[Cite as *Phelps v. Community Garden Assn.*, 2019-Ohio-1364.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107127

WILLIE PHELPS, ET AL.

PLAINTIFFS-APPELLANTS

vs.

COMMUNITY GARDEN ASSOCIATION, INC.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-864799

BEFORE: E.A. Gallagher, J., Boyle, P.J., and Sheehan, J.

RELEASED AND JOURNALIZED: April 11, 2019

ATTORNEYS FOR APPELLANTS

David M. Dvorin
Brad A. Straka
Lieberman, Dvorin & Dowd, L.L.C.
30195 Chagrin Boulevard, Suite 300
Pepper Pike, OH 44124

ATTORNEYS FOR APPELLEE

Steven M. Ott
Lindsey A. Wrubel
Callie J. Channell
Ott & Associates Co., L.P.A.
1300 East 9th Street, Suite 1520
Cleveland, OH 44114

David L. Lester
Collins, Roche, Utley, & Garner, L.L.C.
875 Westpoint Parkway, Suite 500
Cleveland, OH 44145

EILEEN A. GALLAGHER, J.:

{¶1} Plaintiffs-appellants Willie and Brenda Phelps ("Phelps") own real property located in the Elizabeth B. Blossom Union Subdivision in Beachwood, Ohio. The houses that comprise the subdivision are subject to a Declaration of Restrictions ("Declaration"). There is a private park adjacent to the houses that was established for the subdivision's benefit. Defendant-appellee Community Garden Association, Inc. ("CGA") is a nonprofit corporation that administers the park and is funded by property owners in the subdivision through assessments. The Phelps have never paid assessments to CGA. Following CGA's attempt to collect assessments from them, the Phelps brought an action seeking a declaration that they are not members of the association and, therefore, they are not obligated to pay to it any dues or

assessments. They also asserted claims of retaliation and discrimination in violation of state and federal statutes. CGA answered and counterclaimed, seeking a declaration of their own that the Phelps are members of the association and that they are obligated to pay assessments pursuant to the Declaration.

{¶2} CGA moved for summary judgment on the Phelps' claims and its counterclaim and the trial court granted said motions. In so doing, the court interpreted the Declaration as adopted in 1978 and as amended in 2007. Pursuant to its interpretation, the court found that the Phelps were members of CGA and were obligated to pay assessments, late fees and attorney fees, in the subsequently determined amount of $17,253.84. The court also granted CGA summary judgment as to the claimed violations of state and federal law.

{¶3} The Phelps now appeal and raise four assignments of error. The Phelps argue that the trial court erred by finding that they are members of the association. They argue that they are not obligated to pay CGA assessments. They dispute the court's calculation of damages and they complain that the court improperly subjected their discrimination and retaliation claims to a heightened pleading standard. For the reasons that follow, we affirm in part, reverse in part and remand.

I. Relevant Factual Background

{¶4} In August of 2003, the Phelps took title to their property through a deed that provided that the property was "free and clear from all liens and encumbrances, except zoning ordinances, easements, restrictions and conditions of record * * *." There is no dispute that when the Phelps took title to the property, they had notice that it was a part of the subdivision and that it was subject to the Declaration as adopted in 1978 and thereby bound to its terms.

{¶5} It is similarly undisputed that, at that time, the Declaration did not contain a requirement that obligated property owners to pay assessments. The Declaration did however contain an amendment provision in section 16:

> The Covenants and Restrictions may be terminated or amended at any time by the affirmative vote of Owners representing seventy percent or more of the voting power of all Owners.

{¶6} In May 2007, the Declaration was amended to create an obligation for property owners to pay assessments to CGA. There is no dispute that "seventy percent or more" of the owners voted for the amendment and that it otherwise complied with the procedure required by section 16.[1]

{¶7} The Declaration as amended contains section 18, which defines the types of assessments that the association may impose, the terms of payment and the consequences of nonpayment. It also outlines the association's obligation to provide owners specific notice in writing about assessments.

{¶8} In relevant part, section 18(A) makes clear that each owner is required to pay assessments:

> Each Owner of any Sublot, either by present ownership or by acceptance of the deed therefor, whether or not it shall be so expressed in the deed, hereby covenants and agrees to pay the Association regular assessments and special assessments as provided for in this Declaration, and covenants to the enforcement of payment of the assessments and the lien of the Association as hereinafter provided. Such assessments shall be fixed, established, and collected from time

---

[1] The parties do not dispute that the amendment followed the procedure required by the Declaration. The Phelps' argument goes to the substance of the amendment and not the amendment process itself. Nevertheless, for completeness we note that section 16 further provides:

> In the event of the amendment or termination of this Declaration, the members of the Architectural Committee shall execute and file a certificate with the office of the County Recorder of Cuyahoga County, Ohio, (a) reciting the effective date of such amendment or termination and that the requisite approval of the Owners was obtained in accordance with the provisions of this Declaration, and, in the event of amendment, (b) containing the complete text of the Declaration, as amended.

> to time as provided by the Association. The regular and special assessments, together with any interest thereon and costs of collection thereof, including reasonable attorney's fees, shall be a charge upon each Sublot and a continuing lien upon each Sublot against which each such assessment is made.

{¶9} In relevant part, section 18(E) obligates the association to provide written notice as to any assessment:

> Written notice of the assessment for each assessment year shall be sent to every Owner subject thereto at least thirty (30) days prior to the commencement of the Assessment Year. The Association shall have the obligation to provide the Owner of each and every Sublot with written notice as to the amount of the Assessment in effect with respect to said Sublot at the time the Owner notifies the Association that such Owner has acquired an ownership interest in said Sublot. Said written notice shall set forth the amount of the periodic installment of Assessments and the dates on which the same are due and payable. Thereafter, the Association shall be obligated to provide written notice of the periodic installment of Assessments only when the amount or payment date thereof changes. All such notices shall be effective as of the date set forth therein and may be delivered to the Owner personally, sent to the address of the Sublot via ordinary U.S. Mail, or conspicuously posted at the Sublot.

II. Standard of Review

{¶10} We review summary judgment rulings de novo, applying the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). We accord no deference to the trial court's decision and conduct an independent review of the record to determine whether summary judgment is appropriate.

{¶11} Under Civ.R. 56, summary judgment is appropriate when no genuine issue exists as to any material fact and, viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party entitling the moving party to judgment as a matter of law.

{¶12} On a motion for summary judgment, the moving party carries an initial burden of identifying specific facts in the record that demonstrate his or her entitlement to summary

judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, the nonmoving party has the reciprocal burden to point to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial. *Id.* at 293. Summary judgment is appropriate if the nonmoving party fails to meet this burden. *Id.*

III. The Declaration as Amended does not Mandate Membership

{¶13} The Phelps argue that the trial court erred by determining that they are and, are required to be, members of the association. We agree.

{¶14} Contrary to CGA's contention and the trial court's finding, the Declaration imposes no requirement that an owner join the association. The Declaration as adopted in 1978 makes no mention of the association. While the Declaration as amended does refer to the association, and requires owners to pay assessments to it, it does not create or contain any membership requirement. According to the plain language of the Declaration, there is nothing that requires an owner to be an association member. *See Cleveland Baptist Assn. v. Scovil*, 107 Ohio St. 67, 71-72, 140 N.E. 647 (1923) ("[R]estrictions in deeds must be construed in favor of the free use of real estate, and that if doubtful meaning attaches thereto the doubt must be resolved against the restriction."). We refuse to recognize a membership requirement where the Declaration clearly does not.

{¶15} Our conclusion that the Phelps are neither association members, nor required to be, is further supported by CGA's Articles of Incorporation, as adopted in 1978 and as restated in 2010 which explicitly states the criteria for membership in the association:

> Membership is limited to natural persons who (a) own a sublot which is restricted by certain Covenants and Restrictions set forth in [the declaration], (b) are in full and complete compliance with such Covenants and Restrictions; and (c) satisfy all

> other membership requirements set forth in these Amended Articles of Incorporation and the Code of Regulations of the Corporation.

{¶16} Here, it is true that the Phelps "own a sublot which is restricted by certain Covenants and Restrictions." And regardless of whether the Phelps "satisfy all other membership requirements," since they have not paid the required assessments, they are clearly not "in full and complete compliance with such Covenants and Restrictions." Indeed, this is CGA's chief complaint against the Phelps.

{¶17} The association's internal records provide no basis to conclude that the Phelps are CGA members or that membership is mandatory. Indeed, minutes from a 2013 CGA trustee meeting indicate "[a]ll members are paid in full, although the Phelps Family is not in the Association * * *," and "[a]lthough the membership is voluntary, their property value is increased by the park property * * *."

{¶18} Moreover, the association's communications to the Phelps provide no indication that the Phelps are CGA members or required to be. In fact, CGA sent the Phelps a letter in 2004 shortly after they took title to the property in which they were encouraged to join the association. Far from informing the Phelps that they were already members or required to join, the letter instead outlined various benefits to entice them to join, including the ability to use the park and co-ownership of it. The letter listed the three membership requirements as provided in the articles of incorporation. It also included the consequences of not joining: "[s]hould you decide not to join the CGA, obviously you forfeit the use of the property and should the property ever be sold, any financial gain."

{¶19} We sustain the assignment of error and reverse the trial court's determination that the Phelps are CGA members.

IV. The Phelps Must Pay Assessments

{¶20} The Phelps argue that the court erred by determining they were obligated to pay CGA assessments. They argue that the Declaration, as amended, which imposes the assessment requirement, is not binding on them because it was adopted after they took title to the property and claim that because they acquired the property prior to the amendment, they did not have notice of it. Alternatively, the Phelps claim that the amendment exceeded the bounds of the Declaration because it created the obligation for owners to pay assessments. We disagree.

{¶21} A restrictive covenant is a private agreement that imposes a limit or burden on the use or occupancy of real property. *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶ 28. A restrictive covenant will bind a subsequent purchaser of real property so long as that person had notice of the covenant. *Lake Milton Estate Property Owners Assn. v. Hufford*, 7th Dist. Mahoning No. 17 MA 0163, 2018-Ohio-4784, ¶ 23.

{¶22} The Phelps acknowledge that their property is subject to the Declaration, which contains restrictive covenants and they make no claim they lack notice as to that. As previously discussed, the Declaration at paragraph 16 clearly and unambiguously permits amendment. Moreover, as previously discussed, the Phelps make no claim that the amendment process failed to conform to the Declaration requirements. Accordingly, the Phelps may not claim they are not subject to the amendment or did not have notice of it while simultaneously agreeing that the property is subject to the Declaration that provided the basis for amendment.

{¶23} We also reject the Phelps' argument that the amendment introducing the assessment requirement impermissibly exceeded the scope of the Declaration. As previously stated, the Declaration at section 16 provides that it may be "terminated or amended at any time." There are no constraints on the extent to which the declaration may be amended. Rather, its

permissive language provides an unlimited ability to increase or decrease the covenants and restrictions, bound only by its stated requirement: "the affirmative vote of Owners representing seventy percent or more of the voting power."

{¶24} At oral argument, the Phelps argued that we should follow *Grace Fellowship Church, Inc. v. Harned*, 2013-Ohio-5852, 5 N.E.3d 1108 (11th Dist.). We disagree. In that case, the Eleventh District interpreted a restrictive covenant that provided in relevant part "[t]he covenants herein * * * shall remain in effect * * * unless and except modified or changed * * *" as precluding an amendment that restricted usage to "solely for single family residential purposes," and held that the amendment provision did not permit a restriction that "could completely alter a landowner's ability to use his property for the purposes for which it was intended." *Id.* at ¶ 3, 5, 32, 36.

{¶25} We decline to apply that analysis in this case. *Compare Maasen v. Zopff*, 12th Dist. Warren Nos. 98-10-135, 98-10-138, and 98-12-153, 1999 Ohio App. LEXIS 3422, 16-17 (July 26, 1999) (court will not imply a limit of scope of amendment where the term the "amendment" in the agreement is not otherwise qualified). The amendment provision at issue here is expansive and not qualified. It broadly permits the covenants and restrictions to be terminated or amended.

{¶26} We conclude that because the Phelps took title to the property knowing it was subject to the Declaration and because the Declaration permitted unrestricted amendment that they are bound by any amendment that properly results. We find no basis to limit the scope of amendment where the Declaration does not do so itself.

{¶27} Moreover, as previously discussed, the terms of the amendment are similarly clear and unequivocal in requiring all owners to pay assessments. Accordingly, the trial court did not

err by finding that the Phelps have an obligation to pay assessments. We overrule this assignment of error.

V. CGA Failed to Establish Notice and Correct Amount of Damages

{¶28} The Phelps argue that CGA failed to comply with the Declaration's notice provisions and complain that the amount of damages the court ordered them to pay is inappropriate. We agree.

{¶29} Although the Phelps are bound to the Declaration as amended, which imposes the general obligation that they pay the association assessments, it also imposes a reciprocal burden on CGA to provide owners specified notice about assessments. *See O'Bannon Meadows Homeowners Assn. v. O'Bannon Properties, L.L.C.*, 12th Dist. Clermont No. CA2012-10-073, 2013-Ohio-2395, ¶ 19 ("A declaration is a contract, and as such, construction of the [d]eclaration is a matter of law.").

{¶30} Section 18(A) provides that assessments become a "personal obligation" of an owner at the time the assessment becomes due. However, the amendment does not indicate any specific amount or due date for assessments. Instead it provides the association flexibility in making these determinations. Nevertheless, as previously discussed, section 18(E) requires CGA initially provide owners written notice of the specific amount and due date. It requires CGA give written notice to owners at least 30 days before commencement of the assessment year. It also requires the association to provide written notice any time the amount of the assessment or the due date is changed. It explains that notice is effective as of the date contained in the notice. And it provides that notice is effective if delivered to the owner personally, sent to the address of the sublot via ordinary mail, or conspicuously posted at the sublot.

{¶31} CGA argued that it was entitled to summary judgment on its counterclaim on the basis that the Phelps are bound to the restrictive covenants contained in the Declaration and, therefore, are obligated to pay assessments. CGA claimed that the Phelps owed it $13,238 for unpaid assessments, late fees, and costs of collection in addition to an unspecified amount for attorney fees,[2] but it made no claim that it gave the Phelps the requisite notice. Indeed, it failed to address the issue of notice in its brief in support of the motion. Moreover, it failed to identify any evidence that established it provided the Phelps notice. Essentially, on summary judgment CGA sought to hold the Phelps to burdens imposed by the Declaration as amended, while at the same time denying them any of the protections afforded by it. And while the Phelps concede they began receiving notice of assessments starting in 2015, CGA has provided no basis for us to conclude it provided them notice before this point.

{¶32} Accordingly, we find CGA failed to establish it was entitled to summary judgment. Therefore, the trial court erred by granting CGA summary judgment and ordering the Phelps to pay CGA damages based on that judgment. We sustain this assignment of error. We reverse and remand the case for the trial court to determine the date that the Phelps received notice of assessments as required by the Declaration as well as the correct amount that they owe based on that date.

VI. No Basis for Statutory Claims

{¶33} Finally, the Phelps complain that the trial court "erred by subjecting [their] claims of discrimination and/or retaliation to a heightened pleading standard." We note that the Phelps

[2] In its subsequent "brief in support of damages," CGA argued the Phelps owed $3,899.66 for "dues and late fees" and $13,354.18 for attorney fees for a total of $17,253.84.

provide no basis for us to conclude that the trial court subjected these claims to a heightened pleading standard.

{¶34} In their complaint, the Phelps argued that CGA violated R.C. 4112.02 and 42 U.S.C. 3605. In its brief in support of summary judgment, CGA demonstrated that there was no genuine dispute of material fact as to the applicability of either statute because CGA was not involved in any relevant real estate or housing transactions. In their brief in opposition to CGA's motion for summary judgment, the Phelps failed to meet their reciprocal burden to establish that either statute applies or present evidence of their ability to recover under either statute.[3] We find the trial court committed no error by granting summary judgment to CGA on the Phelps' statutory claims and overrule this assignment of error.

{¶35} Judgment affirmed in part, reversed in part, and remanded.

It is ordered that appellants and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____

EILEEN A. GALLAGHER, JUDGE

MARY J. BOYLE, P.J., and
MICHELLE J. SHEEHAN, J., CONCUR

[3] However, in their brief the Phelps also asserted new claims pertaining to different statutes. *But see EverStaff, L.L.C. v. Sansai Environmental Technologies, L.L.C.*, 8th Dist. Cuyahoga No. 96108, 2011-Ohio-4824, ¶ 13 (plaintiff cannot raise new claims on summary judgment without amending the complaint).