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JUL 23 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Appeal Cause No. 307450

Benton County Superior Court Cause No. 11-2-00586-8

**COURT OF APPEALS
DIVISION III, STATE OF WASHINGTON**

MATT BAKER and WHITNEY BAKER, husband and wife,
d/b/a BEND IN THE RIVER, LLC,
a Washington for profit limited liability company,

Appellants,

v.

DARREL D. SUNDAY; WES GREEN; HAROLD and
LYNN L. TREASE; JOHN S. and LYNNE R. TREADWELL;
JOHN S. and SUSAN J. WILLIAMS; STEWART MACKAY;
LARRY D. and PATRICIA R. McCULLOUGH; SAM R. and
LINDA S. SORENSEN; TRACI K. SUNDAY; MARSHALL R.
BAKER; JOE and HILLARY THOMAS; ERNEST L. and ROVECKA A.
VINSON, Jr.; and ROBERT S. TAYLOR,

Respondents.

RESPONDENTS' REPLY BRIEF

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I. INTRODUCTION

Mountain Park Homeowners Association v. Tydings, 125 Wn.2d 337, 883 P.2d 1383 (1994), is controlling precedent. When a covenant document contains separate covenants and a severability clause, as the covenant document does here, then the covenants cannot be abandoned *en masse* through unchecked violations of some (but not all) of the covenants.

Under these facts, Appellants (hereinafter “Baker”) must present evidence that the particular covenant at issue (the “No Business Activity Covenant”) was substantially and habitually violated. They have failed to present such evidence, and therefore, the trial court’s order granting summary judgment should be affirmed.

II. ISSUE ON APPEAL

1. Should the trial court’s order granting summary judgment be affirmed when at the summary judgment hearing Baker failed to present evidence that the No Business Activity Covenant itself was habitually and substantially violated?

III. STATEMENT OF THE CASE

Along the bank of the Yakima River in rural Benton County rests the Bend in the River Subdivision, a small residential subdivision consisting of 12 homes and 12 undeveloped lots (the “Subdivision”). (CP 36). Respondents are all homeowners in the Subdivision (the “Homeowners”).¹ *Id.* Each lot is connected by a private gravel road, which in turn is connected to a public road known as Harrington Road, the sole ingress and egress to the Subdivision. *Id.*

In 2010, Baker began operating an event center out of his home in the Subdivision without a permit. (CP 59, 78, Brief of Appellant at 3). In August 2010, Baker filed an application for a special use permit for “wedding receptions and corporate retreats” to include a maximum of 200 people (but with 300 parking spaces). (CP 48-49). The events would take place in an outside area of the Baker property, and occur Fridays and Saturdays, 12:00pm to 10:00pm, with amplified music, catered food and alcohol. *Id.*

Baker’s permit application was adamantly opposed by the Homeowners. (CP 2, 19, 36, 77-78). Several Homeowners provided

¹ For the purposes of this brief, “Homeowners” refers to the following Respondents: Vinson, McCulloch, Williams, Sorenson, Treadwell, Sunday, Trease and Taylor. The other named Respondents did not retain counsel or otherwise appear in the trial court.

either written comments, live testimony, or both to the administrative body hearing the permit application. (CP 2). The Homeowners asserted, amongst other arguments, that the proposed business violated the recorded real property covenants, specifically a prohibition on business activity in the Subdivision, which states, in relevant part:

10. No part of the properties shall be used directly or indirectly for any business, commercial, manufacturing, mercantile, storage, vending or other nonresidential purposes, except for agriculture or ranching with the limits set below.

(the “No Business Activity Covenant”). (CP 2, 41). The applicable Benton County Code provisions did not require the administrative body to consider real property covenants, but the permit application was denied on other grounds. (*see* CP 15, 19).

The covenant document at issue contains 27 enumerated covenants, each one a separate and distinct prohibition. (CP 40-42). For example, covenant 12 limits the number of large animals per acre to three, (CP 41), while covenant 25 requires all utility lines be buried underground, (CP 42), and covenant 27 requires all owners to abide by a road maintenance agreement. (CP 42). Additionally, the covenant document contains the following relevant terms:

Regarding modification and termination of the individual covenants:

[The owners]... hereby declare the following restrictions and covenants which shall run with the land and be binding on all parties and all persons under them until such time as a two thirds (2/3) majority of the owners of the lots herein agree to change or dissolve these covenants but only after they have been in effect for one year.

(CP 40).

Regarding enforcement of individual covenants by homeowners in lieu of enforcement through a homeowners association, architectural control committee, or some other entity:

If the undersigned, or either of them or their heirs or assigns, shall violate or attempt to violate any of these covenants, it shall be lawful for any other person or persons owning any real property situated in said tract to prosecute any proceeding at law or in equity against the persons violating or attempting to violate any such covenants and either to prevent him or them from so doing or to recover damages or other dues for such violation.

Id.

Regarding the severability of each individually enumerated covenant:

Invalidation of any of these covenants by judgment or court order shall in no way affect any of the other provisions which shall remain in full force and effect.

Id.

The covenant document provides for individual enforcement and does not reference a homeowners association. (CP 40). A homeowners association was created at some point by the owners (the “HOA”), but largely stopped meeting in 2004. (*See* CP 88).² A primary factor in the HOA no longer meeting was that there were no pressing issues. (CP 90-91). The gravel roadway did not require maintenance, the neighborhood architectural control committee was still approving new structures, and there was no business activity in violation of the covenants to enjoin. *Id.*

Covenant No. 1 established the architectural control committee (“ACC”). (CP 40). The ACC is limited to approving the appearance and location of new structures. *Id.* Matt Baker was a member of the ACC, until he quit in 2007. (CP 120, Brief of Appellant at 6). Between 2004 through 2011, the ACC reviewed plans and approved at least ten structures/improvements. (CP 63-64, 115-117).

There is no evidence of any violation (other than Baker) of the No Business Activity Covenant. (*See* Brief of Appellant, which cites

² Ro Vinson testified during her deposition that, to the best of her knowledge, formal HOA meetings ended after her resignation as HOA President in February, 2004. (CP 88).

no evidence of any violation of the covenant). One homeowner has a tree nursery and grape vines (CP 37), but agricultural activity is expressly permitted by the No Business Activity Covenant. (CP 41).

IV. ARGUMENT

A. Standard of Review.

When reviewing an order for summary judgment, the reviewing court engages in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). All evidence and reasonable inferences therefrom are construed in a light most favorable to the nonmoving party. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Issues of law are reviewed de novo. *McCoy v. American Suzuki Motor Corp.*, 136 Wn.2d 350, 355, 961 P.2d 952 (1988).

B. When A Covenant Document Contains Separate Prohibitions And A Severability Clause, As The Covenant Document Does Here, Then The Abandonment Analysis Is On A Covenant By Covenant Basis

The trial correctly held that the No Business Activity Covenant was not abandoned. “The defense of abandonment requires evidence that prior violations by other residents have so eroded the general plan as to make enforcement useless and inequitable.” *Mountain Park*

Homeowners Association v. Tydings, 125 Wn.2d 337, 883 P.2d 1383 (1994) (“*Mountain Park*”). “[I]f a covenant which applies to an entire tract has been habitually and substantially violated so as to create an impression that it has been abandoned, equity will not enforce the covenant.” *Id.* quoting *White v. Wilhelm*, 34 Wn.App. 763, 769, 665 P.2d 407 (1983). “Violations must be material to the overall purpose of the covenant, and minor violations are insufficient to find abandonment.” *Id.* at 342. “The Washington State Supreme Court] has refused to find abandonment from evidence of a single violation.” *Id.*

Based on the above cited case law, to establish the defense of abandonment Baker must show habitual and substantial violations to such a degree that equity will not allow the homeowners to enforce the No Business Activity Covenant against him. There is no evidence to suggest that the No Business Activity Covenant itself was violated in such a manner. Baker’s argument that unchecked violations of other covenants can be used to prove the No Business Activity Covenant was abandoned has already been rejected by the Washington State Supreme Court in *Mountain Park Homeowners Association v. Tydings*, 125 Wn.2d 337, 883 P.2d 1383 (1994)

(“*Mountain Park*”).

In *Mountain Park*, the state Supreme Court construed a covenant document, the relevant portions of which are almost identical to the relevant portions of the covenant document before this Court. The covenant document in *Mountain Park* contained multiple prohibitions and a severability clause (*Id.* at 343-44), as the covenant document does here. (CP 40). The severability clause in *Mountain Park* stated:

Invalidation of any one of these covenants or restrictions by judgment or court order shall not affect any other provisions which shall remain in full force and effect.

Id. at 343.

The severability clause here states:

Invalidation of any of these covenants by judgment or court order shall in no way affect any of the other provisions which shall remain in full force and effect.

(CP 41).

The plaintiff HOA in *Mountain Park* brought suit against Tydings to enforce a prohibition on exterior antennae in a residential subdivision (Tydings had installed an exterior satellite dish). *Id.* at 339. In his defense, Tydings asserted that the covenant was

abandoned due to lack of enforcement of other covenants. *Id.* at 340. The state Supreme Court reviewed the law of abandonment (*Id.* 342-43), but found that the then existing case law was not directly on point because “[t]he case at hand is made unique by the nature of the CCR; instead of a single broad covenant, the CCR catalogs specific prohibitions in separate covenants.” *Id.* at 343.

The *Mountain Park* court then applied principles of contract law, holding “[a] court must construe restrictive covenants by discerning the intent of the parties as evidenced by clear and unambiguous language in the document.” *Id.* at 344. Since the covenant document itself demanded that each covenant be treated separately, the court held:

On its face, the severability clause indicates an intent to preclude the very defense accepted by the trial court. The CCR unambiguously mandates separate treatment of each covenant. As a result, we hold the terms of the CCR makes evidence of violations of other covenants irrelevant in the present case.

Id. at 344-45. The same is true here. Covenants are interpreted in accordance with the law governing contracts. *Id.* at 344. The severability clause precludes the very defense of abandonment *en masse* put forth by Baker. Baker asks this Court to ignore the

severability clause, but *Mountain Park* holds that severability clauses are to be enforced as written.

Additionally, the covenant document (e.g. the contract) states the covenants cannot be terminated absent an affirmative vote by persons owning 2/3rds of the lots in the Subdivision. (CP 40). There is no evidence in the record that such a vote occurred.

C. **Summary Judgment Is Properly Granted When the Responding Party Fails To Meet its Burden**

The burdens placed on the parties to a summary judgment hearing were recently set forth by this division in *Colorado Structures Inc. v. Blue Mountain Plaza, LLC*, 159 Wn.App. 654, 661, 246 P.3d 835 (2011):

The moving party bears the initial burden of establishing that it is entitled to judgment because there are no disputed issues of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If a defendant makes that initial showing, then the burden shifts to the plaintiff to establish there is a genuine issue for the trier of fact. *Id.* at 225–226, 770 P.2d 182. “A material fact is one that affects the outcome of the litigation.” *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). While questions of fact typically are left to the trial process, they may be treated as a matter of law if “reasonable minds could reach but one conclusion” from the facts. *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985). A party may not rely on speculation or having its own affidavits accepted at face value.

Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, it must put forth evidence showing the existence of a triable issue. *Id.*

Id. at 661. Whether a covenant has been abandoned is an issue of fact, but the issue can be decided as a matter of law if “reasonable minds could reach but one conclusion.” *See Id.*; *See also Mountain Park*, at 344-45.

Mountain Park held that the abandonment analysis is on a covenant by covenant basis when the covenant document contains separate prohibitions and a severability clause. *Mountain Park*, 125 Wn.2d at 344-45. Baker claims that the case of *White v. Wilhelm*, 34 Wn.App. 763, 665 P.2d 407 (1983), requires a trial on the issue of abandonment. The *White* case, however, did not involve a severability clause. *See Id.* Moreover, the *White* court held there was evidence on which a jury could find that the covenant at issue in that case was habitually and substantially violated.³ Here, there is no evidence in the record on which a reasonably jury could find that the No Business

³ The issue in *White* was whether a neighborhood architectural committee created by real property covenants had failed to review new structures to such an extent that *Wilhelm* should be permitted to maintain a structure build without the committee’s approval. *Id.* at 770.

Activity Covenant was habitually and substantially violated. Summary judgment was properly granted.

D. The Covenant Document Provides For Individual Enforcement

Baker wrongly conflates the homeowners association (“HOA”) with the covenants. The covenants specifically provide for individual enforcement by the homeowners. (CP 40). The covenants do not reference an HOA, let alone require enforcement be through an HOA. *Id.* The fact an HOA was created, adopted bylaws, and then went inactive in 2004, has no bearing on whether the No Business Activity Covenant was abandoned.

Likewise, alleged ACC inactivity is irrelevant. Matt Baker left the ACC sometime in 2007, but the remaining two members continued to act as the ACC through 2011. (CP 63-64, 115-117, 120 Brief of Appellant at 6). The ACC is charged with reviewing plans and determining whether the design and location of a structure is aesthetically pleasing. (CP 40). The ACC is not charged with enforcing the No Business Activity Covenant, (CP 40-41), so even if there was evidence of ACC inactivity, that evidence would have no

bearing on whether the No Business Activity Covenant itself was habitually and substantially violated.

The covenant document states that it can be modified or terminated by an affirmative vote of persons owning 2/3rds of the lots in the Subdivision. (CP 40). This is the sole means by which the covenants can be terminated *en masse*. There is nothing in the record, however, showing a vote to terminate the covenants occurred. Plaintiffs cite a 2011 email from former HOA president Stewart Mackay as evidence the covenants were abandoned, but Mackay cannot unilaterally abandon the covenants. His subjective belief in 2011 that the covenants were abandoned during some prior year is not evidence of abandonment through a 2/3rds vote, nor is it evidence that the No Business Activity Covenant was habitually and substantially violated.

Additionally, the waivers granted by the HOA do not evidence abandonment or selective enforcement of the covenants. The waivers in question were signed by persons owning at least 2/3rds of the lots in the Subdivision, the amount of votes required by the covenants to grant a modification. (CP 107-108). If anything, the

waivers show the covenants were enforced as written. Regardless, the No Business Activity Covenant was not part of any waiver that appears of record.

The alleged inactivity of the HOA and the ACC, the waivers, and alleged unchecked violations of other covenants are irrelevant. The covenant document itself provides for enforcement by individual homeowners, and individual homeowners obtained the order summary judgment. (CP at 40).

CONCLUSION

Pursuant to *Mountain Park*, Baker has the burden of citing evidence in the record on which a reasonable trier of fact could find that the No Business Activity Covenant itself was abandoned. Evidence of HOA inactivity and unchecked violations of other covenants are irrelevant. Baker has failed to meet his burden, and therefore, the trial court's summary judgment order should be affirmed.

RESPECTFULLY SUBMITTED this 20th day of July, 2012.

RETTIG OSBORNE FORGETTE, LLP

A handwritten signature in cursive script that reads "G. Charley Bowers". The signature is written in dark ink and is positioned above a horizontal line.

G. CHARLEY BOWERS, WSBA 37845
Attorneys for Respondent Homeowners

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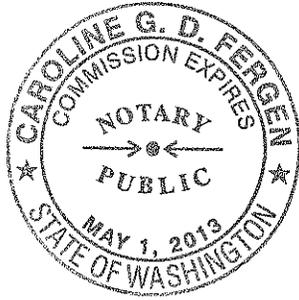
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Affidavit of Service

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SUBSCRIBED AND SWORN to before me this 20th day
of July, 2012.



Caroline Ferguson
NOTARY PUBLIC, in and for the State of
Washington, residing at: Passo, WA
My Commission Expires: 05012013