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IN THE COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

KELLY S. DEAN and ANNA MARIE DEAN,
Husband and wife, Respondents

v.

TIMOTHY MILLER and DIANE MILLER,
Husband and wife, Appellants

APPELLANT'S REPLY BRIEF
October 11, 2016

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RCW 64.04.010 – 0202

I. ARGUMENT

A. The Covenant is not a running real covenant.

The Covenant herein does not satisfy the elements of a running real covenant since the evidence fails to demonstrate compliance with the Statute of Frauds and the Covenant does not touch or concern Lot 9, the Dean property.

(1) Statute of Frauds.

The Covenant states in the last paragraph on Page 2 as follows:

“These covenants shall run with the land and shall be binding on all parties, **having or acquiring any right, title or interest in the land described herein or any part thereof, and **shall inure to the benefit of each owner thereof.**”**

Emphasis added.

The Covenant fails to adequately describe Lot 9 on the face of the Covenant and, therefore, fails to comply with the Statute of Frauds. Respondents assert at Page 8 of Respondent’s Brief that Miller misunderstands the application of the Statute of Frauds to the conveyance of a real covenant running with the land, citing in a footnote to the equitable servitude case of *Riverview Community Group v. Spencer and Livingston*, 181 Wn.2d 888, 337 P.3d 1076 (2014) and *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash 458, 194 P. 536 (1920). The cases relied

upon by Dean are clearly equitable servitude cases and not running real covenant cases. The two (2) Supreme Court Cases do not stand for the proposition that the Statute of Frauds need not be complied with for a running real covenant to be valid but rather that an equitable servitude need not comply with the statute of frauds in appropriate factual situations.

Dean, in Respondent's Brief, at Pages 9 through 10, claims that the dominate or benefited estate need not be legally described in a covenant to be binding for the benefit of a dominate estate. The cases cited by Dean are unpersuasive out of state cases not specifically dealing with the facts herein or the law of the State of Washington including the applicable Statute of Frauds. RCW 64.04.010 – 020. Furthermore, the argument of Dean ignores the words contained in the covenant in that the covenant clearly stated that the covenant would be binding on persons, parties having or acquiring an interest in "the land described herein". Lot 9, the Dean property is not adequately described within the face of the Covenant to satisfy the operative words of the covenant that the property must be "described herein". See, *Berg v. Ting*, 125 Wn.2d 544 (1995); *Martin v. Seigel*, 35 Wn.2d 223; 212 P.2d 107 (1948); *Deep Water Brewing, LLC v. Fairway Resources Limited*, 152 Wn.App. 229 (2009).

In *Berg v. Ting, supra*, the Washington State Supreme Court stated:

Under RCW 64.04.010, "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed . . .". Every deed "shall be in writing, signed by the party bound thereby, and acknowledged . . .". RCW 64.04.020. Although it is an incorporeal right, an easement is an interest in land. See *Perrin v. Derbyshire Scenic Acres Water Corp.*, 63 Wn.2d 716, 388 P.2d 949 (1964). An express grant of easement is a conveyance within the meaning of the statute of frauds. *E.g.*, *Ormiston v. Boast*, 68 Wn.2d 548, 550, 413 P.2d 969 (1966).

To comply with the statute of frauds, "a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description." *Bigelow v. Mood*, 56 Wn.2d 340, 341, 353 P.2d 429 (1960). However, in the case of an easement, a "deed [of easement] is not required to establish the actual location of an easement, but is required to convey an easement" which encumbrances a specific servient estate. (Some italics ours.) *Smith v. King*, 27 Wn. App. 869, 871, 620 P.2d 542, 24 A.L.R.4th 1049 (1980) (citing cases). The servient estate must be sufficiently described. See *Seattle v. Nazarenius*, 60 Wn.2d 657, 660-61, 374 P.2d 1014 (1962).

125 Wn.2d 544 at 551.

The Washington State Supreme Court has long held that reference to a platted property must be described by the correct lot number, block number, addition, county and state. *Martin v. Seigel*, 35 Wn.2d 223; 212 P.2d 107 (1948).

The Supreme Court stated:

In the interests of continuity and clarity of the law of this state with respect to legal descriptions, we hereby hold that every contract or

agreement involving a sale or conveyance of platted real property must contain, in addition to the other requirements of the statute of frauds, the description of such property by the correct lot number(s), block number, addition, city, county, and state. In so far as the Thompson case, *supra*, conflicts with this rule, it is hereby overruled.

Martin v. Seigel, 35 Wn. 2d, 223, at 229, 212 P.2d 107 (1949).

Deep Water Brewing LLC v. Fairway Resources Lt., 152 Wn.App. 229, citing *Leighton v. Leonard*, 22 Wn.App. 136, reaffirmed that a running real covenant must comply with the Statute of Frauds.

Dean's reasoning and the trial court's reasoning that Walsdorf's intent must have been to benefit Lot 9 violates the statute of frauds by using a presumed intent without any evidence of intent. Furthermore, the evidence of intent would be inadmissible. *Hollis v. Garwall*, 137 Wn 2d 683, 974 P.2d 836 (1999). The covenant does not reference any other document with an adequate legal description of the Dean property.

Adjoining property owners whose legal description are not described as the benefited property cannot enforce a covenant encumbering and benefiting adjoining property, *Save Sea Lawn Acres v. Mercer*, 140 Wn.App. 411 (2007). In other words the covenant is not binding for the benefit of property not described in the covenants. In *Save Sea Lawn Acres v. Mercer*, *supra*, the common owner of real property recorded two separate plats in

April of 1951. Plat 1 was recorded on April 11, 1951 and Plat 2 was recorded April 27, 1951 by the common owner. The two plats had identical but separate covenants. Both sets of covenants said that they were binding on all lots within “said plat”.

The owners of Plat 2 recorded a revocation of covenant as to Plat 2 in September of 2005 and the owners of Plat 1 sought to enjoin the revocation alleging a common development scheme. The Court of Appeals denied the relief because the express terms of the covenants indicated that the covenants only applied to the lots within the specific plat and not to any other plat. The owners of Plat 1, who collaterally benefited from the covenants and sought to enjoin the revocation of the covenants on Plat 2, could not enforce those covenants or prevent the revocation of those covenants.

The case before this court is similar in that Lot 9 is not described as a benefited parcel or adequately described at all. The Deans herein are in the same situation as the Plaintiffs in *Save Sea Lawn Acres v. Mercer* and are merely an adjoining property owner without any right to enforce the covenants by the express terms of the Covenant, Lot 9 must be described in order to comply with the Statute of Frauds and provide them with the benefit of the covenant. As stated in *Hollis v. Garwall*, such evidence of intent as argued by Dean is not admissible. *Hollis v. Garwall*, stated:

Under Berg and cases interpreting Berg, extrinsic evidence may be relevant in discerning that intent, where the evidence gives meaning to words used in the contract. *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 189, 840 P.2d 851 (1992) (extrinsic evidence illuminates what was written, not what was intended to be written). However, admissible extrinsic evidence does not include:

Evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term;

Evidence that would show an intention independent of the instrument; or

Evidence that would vary, contradict or modify the written word.

137 Wn.2d 683 at 695.

Deans assumptions as to intent is merely evidence of parties unilateral subjective intent to show an intention independent of the instrument that would modify the written word. The court must interpret the document as written and not as subjectively intended.

The trial court erred in concluding the covenant complied with the statute of frauds and was enforceable as a express covenant, running real covenant or equitable covenant.

Dean attempts to avoid the Statute of Frauds argument by citing *Stewart v. Beghtel*, 38 Wn.2d 870, 874-875, 324 P.2d 484 (1951) for the proposition that selling one parcel of land and retaining the other is sufficient to show an intention that the restriction was for the benefit of the lands

retained. *Save Sea Lawn Acres v. Mercer, supra*, is persuasive authority to the contrary. The case involved an alleged “common development scheme” where a common owner developed both plats and sold property separately, thereby retaining other parcels. The view covenants on Plat 2 benefited Plat 1. However, the court concluded that the lots not described could not enforce the other plats covenants. The 1951 *Stewart v. Beghtel* case is in conflict with the cases relating to the statute of frauds as discussed hereinabove and does not reference any discussion as to the applicability of the Statute of Frauds in that case.

(2) “Touch and Concern”.

The Covenant is not a running real covenant because there was no evidence presented at the trial court level or in the record herein other than assumptions made by the trial court in its Memorandum Decision and Dean’s Brief that the covenants were detrimental to Miller’s property and beneficial to Dean’s property.

Contrary to Dean’s assertion at Page 13 of Brief of Respondents, Miller does and has challenged at the trial court level and herein, the conclusion that there was a detriment to the Miller property and a benefit to the Dean property, Appellants Issue No. 4, briefing at Pages 19 – 21 and 27 of Appellant’s Brief indicate that Appellant Miller has challenged any

conclusion that the property touches or concerns Lot 9 not only because of failure to comply with the Statute of Frauds but also because of the insufficient record at trial court level to establish the necessary elements of “touch and concern”. The Courts of Appeal for the State of Washington have consistently held that to touch and concern land, the document must render the burdened property less valuable and the benefited property more valuable *Feider v. Feider*, 40 Wn.App. 589, 699 P.2d 801 (1985); *Leighton v. Leonard*, 22 Wn.App. 136, 589 P.2d 279 (1978). In *Feider*, the Court of Appeals stated:

“Neither do we find evidence the agreement “touches and concerns” land. To satisfy this requirement, **the agreement must have rendered less valuable Francis’s legal interest in his land and rendered more valuable the legal interest of Andrew in his land.** See 5 R. Powell, *Real Property* 673[2][a], at 60-41 (1984). Under *Robroy*, no interest in land is created by a right of first refusal; only personal rights are affected. A preemptioner acquires no present right to affect the property but holds only a right to acquire a later interest should the property owner decide to sell. *Robroy*, at 71; *Bennett Veneer Factors, Inc. V. Brewer*, 73 Wn.2d 849, 843-54, 441 P.2d 128 (1968). **There is nothing in the record to indicate the value of the land of the respective parties here was increased or decreased or even affected by the agreement.** See 1 Washington State Bar Ass’n, *Real Property Deskbook* 15.3, 15.4 (1979). Thus, the right of first refusal must fail as a covenant in any event.

40 Wn.App. 589, (593-594). Emphasis added.

In the present case Dean failed to submit any evidence to the trial court from which the trial court could conclude that the land of the respective

parties was increased or decreased by the covenant.

The test has also been succinctly set forth in *Leighton v. Leonard*, 22 Wn.App. 136, 139-140, as follows:

For the benefit side **the test for whether a covenant “touches and concerns the land” is whether it enhances the land’s value**, and for the burden side, whether it diminishes the land’s value. *Rodruck V. Sand Point Maintenance Comm’n, Supra* at 575; W. Stoebuck, SUPRA, at 874.

Emphasis Added.

The trial court did conclude in its Memorandum Decision that certain portions of the covenant were a benefit to Dean, however, there is no evidence in the record to support that conclusion. Dean’s Brief at Page 35 also reaches that conclusion, however, fails to point to any evidence in the record to support a finding or conclusion. In *Deep Water Brewing LLC v. Fairway Resources Lt.*, 152 Wn.App. 229 (2008) the trial court found based on evidence before the court that the height restriction made the servient estate less valuable and the dominant estate more valuable. The Court of Appeals referenced specific portions of the record as support for those findings. The record herein is devoid of any evidence to support such a conclusion since no evidence was offered by Dean at the trial level.

B. The covenant and the facts herein do not support a conclusion of an equitable servitude.

Deans, in the Brief of Respondents, once again seek to circumvent the failure of the covenant to adequately describe Lot 9 as the benefited property and, therefore, to avoid the statute of frauds by asserting that the covenant was an equitable servitude. The trial court concluded as an alternative means for granting summary judgment, that the covenant was an equitable servitude. (CP 096-111). Deans relied on *Riverview Community Group v. Spencer & Livingston*, 181 Wn.2d 888, 337 P.3d 1076 (2014) and *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920). However, Dean's recitation and analysis ignores the basic premise of each of those cases that equitable estoppel and equitable principals, absent in the present case, apply to prevent injustice. Neither case was decided as a running covenant or as a real covenant. The present case lacks any evidence supporting relief under equitable estoppel or equitable principals because there is no evidence to establish that Deans or their predecessors relied on the covenant and changed their position or were induced to sell or buy in reliance on the covenant.

In *Johnson v. Mt. Baker Park Presbyterian Church*, *supra*, the developer of the plat, advertised the property for sale representing the neighborhood as a "strictly high-class residence section" that "would not permit any building other than residences." The Deeds to most but not all of

the lots included language restricting the lots for use as “single-detached residences”. The trial court specifically found that the restrictions and representations increased the value of all the lots of the subdivision by 15% to 20%. The Supreme Court enforced the restrictions on equitable principals and not as either an express or running covenant and viewed the representations of the improvement company to impose use restrictions which the company could not violate. The decision of the court expressly declined to find a covenant that ran with the land but held that equitable principals estopped the development company and the church that purchased from the development company from violating the equitable servitude. The majority opinion stated:

“By its conduct and representations, the improvement company imposed on its remaining lots certain use restrictions which it may not now violate”.

113 Wash. 458 at 465-66.

Similarly in *Riverview Community Group v. Spencer & Livingston, supra*, the developers were alleged to have marketed the properties involved as a golf course community which would permanently have an operating golf course as part of the community. There was evidence in the record provided by the Plaintiffs therein of actual and implied representations of those facts. The case also involved evidence that the parties were induced to purchase

their residential lots by the representations that a golf course would be part of the development. The Washington State Supreme Court reversed the decision of the Court of Appeals and remanded for further proceedings. The Court stated:

We find that Riverview has presented sufficient evidence to survive summary judgment under *Johnson*. The evidence presented creates a material question of fact of whether those with the power to burden the property induced purchasers to purchase lots on the promise that the golf course would remain a permanent fixture of the community. Under *Johnson*, both equitable and injunctive relief may be available. 113 Wash. At 464-65

181 Wn.2d 888 at 899.

The Deans have failed to present any evidence to support an equitable estoppel claim or an equitable servitude based on equitable principals. Deans failed to offer any proof that the value of their property was enhanced by the covenant or that the Deans knew about the covenant prior to purchasing the Dean property.

II. CONCLUSION

Miller respectfully requests this court to reverse Chelan County Superior Court Order granting Plaintiff's Motion for Reconsideration and granting Summary Judgment to Plaintiff, and remand to the trial court for a trial on the merits of the case.

RESPECTIVELY SUBMITTED this 11th day of August, 2016.

A handwritten signature in black ink, reading "Chancey C. Crowell". The signature is written in a cursive style with a horizontal line underneath the name.

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