer*, 107 Wn.2d 225, 728 P.2d 135 (1986). Since no such restrictive covenant was established of record prior to the tax sale, no restrictive covenant survived the tax sale.

C. The legal description in the Treasurer’s Deed cannot create a restriction on the use of Tract A.

Instead of relying on the notation on the face of the plat to create a restrictive covenant, the Association argued that the description of the property in the Treasurer’s Deed created a restrictive covenant. However,

the descriptive language in the Treasurer's Deed does not express an intention to create a restrictive covenant. The Deed does not say that Tract A "is" dedicated to the homeowners association for park and recreational uses. Rather, it describes the property as already dedicated to the homeowners association. As discussed above, there are no facts alleged to indicate that this description of the prior dedication of Tract A is correct.

Erroneously describing the property as having been dedicated to the homeowners association is not the same as making a conveyance to the homeowners association. As noted above, to create a restrictive covenant, there must be an expression of present intent to convey, not merely reference to a prior act. It was just such a reference to a prior act that the Court found ineffective to create an easement in *Zunino, supra*.

Not only is the description of the property in the Treasurer's Deed insufficient to convey a restrictive covenant to the Association, the County has no authority to make such a conveyance. A review of the statutory procedure to foreclose a tax lien demonstrates that Pierce County had no authority to create an easement or restrictive covenant in favor of third parties in the course of a foreclosure proceeding.

The assessor is required to create a list of all real property in the county, including a description of the property. RCW 84.40.160. "Real Property" is defined in RCW 84.04.090:

The term "real property" for the purposes of taxation shall be held and construed to mean and include the land itself, whether laid out in town lots or otherwise, and all buildings, structures or improvements or other fixtures of whatsoever kind thereon, ... and all rights and privileges thereto belonging or in any wise appertaining, ... and all property which the law defines or the courts may interpret, declare and hold to be real property under the letter, spirit, intent and meaning of the law for the purposes of taxation.

...

Thus, the assessor must list on the assessment rolls all land within the county. The land listed on the rolls must include all rights and privileges belonging thereto. By describing the property on the assessment roll, the assessor cannot make a conveyance of a restrictive covenant to anyone. The County does not even own the property.

The state, county and other taxing districts levy taxes upon the assessed value of the property carried on the assessment roll. RCW 84.52.030; 84.52.040; 84.52.080(1). The county assessor delivers the tax rolls to the county treasurer. RCW 84.52.080(4). The county treasurer is charged with collection of the taxes as shown on the tax roll. RCW 84.56.020. All such taxes are a lien upon the real property upon which they are assessed. RCW 84.60.010. However, the County still does not

own the property, and thus cannot create a restrictive covenant on the property.

If taxes are not paid, the county treasurer issues a certificate of delinquency, which is prima facie evidence that the property described was subject to taxation, that it was assessed, and that the taxes were not paid. RCW 84.64.050. The county treasurer must file those certificates of delinquency with the clerk of the court, and proceed to foreclose the tax lien embraced in that certificate. RCW 84.64.050. The certificate of delinquency may be issued in book form including all property, and foreclosure proceedings against all properties may be brought in one action. *Id.* The treasurer must conduct a title search of the property to be sold to determine the legal description and record title holder. *Id.*

The Superior Court actually directs the sale of the property. RCW 84.64.080 states in part:

... The court shall give judgment for such taxes, interest and costs as shall appear to be due upon the several lots or tracts described in the notice of application for judgment or complaint, and such judgment shall be a several judgment against each tract or lot or part of a tract or lot for each kind of tax included therein, including all interest and costs, and the court shall order and direct the clerk to make and enter an order for the sale of such real property against which judgment is made, or vacate and set aside the certificate of delinquency or make such other order or judgment as in the law or equity may be just. The order shall be signed by the judge of the superior court, shall be delivered to the county

treasurer, and shall be full and sufficient authority for him or her to proceed to sell the property for the sum as set forth in the order and to take such further steps in the matter as are provided by law. The county treasurer shall immediately after receiving the order and judgment of the court proceed to sell the property as provided in this chapter to the highest and best bidder for cash. ...

Pierce County followed those procedures in this case. On July 22, 2005, the Assessor-Treasurer filed an Amended Certificate of Delinquency for the year 2005 in Pierce County Civil Cause No. 05-2-08464-8. (CP 52) One page of that Certificate listed the property at issue in this case, using an erroneous legal description indicating that Tract A is “dedicated to Homeowners Association for parkc [sic] & recreational uses.” (CP 53) At that time, it is undisputed that no such dedication had occurred. In fact, the County had previously received a title certificate from Lawyers Title showing the property was owned by Schuur Bros., Inc., and containing a legal description making no mention of a dedication for park and recreational uses. (CP 26-27)

On that same date, the County filed an Amended Summons and Notice of Intention to Apply for Judgment of Foreclosure, reciting the liens set forth in the Amended Certificate of Delinquency, and incorporating the legal descriptions shown in the Amended Certificate of Delinquency. (CP 55) On October 28, 2005, Judge Fleming signed a

Judgment of Tax Foreclosure and Order of Sale. (CP 63) The Judgment foreclosed the liens upon the parcels listed in the Amended Certificate of Delinquency, and ordered the Assessor-Treasurer to sell the parcels of real property listed in the Amended Certificate of Delinquency to the highest bidder. The County conducted a sale on December 5, 2005, and thereafter issued the Treasurer's Deed for Tract A to Graziano. (CP 37)

Nowhere in these proceedings did the County have the authority to convey a restrictive covenant to the plaintiff homeowners association, nor did the Court order the conveyance of such restrictive covenant. As stated in *Carson v. Stair*, 3 Wn. App. 27, 30, 472 P.2d 598 (1970):

A tax deed extends only to the real property over which the court in the foreclosure proceeding has obtained jurisdiction.

This conforms to the general rule stated in 85 C.J.S., Taxation §1413:

The tax deed must show that the property conveyed is the same as that assessed, sold, and described in the certificate of sale. If it purports to convey more, less, or other and different land, it is not valid.

As further stated in 85 C.J.S., Taxation §1358:

Since a sale of property for taxes is strictly statutory, the sale conveys only the property on which the sovereign has a lien for the taxes, which is ordinarily limited to the quantity and character of the property embraced in the basic assessment, so that nothing passes on a tax sale except the property which has been assessed.

Thus the Treasurer's Deed merely conveys the interest owned by the taxpayer, no more or less. The real property which is subject to assessment and the levy of tax includes all rights and interests that the property owner has in the property. Regardless of the description used, it is undisputed that Tract A was not subject to a restrictive covenant limiting its use to park or recreation uses prior to the tax foreclosure sale. The County's erroneous description of the property on the tax roll as subject to a restrictive covenant, which even the Association acknowledges was not correct, did not constitute a conveyance. Since the tax sale only conveys what the taxpayer owned, use of an erroneous description in the Treasurer's Deed cannot limit the estate conferred.

The Association cannot benefit by the County's error in describing a restriction on the property which did not exist. It has long been the rule in this state that the title received in a tax foreclosure "rests upon the statutory requirements, and not upon a failure of the proper officers to comply therewith." *Baldwin v. Frisbie*, 149 Wash. 294, 296, 270 P. 1025 (1928). In that case, the Supreme Court held that the failure of the foreclosure deed to mention that it was subject to any lien for drainage improvement district assessments did not have the effect of conveying title free of that lien. Similarly, in the case at bar, the erroneous description of

the property as subject to a restrictive covenant in favor of the homeowners association does not have the effect conveying title subject to that non-existent covenant.

In issuing a deed, the Assessor-Treasurer is not authorized to carve out restrictive covenants for the benefit of third-parties, nor is there anything in the chain of events indicating an intention to do so. By law, the Treasurer's Deed merely conveys the real property which was assessed for the delinquent taxes, and cannot create rights for third-parties. In issuing the tax deed, the Assessor-Treasurer was simply carrying out the directive of the Superior Court. Therefore, there is no restrictive covenant on the property purchased by Graziano, and he is entitled to summary judgment in these proceedings.

V. CONCLUSION

It is conceded that the plat did not create a restrictive covenant on Tract A. An erroneous reference to a prior dedication in the legal description of Tract A in the tax roll cannot create a restrictive covenant, and use of that erroneous description in the Treasurer's Deed cannot transfer an interest to the Association that did not previously exist.

The trial court erred in granting summary judgment to the Association. However, since the material facts are not in dispute,

summary judgment should be granted to Graziano, quieting title to the property described in paragraph 2.2 of the complaint in Graziano free and clear of any interest of the Association, and declaring that such property is not subject to any use restriction arising out of the plat of Woodfield Estates Division I or the Declaration of Covenants, Conditions and Restrictions thereto. This Court should reverse the summary judgment in favor of Association, and enter summary judgment in favor of Graziano.

RESPECTFULLY SUBMITTED this 7th day of October, 2008.



JAMES V. HANDMACHER, WSBA #8637
Morton McGoldrick, P.S.
Attorneys for Appellant

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DEPUTY

IN THE COURT OF APPEALS OF THE STATE
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WOODFIELD NEIGHBORHOOD
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ENGLISH GARDENS HOMEOWNER'S
ASSOCIATION, a Washington Non-Profit
Corporation,

Plaintiff,

v.

RICARDO G. GRAZIANO,

Defendant.

NO. 37769-1-II

CERTIFICATE OF SERVICE

I, Lacina M. Lacy, under penalty of perjury under the laws of the State of Washington declares as follows:

I am an individual of at least 18 years of age, a resident of Pierce County, Washington, and not a party to this action. On October 13, 2008 I did cause to be served by U.S. Mail a true and correct copy of the Brief of Appellant on:

Werner Boettcher
14705 Meridian East
Puyallup, WA 98375

DATED this 13th day of October, 2008 at Tacoma, Washington


Lacina M. Lacy