

NO. 35654-6-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

MEADOWMEER GOLF & COUNTRY CLUB,

Appellant,

vs.

DAN A. PRESTON & JEANA PRESTON,

Respondents.

FILED
COURT OF APPEALS
DIVISION II
07 JUN 22 PM 1:45
STATE OF WASHINGTON
DEPUTY

APPELLANT'S REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION

There are two issues before this Court. The threshold issue is whether the non-inclusion of the subject property within the description of the Meadowmeer subdivision, as a matter of law, precludes enforcement of the covenants against the Preston property. If not, as Meadowmeer Golf & Country Club (“MGCC”) contends, the Court must address whether the Meadowmeer Covenants are enforceable under the doctrines of real covenants or equitable servitudes.

The Prestons base all of their arguments on a single premise: their property is not within the legal description of the Meadowmeer subdivision. This is undisputed. This single premise pervades and influences all of the Prestons’ arguments on appeal. The Prestons contend, as the trial court held, that this fact is fatal to MGCC’s attempt to impose the terms of the Meadowmeer Covenants on the Preston property. The Prestons have not cited any authority to support this proposition in connection with the cross-motions for summary judgment or this appeal. The trial court erroneously accepted this argument without identifying any authority underlying its decision.

Contrary to the Prestons’ contention, inclusion of the subject property in the description of Meadowmeer was but one way to bind the subject property. An agreement between the original seller and purchaser to bind the subject property was equally effective. The Prestons recognize the principle that a restrictive covenant arises when “the contract or deed of conveyance refers to or incorporates by reference the declaration of

covenants by language that makes them binding upon one or both parties” in their Respondents’ Brief.¹ This is precisely the case here.

Meadowmeer, Inc. was the original property owner of the parcels that now comprise the Meadowmeer subdivision and the adjacent property that includes the property now owned by the Prestons. Meadowmeer, Inc. developed residential lots and created Meadowmeer. Contemporaneous with the creation of Meadowmeer and the filing of the Amended Meadowmeer Covenants, Meadowmeer, Inc. sold the subject property to Meadowmeer Woods Associates. As a condition of the sale, Meadowmeer, Inc. (the original seller) and Meadowmeer Woods Associates (the original purchaser) bi-laterally agreed to bind the subject property to the Meadowmeer Covenants. This agreement was effective to bind the subject property to the Meadowmeer Covenants. The trial court’s refusal to recognize that restrictive covenants may be created by agreement of the original parties was in error.

Having dispensed with the threshold question, and the trial court’s erroneous holding, the Court must then consider whether the Meadowmeer Covenants are enforceable as either a real covenant or an equitable servitude. MGCC submits that all of the requisite elements are satisfied for both doctrines: (1) there is an enforceable agreement between the original parties, (2) the covenants touch and concern the land, (3) the original parties to the agreement intended to bind successors, (4) there is

¹ Respondents’ Br. at 10.

vertical privity, (5) there is horizontal privity, and (6) the Prestons had notice that their property was subject to covenants and inquiry would have revealed that the Meadowmeer Covenants applied to the property.

MGCC respectfully requests that the Court reverse the decision of the trial court and find that the Meadowmeer Covenants apply to the Preston property as a matter of law.²

II. ARGUMENT

A. **Meadowmeer's Covenants are not Inapplicable Merely Because the Legal Description of the Meadowmeer Subdivision in the Covenants does not Contain the Preston Property.**

The trial court, without citing any authority, ruled that the Preston property could not be bound by the Meadowmeer Covenants under the doctrines of real covenants and equitable servitudes, even if all the elements were satisfied, because the Preston property is not within the legal description of "Meadowmeer" contained in the Meadowmeer Covenants. CP 219. The trial court erred.

The fact that the Meadowmeer Covenants do not include the Preston property in the description of "Meadowmeer" does not mean that the original developer and purchaser were not free to bind the Preston

² The Prestons incorrectly assert that the trial court granted Respondents' motion in part leaving only the issue of damages for trial. Respondents' Br. at 2. The trial court denied the Prestons' motion in full, leaving for trial the Prestons' entire slander of title claim: "Plaintiff's Motion for Summary Judgment declaring that there was a wrongful lien filed by Defendant slandering title to Plaintiff's property is denied. There are genuine issues of fact precluding summary judgment as a matter of law." CP 191.

property, and all successive owners, to the Meadowmeer Covenants through contract. Washington courts have noted that the writing containing the covenant is often recorded as a declaration of covenants, set forth as a restriction contained in the deed transferring an interest in the property, or contained on the face of the subdivision plat. Hollis v. Garwall, Inc., 137 Wn.2d 683, 691, 974 P.2d 836 (1999). Thus, including the property within the description of “Meadowmeer” was only one way to bind the property to the covenants. The property could also be bound through contract and deed, as it was here.

The Prestons recognize this principle in their Respondents’ Brief: “A restrictive covenant will arise only when, in the conveyance of all or part of the land, the contract or deed of conveyance refers to or incorporates by reference the declaration of covenants by language that makes them binding upon one or both parties.” Respondents’ Br. at 10. This is precisely what we have here. In connection with the sale of the property, Meadowmeer Inc. and Meadowmeer Woods Associates agreed to bind the subject property to the Meadowmeer Covenants and included language in the deed that incorporates the covenants by reference.

Despite the Prestons’ recognition of this principle, the Prestons maintain that more is required. The Prestons argue, “Critical to the analysis here is that the restrictive covenants will arise only as to those properties listed in the covenant document.” Respondents’ Br. at 10. They further argue,

The reference in the contract or deed to the covenants incorporates the covenant document and makes the covenants binding only upon the parties who own those properties listed as bound to the covenants. The two acts must coincide—(1) the covenants provide for those properties listed as bound by the covenants in the covenant document and (2) those contracts or deeds of conveyance of those properties listed should incorporate by reference it is to be bound by those covenants.

Respondents' Br. at 11. Although the Prestons espouse a rule of law that is "critical" to this Court's analysis, the Prestons fail to cite a single authority that supports the proposition that restrictive covenants are only enforceable against property listed in the covenant document.

The Utah Supreme Court decided a nearly identical issue. Dansie v. Hi-Country Estates Homeowners Ass'n, 987 P.2d 30 (Utah 1999). There, the court did not adopt the Prestons' argument that the failure to include a parcel of property within the description of a subdivision's covenants was *per se* fatal. Rather, the court stated that in order for covenants to apply to property in the absence of the property's inclusion in the covenants, the proponent must demonstrate an intent for the covenants to apply by "plain and unmistakable language." Id. at 36.

Contrary to the Prestons' contention, Dansie does not support a finding that the Preston property is not bound by the Meadowmeer Covenants. While the holding in Dansie was that the adjacent property was not bound by the subdivision's covenants, the facts leading to that conclusion are entirely different from the facts of this case. Significant to the court's ultimate holding was the fact none of the deeds conveying the

property to Dansie made any attempt to bind the property to the covenants. Id. at 34. The court noted, “While it may well have been the intent of the developers to impose the covenants on additional phases of the Subdivision which might be developed later, that was never done by a written instrument.” Id. Because of this lack of evidence, the association could not demonstrate an intent to bind the property by “plain and unmistakable language.” Id. at 36.

The evidence required by the Dansie court to bind property to restrictive covenants is present in this case. Every deed in the chain of title evidences Meadowmeer, Inc.’s intent to bind the subject property to the Meadowmeer Covenants:

- Meadowmeer, Inc. to Meadowmeer Woods Associates

Deed states, “SUBJECT TO restrictive and protective covenants, as amended, and recorded under Kitsap County Auditor’s # 7912271105.” CP 202.

- Meadowmeer Woods Associates to Corman Management

Deed states, “SUBJECT to restrictive and protective covenants, as amended and recorded under Auditor’s File No. 7912271105.” CP 200.

- Corman Management Subdivision

Subdivision Application, recorded under Auditor’s File No. 9005240198, notes the following encumbrance: “Subject to restrictive and protective covenants, as amended and recorded under Auditor’s File No. 7912271105.” CP 102, 122.

- Corman Management to Theros

Deed references restrictions in Corman Management subdivision: “Covenants, conditions, restrictions and or easements and maintenance agreements contained in Short Plat No. 5169, recorded under Auditor’s File No. 9005240198.” CP 142.

Deed of Trust contains a Planned Unit Development Rider that states that the property is part of the Meadowmeer Subdivision and subject to the Meadowmeer Covenants. CP 134.

- Theros to Preston

Deed references that property is subject to “Covenants, conditions and restrictions” recorded on May 24, 1992, and filed under Auditor’s File No. 9005240198. CP 109.

Here, the deed arising from Meadowmeer, Inc.’s sale of the property to Meadowmeer Woods Associates makes the Meadowmeer Covenants applicable to the subject property by “plain and unmistakable” language. The subsequent deeds further Meadowmeer, Inc.’s intent. Therefore, MGCC has met this burden. The trial court erred by refusing to consider the contract entered into between Meadowmeer, Inc. and Meadowmeer Woods Associates in deciding whether the Meadowmeer Covenants apply to the subject property.

The Prestons next contend that MGCC fails to address the fact that the Covenants themselves do not include the Preston property. MGCC has addressed this point; including the subject property in the covenants was only one method Meadowmeer, Inc. could have utilized to bind the subject

property. As noted above, Washington courts recognize that covenants can be created by (1) a writing recorded as a declaration of covenants, (2) a restriction contained in the deed transferring and interest in the property, **or** (3) language contained on the face of the subdivision plat. Hollis v. Garwall, Inc., 137 Wn.2d 683, 691, 974 P.2d 836 (1999). Meadowmeer, Inc. bound the subject properties through one of these methods.

Lastly, the Prestons argue that once the Meadowmeer Covenants were recorded, additional properties could be brought within “Meadowmeer” only upon “agreement of the owners” of lots subjected to the covenants. Respondents’ Br. at 14. They further contend, “An agreement with ‘Meadowmeer’ is required to include the Prestons’ property within the legal description of the properties to be bound by the covenants.” Id.

This argument was impliedly, if not expressly, rejected in Dansie. There the court noted,

In the instant case, the Subdivision’s developers placed the CC&Rs by written instrument on Phase I alone. The developers’ written, signed, and recorded Protective Covenants expressly limit their application to “the described property,” which is Phase I. Furthermore, while the Association’s certificate of incorporation refers to “any addition[al property] as may hereafter be brought within the jurisdiction of th[e] Association,” the Property has never either been part of Phase I or been brought under the Association’s purview. Therefore, if Association membership—with its corresponding fees, assessments, and CC&Rs—as is currently imposed on Phase I lot owners

is to be impliedly imposed on the Property, it must be done in plain and unmistakable language.

Dansie, 987 P.2d at 36. In Dansie, as the case is here, the covenants only applied to the property described in the covenants. While the covenant documents indicated that additional property could be brought within the purview of the covenants by agreement of the owners, the association took no action to include the adjacent property. Despite these facts, the court left the door open for the property to be bound by the covenants if there was plain and unmistakable language of an intent to bind the property. The court did not, as the Prestons suggest here, determine that the failure of the association to vote to include the subject property was fatal to an attempt to enforce the covenants.

Moreover, the Prestons' argument improperly shifts the focus to the associations' intent. Courts focus on the intent of the developer (the party implementing the covenants), not the subsequent intention of the lot owners, in determining whether a subdivision's covenants apply to a parcel of property. See, e.g., Hollis, 137 Wn.2d at 692 (focusing on "intent on the part of the developers"); Shafer v. Bd. of Tr. of Sandy Hook Yacht Club Estates, Inc., 76 Wn. App. 267, 276, 883 P.2d 1387 (1994) (focusing on Sandy Hook's developers' intent); Dansie, 987 P.2d at 34.

The proper focus for this Court is the intent of Meadowmeer, Inc. It is important to remember that Meadowmeer, Inc. was the original owner of the property that is now "Meadowmeer" and the owner of the adjacent land containing the subject property. It was Meadowmeer, Inc. that

created “Meadowmeer” and its covenants. It was Meadowmeer, Inc. that filed the amended covenants. It was Meadowmeer, Inc. that bound the subject property to the covenants that it created when it sold the property to Meadowmeer Woods Associates. Focusing on Meadowmeer, Inc.’s intent, the evidence quite clearly establishes that it intended the Meadowmeer Covenants to apply to the Preston property.

For the foregoing reasons, the trial court erred when it held that Meadowmeer, Inc. could not bind the subject property through contract.

B. The Meadowmeer Covenants Apply to the Preston Property Under the Doctrines of Real Covenants and Equitable Servitudes.

As set forth in MGCC’s Appellant’s Brief, a real covenant runs with the land if the following conditions are met:

(1) the covenant[] must have been enforceable between the original parties, such enforceability being a question of contract law except insofar as the covenant must satisfy the statute of frauds; (2) the covenant must “touch and concern” both the land to be benefited and the land to be burdened; (3) the covenanting parties must have intended to bind their successors in interest; (4) there must be vertical privity of estate, *i.e.*, privity between the original parties to the covenant and the present disputants; and (5) there must be horizontal privity of estate between the original parties.

Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., 120 Wn. App. 246, 254, 84 P.3d 295 (2004) (citing Lake Arrowhead Cmty. Club, Inc. v. Looney, 112 Wn.2d 288, 294-95, 770 P.2d 1046 (1989)). An equitable servitude (also referred to as an equitable restriction) runs with the land if the following elements are met:

(1) a promise, in writing, which is enforceable between the original parties; (2) which touches and concerns the land or which the parties intend to bind successors; and (3) which is sought to be enforced by an original party or a successor, against an original party or a successor in possession; (4) who has notice of the covenant.

Hollis v. Garwall, Inc., 137 Wn.2d 683, 691, 974 P.2d 836 (1999).

The Prestons do not dispute that there is vertical and horizontal privity. However, the Prestons argue that the following elements are not satisfied: (1) an enforceable agreement between the original parties, (2) the covenants touch and concern the land, (3) intent by the original parties to the agreement to bind successors, and (4) notice of the covenants.

1. Enforceable Covenant/Enforceable Promise

The Prestons do not dispute that Meadowmeer, Inc. and Meadowmeer Woods Associates entered into an agreement to bind the subject property to the Meadowmeer Covenants. Rather, the Prestons simply assert that any such agreement is not enforceable because the property was not included in the description of Meadowmeer in the Meadowmeer Covenants. This is merely an iteration of their primary argument. Setting aside the invalid premise that the property must be included in the description of Meadowmeer for the covenants to be enforceable, the Prestons assert no challenge to the satisfaction of this element.

2. Touches and Concerns the Land

The Prestons concede that the Meadowmeer Covenants touch and concern land within Meadowmeer, but disagree that the Meadowmeer Covenants touch and concern their property. The Prestons base their disagreement again on the same argument that their “property was not described within the legal description nor located on the map of page 1 of the Meadowmeer covenants.” Respondents’ Br. at 17. Thus, the Prestons argue, “[T]he land which the Meadowmeer Covenants touch and concern does not include the Prestons’ property.” Respondents Br. at 18.

The Prestons’ challenge to the satisfaction of this element does not really challenge the element at all. The Prestons make no challenge to the legal requirements of touch and concern, but rather simply make the factual argument that their property is not bound by the covenants. Because the Prestons concede that the Meadowmeer Covenants touch and concern the land that is subject to the covenants, this element is satisfied.

3. Intent to Bind Successors

That the covenants were intended by Meadowmeer, Inc. and Meadowmeer Woods Associates to bind successors to the subject property is clear on the face of their deed and evidenced by each subsequent deed. Every deed in the chain of title attempts to make some reference to the subject property being bound to the Meadowmeer Covenants.

The parties’ intent to bind successors is clear even though the Meadowmeer Woods Associates’ deed contains a scrivener’s error. Indeed, even after the scrivener’s error, the Theros’s Planned Unit

Development Rider states that the property is subject to covenants and specifically refers to the Meadowmeer subdivision. CP 134.

The Prestons challenge the satisfaction of this element using their redundant and ubiquitous argument that their property was not intended to be included in the Meadowmeer Covenants because it is not contained in the legal description of Meadowmeer. Looking past this argument, though, the Prestons do not challenge that Meadowmeer, Inc. and Meadowmeer Woods Associates, the original seller and purchaser, intended for the Meadowmeer Covenants to apply to the subject property and to bind successors. This element, therefore, is satisfied.

Notice is not required for the enforcement of a real covenant. See Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., 120 Wn. App. 246, 254, 84 P.3d 295 (2004). As the foregoing requirements are satisfied, the Meadowmeer Covenants are enforceable as a real covenant. As discussed below, however, the notice element is satisfied, making the covenants also enforceable as an equitable servitude.

4. Notice of Covenant

The general rule is that a person purchasing real property may rely on the record title to the property, in the absence of facts sufficient to put the purchaser on inquiry. Hollis, 137 Wn.2d at 692-93 (citing Olson v. Trippel, 77 Wn. App. 545, 550-51, 893 P.2d 634 (1995)). However, where sufficient facts exist to put the purchaser on inquiry, the inquiry rule imputes “notice of all facts which reasonable inquiry would disclose.” Diimmel v. Morse, 36 Wn.2d 344, 348, 218 P.2d 676 (1950). As stated by

the Prestons, the inquiry rule requires a purchaser to further inquire when the purchaser has “information, from whatever source derived, which would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry.” Respondents’ Br. at 22 (citing Paganelli v. Swendsen, 50 Wn.2d 304, 308, 311 P.2d 676 (1957)).

Here, the Prestons’ deed and their title report indicated that the property is subject to covenants. Notice that one’s property was subject to covenants would “excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry.” With this knowledge, the Prestons had a duty to further inquire as to what covenants bound the property. Such an inquiry would have revealed the Theros’s deed of trust, which contains the Planned Unit Development Rider that specifically references the Meadowmeer Covenants. The Prestons cannot plead ignorance of information that they would have ascertained had they conducted a reasonable inquiry.

The Prestons argue that the fact that the wrong Auditor’s File Number was referenced in the preceding deeds is fatal to MGCC’s argument that the Prestons had notice of the Meadowmeer Covenants. Respondents’ Br. at 23. The Prestons contend that they were required to go no further than a search of the record, and upon finding no document under Auditor’s File No. 7912271105, they had no further duty to inquire into which covenants were mentioned in their title report. Respondents’ Br. at 21. The Prestons’ position is untenable.

While the scrivener's error may have made inquiry more burdensome, it did not relieve the Prestons of their duty of reasonable inquiry. A reasonable person searching the chain of title would have seen that each deed conveying the property indicated that the property was subject to covenants. A further inquiry would have revealed that the original seller of the property was Meadowmeer, Inc. and the original purchaser was Meadowmeer Woods Associates. Given that the property is adjacent to the Meadowmeer subdivision, it seems disingenuous for the Prestons to argue that the scrivener's error made learning that the property was subject to the Meadowmeer Covenants difficult. This is especially so when a search of the title records of their immediate predecessors, the Theroses, would have revealed the Planned Unit Development Rider that specifically references the Meadowmeer Covenants.

The Prestons should not be permitted to escape the applicability of the Meadowmeer Covenants, which all the preceding owners intended to apply, simply because a scrivener's error made it slightly more difficult to identify the Meadowmeer Covenants as the applicable covenants. Equity dictates that the Prestons be held to what they bargained for: a property subject to covenants.

Based on the foregoing, the trial court erred in holding that the Meadowmeer Covenants do not apply to the subject property. All of the requisite elements necessary for enforcement of the covenants as either a real covenant or equitable servitude are satisfied.

III. CONCLUSION

Based on the foregoing, MGCC respectfully requests that the Court reverse the trial court's rulings and find that the Meadowmeer Covenants apply to the Preston property as a matter of law.

DATED this 20th day of June, 2007.

BETTS, PATTERSON & MINES, P.S.

By  _____

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DECLARATION OF SERVICE

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I, Laraine Green, am a citizen of the United States, a resident of King County, I am over 18 years of age and not a party to this action. My business address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, WA 98101-3927.

On, Thursday, June 21, 2007, we made arrangements with ABC Legal Messengers to file our Appellant's Reply Brief, along with a copy of this Declaration of Service. A copy of the above-referenced documents were deposited in the U.S. Mail First Class Postage Prepaid directed to: William H. Broughton, Attorney for Plaintiffs, Broughton & Singleton, P.S., 9057 Washington Avenue N.W., Silverdale, WA 98373, and VIA Facsimile to William H. Broughton at (360) 692-4987 on today's date.

EXECUTED this 21st day of June, 2007.

A handwritten signature in cursive script that reads "Laraine Green". The signature is written in black ink and is positioned above a horizontal line.

By _____
Laraine Green, Legal Assistant to
Steven Goldstein and Adam R. Asher
Attorneys for Appellant