July 2021
MPT-2 Library

In re Canyon Gate Property Owners Association

Excerpts from Franklin Property Code, Chapter 400

§ 401 Definitions

. . .

(d) "Restrictive covenant" means any condition or restriction that runs with the land and limits permissible use of the land.

* * *

§ 403 Construction of Restrictive Covenants

(a) A restrictive covenant shall be reasonably construed to give effect to its purposes and intent.

(b) A restrictive covenant may not be construed to prevent or restrict the use of property as a family home.

(c) This section applies to all restrictive covenants regardless of the date on which they were created.

§ 404 Enforcement of Restrictive Covenants

(a) A property owners' association may initiate, defend, or intervene in litigation or an administrative proceeding affecting the enforcement of a restrictive covenant or the protection, preservation, or operation of property subject to a restrictive covenant.

(b) A court may assess civil damages for the violation of a restrictive covenant in an amount not to exceed $200 for each day of the violation.

Foster v. Royal Oaks Property Owners Association
Franklin Court of Appeal (2017)

The Royal Oaks Property Owners Association (Association) sued Mark and Kathryn Foster to enforce the deed restrictions for the Royal Oaks subdivision after the Fosters erected a fence that violated certain restrictive covenants contained in the deed restrictions. The trial court entered judgment for the Association. We affirm.

Background

The Royal Oaks subdivision, in the city of Hayden, Franklin, is subject to deed restrictions that include specific setback requirements governing the placement of structures on each lot and other restrictive covenants. The Royal Oaks Architectural Control Committee (ACC), a three-member committee appointed by the Association and made up of homeowners in the subdivision, governs approvals of improvements to lots within the subdivision and enforces the subdivision's deed restrictions.

In June of 2015, the Fosters bought a lot at the corner of Eagle Drive and Tremont Road in the subdivision and received ACC approval of plans to build a house. The approved plans included a wrought-iron fence enclosing the backyard along Eagle Drive to be located 25 feet from Eagle Drive (the "Eagle Setback"). Nine months after the plan approval, an ACC member drove by the Foster lot and saw a wrought-iron fence being constructed 10 feet from Eagle Drive and thus significantly outside the 25-foot Eagle Setback. On learning of the fence relocation, the ACC sent a letter to the Fosters advising them to stop construction of the fence because it was too close to the street, in a location that had not been approved by the ACC. The Fosters ignored the letter and completed construction of the fence. They thereafter requested a variance to allow the noncompliant fence.

Discussions ensued between the Association and the Fosters, but no agreement was reached. When the Fosters failed to remove or relocate the fence, the Association sued seeking injunctive relief to enforce the restrictive covenants contained in the deed restrictions, a declaratory judgment affirming the Association's authority to enforce the restrictive covenants, and damages pursuant to § 404 of the Franklin Property Code. The Fosters filed a counterclaim, seeking a declaratory judgment that their fence did not violate the restrictive covenants or, alternatively, that the ACC had been arbitrary, capricious, and/or discriminatory in not granting the Fosters a "variance." Following a bench trial, the court entered judgment in favor of the Association,

granting the Association's requested injunctive and declaratory relief, and awarding $20,000 in damages pursuant to Franklin Property Code § 404, plus attorney's fees and costs.

The Fosters raise three issues on appeal: (1) the trial court misinterpreted the Royal Oaks subdivision restrictive covenants, (2) the trial court erred in upholding the ACC's denial of the requested variance, and (3) the trial court erred in assessing damages under § 404 without evidence of actual injury or harm.

On appeal, we review these Association actions de novo, applying two separate analyses. First, we must determine whether the Association correctly interpreted the restrictive covenant. Then, we must determine whether the Association properly applied the restrictive covenant.

Interpretation of the Restrictive Covenant

Restrictive covenants are a type of deed restriction. They are widely used in many neighborhoods to protect homeowners against construction that could interfere with their use and enjoyment of their property and/or impair property values. Restrictive covenants are a "contract between a subdivision's property owners as a whole and individual lot owners and are thus subject to the general rules of contract construction." *Coleman LLC v. Ruddock* (Fr. Sup. Ct. 1999). In construing a restrictive covenant, a court must ascertain the drafter's intent from the instrument's language, giving a restrictive covenant's words and phrases their commonly accepted meaning. *Id.*

At common law, covenants restricting the free use of land were not favored. However, in 1990, the Franklin legislature amended the Property Code to provide that all restrictive covenants contained in instruments governing certain residential developments must be reasonably construed to give effect to their purposes and intent. *See* Fr. Prop Code § 403. The Franklin Supreme Court has held that § 403's reasonable-construction rule concerning restrictive covenants supersedes the common law rule of strict construction. *See Humphreys v. Oliver* (Fr. Sup. Ct. 2007).

The Fosters contend that the trial court erroneously interpreted the restrictive covenant regarding the minimum distances at which fences must be placed from Eagle Drive (i.e., the 25-foot Eagle Setback). Article III, Section 9 of Royal Oaks subdivision's deed restrictions prohibits any fence from being erected "*nearer to the street* than 25 feet" [emphasis added]. Section 14 provides that "to the extent not otherwise limited by these deed restrictions, no building or other structure shall be located *nearer to a side lot line* than five feet" [emphasis added].

The Fosters argue that although Section 9 requires fences to be located at least 25 feet from the street, Section 14 should govern here because the front of their house faces Tremont Road and

thus the side of their house (and side lot line) faces Eagle Drive. Because the lot extends to the edge of Eagle Drive, and the fence is 10 feet from the edge of Eagle Drive, they assert that the fence does not violate the deed restrictions because it is more than 5 feet from their side lot line (as required by Section 14).

This interpretation lacks merit. The five-foot setback in Section 14 specifically applies to a setback from the "side lot line" only "to the extent not otherwise limited by these deed restrictions." Section 9 deals exclusively with a fence's distance "from the street." Thus, the "side lot line" setback established by Section 14 does not apply because Section 9 requires a greater setback (25 feet) between fences and bordering streets. Accordingly, the trial court did not misinterpret the Royal Oaks deed restrictions.

Application of the Restrictive Covenant

The trial court found that the ACC acted properly in denying the Fosters' request for a variance for the Eagle Drive fence. On appeal, the Fosters assert that the ACC's refusal to grant the variance was arbitrary, capricious, and/or discriminatory.

An association's application of a properly interpreted restrictive covenant in a particular situation is presumed to be proper "unless the court determines that the association acted in an arbitrary, capricious, or discriminatory manner." *Cannon v. Bivens* (Fr. Sup. Ct. 1998). The Fosters thus had the burden at trial to prove by a preponderance of the evidence that the Association's denial of the requested variance was arbitrary, capricious, or discriminatory.

In *Mims v. Highland Ranch Homeowners Ass'n Inc.* (Fr. Ct. App. 2011), the court upheld a summary judgment finding that the defendant association had acted in an arbitrary, capricious, or discriminatory manner in denying a request to build a carport. In *Mims*, although the deed restrictions did not specifically prohibit carports, an ACC member told the homeowner that the carport plans would be denied "no matter what," and the ACC did not review the carport plans or even contact the homeowner to discuss the dimensions of the proposed carport.

Here, in contrast, the Fosters deviated from the approved plans for their home and the ACC attempted to work out other fencing options with them. Although the deed restrictions allow the ACC to modify deed restrictions under "compelling" circumstances, the Fosters failed to provide any justification, let alone a compelling one, for relaxing the 25-foot Eagle Setback. The evidence at trial supports the trial court's finding that the ACC acted properly in denying the requested variance.

Damages under Franklin Property Code Section 404

Finally, the Fosters assert that the trial court erred in assessing $20,000 in damages under Franklin Property Code § 404(b) because the damages were "unsupported by the evidence, manifestly unjust, and erroneous as a matter of law." They contend that a trial court may not assess damages unless there is record evidence that a violation of a restrictive covenant resulted in actual harm or injury.

The amount of damages that may be assessed under § 404 is not related to the showing of any type of injury or harm or the extent of such injury or harm; rather, it is related to the number of days that the violation takes place, without any reference to the existence, nature, or extent of any type of injury or harm. Nothing in § 404 indicates that the "damages" that the trial court may "assess" under subsection (b) are intended to be compensation for any actual harm or injury from the violation of a restrictive covenant. The trial court did not abuse its discretion in assessing damages of $20,000 under § 404(b).

Affirmed.

Powell v. Westside Homeowners Association Inc.
Franklin Court of Appeal (2019)

Richard Powell appeals the trial court's grant of a permanent injunction in favor of Westside Homeowners Association Inc. (HOA) requiring Powell to remove a vehicle parked on his front lawn in violation of certain restrictive covenants contained in the neighborhood association's deed restrictions. We affirm.

BACKGROUND

The HOA is a neighborhood association in the Westside neighborhood of Bradford, Franklin, and is governed by a board of directors. Property in the neighborhood is subject to certain deed restrictions recorded in January 1974 and enforced by the HOA Architectural Control Committee (ACC).

Powell owns a home on Claremont Drive in the neighborhood. In August 2016, Powell began parking a Chrysler Pacifica minivan on his front lawn, next to the driveway and under an oak tree. In September 2016, the ACC notified Powell that parking a vehicle in his front yard violated the HOA restrictive covenants and that the vehicle needed to be removed within 10 days. The letter also stated that if Powell disagreed, he could contact the ACC and explain his position. Powell did not respond or move the minivan. The ACC sent a second letter in October 2016 notifying Powell that the HOA was prepared to file suit against him for the ongoing violation and advising that he could request a hearing before the board within 30 days. Powell never responded. On February 6, 2017, the HOA sued Powell, seeking a permanent injunction requiring removal of the minivan. After a bench trial, the trial court granted the permanent injunction and assessed attorney's fees and costs against Powell.

DISCUSSION

Powell challenges the trial court's findings that Powell violated the restrictive covenants by parking his minivan on his front lawn. In the alternative, Powell argues that even if his actions did violate the restrictive covenants, the HOA waived its right to enforce the restrictions because the HOA allowed other homeowners to park their cars in their front yards.

We review de novo a trial court's conclusions of law. *Mistover LLC v. Schmidt* (Fr. Sup. Ct. 1987). Restrictive covenants are subject to the general rules of contract construction and are to be reasonably construed to give effect to their purposes and intent. Fr. Prop. Code § 403(a). The restrictive covenant at issue provides, in relevant part, that "No vehicles . . . shall be parked or

stored between the curb and building line of any lot, other than on a paved driveway." Although restrictive covenants cannot restrict or prevent the use of property as a family home, *id*. § 403(b), the restrictive covenant here does not affect Powell's ability to use his property as his home. Rather, it simply requires him not to park his minivan in his front yard. Although this restriction was recorded in 1974, before Franklin Property Code § 403 was enacted, § 403 applies retroactively to create a presumption that the restriction is reasonable. *See id.* § 403(c).

Powell admits to parking his minivan on his front lawn, which is between the curb and the building line of his lot. In doing so, Powell violated the deed restriction.

We reject Powell's contention that the HOA waived its right to enforce the deed restriction. To demonstrate a waiver of restrictive covenants, a party must prove that "the violations then existing were so extensive and material as to reasonably lead to the conclusion that the restrictions had been waived." *Larimer Falls Comm. Assoc. v. Salazar* (Fr. Ct. App. 2005). The number, nature, and severity of the existing violations are factors to consider in determining waiver. *Id*.

Franklin courts have repeatedly found that the evidence was insufficient to support a finding of waiver when 1% to 10% of properties violated the restrictive covenants at issue. For example, no waiver has been found where 4 of 62 lots had nonconforming fences, 2 of 33 lots contained unapproved access roads, 10 of 180 houses violated setback requirements, and 15 of 150 homeowners stored prohibited recreational vehicles on their property. *See id.* and cases cited therein.

At trial, the chair of the ACC testified that in the five years preceding the lawsuit, she had not seen any other vehicles parked on the front lawns of other properties in the neighborhood. Powell did not produce any evidence to support his allegation that other homeowners parked their cars in violation of the restrictive covenant.

The trial court properly issued the permanent injunction. Affirmed.