2014 IL App (3d) 130821-U

Order filed August 7, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

PEGGY LEE STUDIGER,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois.
	)	
v.	)	Appeal No. 3-13-0821
	)	Circuit No. 11-MR-805
HONEYTREE TOWNHOUSE	)	
IMPROVEMENT ASSOCIATION,	)	
	)	The Honorable
Defendant-Appellant.	)	Barbara Petrungaro,
	)	Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: In a case in which a homeowner filed a declaratory judgment action against a homeowner's association, the circuit court ruled in favor of the homeowner, finding that an amendment to the restrictive covenants of the homeowner's association—which sought in part to prohibit homeowners from leasing their residences—was vague, ambiguous, unreasonable, and arbitrary in its application. The appellate court affirmed the circuit court's judgment.

¶ 2 The plaintiff, Peggy Lee Studiger, filed a complaint for declaratory judgment against the defendant, Honeytree Townhouse Improvement Association, alleging that an amendment to the

Association's restrictive covenants was unreasonable, invalid, and unenforceable as to her property. The circuit court ruled in favor of the plaintiff after finding the amendment to be vague, ambiguous, unreasonable and arbitrary in its application. On appeal, the defendant argues that the circuit court's ruling was erroneous. We affirm.

¶ 3 FACTS

¶ 4 The complaint filed by the plaintiff in this case on August 26, 2011, alleged that she had owned a house since 1972 in the area administered by the defendant. She had leased the house for 26 years until the defendant adopted an amendment to its restrictive covenants which, *inter alia*, prohibited the leasing of units within the defendant's administration. The plaintiff sought a ruling that the amendment was unreasonable, invalid, and unenforceable as to her property.

¶ 5 The amendment at issue pertained to section 8 of the Association's restrictive covenants and read as follows:

> "(a) Except as otherwise provided in this paragraph, each Lot Owner or member of the Lot Owner's 'Immediate Family' (as defined below) shall occupy and use his or her Unit as a private residence, and the rental or leasing of Units shall be prohibited.
>
> (b)(i) A Lot Owner need not be an occupant of his or her Unit if a member of the Lot Owner's Immediate Family (strictly defined as a Lot Owner's mother, father, daughter, son, grandmother, grandfather, sister and brother) resides in the Unit. Individuals not related to a Lot Owner may reside in a Unit with the Lot Owner or a member of the Lot Owner's Immediate Family. In the event there is more than one Lot Owner of record, only one such Lot Owner shall be required to occupy his or her

Unit as provided herein. Occupancy of any Unit is subject to local ordinances and regulations governing the number of occupants in the Unit.

(ii) Any arrangement for ownership or occupancy of a Unit or between the seller and purchaser of a Unit which does not vest title of the Unit in the person occupying the Unit shall be reviewable by the Association as to compliance with the specific requirement of this section that the Lot Owner shall occupy his or her Unit except as otherwise provided. Non-compliance shall cause the Lot Owner to be subject to sanctions. In the event that a Lot Owner is a land trust or estate planning trust, the holder or holders of the beneficial interest in the trust shall be deemed to be the Lot Owner for the purposes of this section.

(c) Provided that a copy of the lease agreement has been submitted to the Association prior to the effective date of this amendment, a Unit which is subject to a written lease agreement before the effective date of the Amendment shall be permitted to continue to be leased until that lease expires or for a period of time not to exceed two years from the effective date of the Amendment, whichever occurs first. Upon expiration of said lease or time period, the Unit no longer may be leased except within the terms of this paragraph. Failure to have a copy of the lease agreement on file prior to the effective date of the Amendment shall cause a Lot Owner to forfeit the opportunity to continue to lease his or her Unit after the effective date of the Amendment.

(d) Except as otherwise provided in Paragraphs 8(a) - (c) and 8(i), no Lot Owners shall be permitted to lease their Units or otherwise not reside in their Units and allow other Persons to reside therein unless a written request setting forth how the

Lot Owner-occupancy requirement causes a hardship to the Lot Owner is submitted to the Board and approved as provided herein. Reasons for such hardship may include, without limitation, illness of the Lot Owner, the Lot Owner's spouse or a member of the Lot Owner's Immediate Family (as defined above), the loss of employment or job relocation of the Lot Owner or the Lot Owner's spouse, or the death of the Lot Owner or the Lot Owner's spouse. In the event the Board determines in its sole discretion that a hardship exists, the Board may grant permission for the Unit to be leased or occupied by a Person in the absence of the Lot Owner for a period of time not to exceed twelve (12) months. Thereafter, the Lot Owner must reapply for hardship status in order for his or her Unit to remain so occupied. The Board shall be under no obligation to grant the requested hardship status or any continuation thereof.

(e) No Unit shall be leased for transient or hotel purposes, which are defined as being for a period of less than thirty (30) days or for a period of more than thirty (30) days where services normally furnished by a hotel (such as room service or maid service) are furnished.

(f) Any lease permitted under this paragraph or as otherwise may be allowed under the Declaration shall be in writing, shall contain fixed beginning and ending dates and shall provide that the lease shall be subject to the terms of this Declaration, the By-Laws, the Rules and Regulations of the Association and applicable laws and that any failure of a tenant to comply with the terms of the Declaration, the By-Laws, the Rules and Regulations and / or applicable laws shall be a default under the lease. The Lot Owner shall deliver to the Board a true and correct copy of the fully executed

lease not later than occupancy or ten (10) days after the lease is signed, whichever occurs first.

(g) No Leasing or allowing someone other than the Lot Owner to reside in his or her Unit shall relieve the Lot Owner from the obligations imposed upon him or her or her Unit pursuant to the Act, the Declaration, the By-Laws, and the Rules and Regulations of the Association. A Lot Owner shall remain primarily liable for these obligations.

(h) In addition to the authority to levy fines against a Lot Owner for violation of this Amendment or any other provision of the Declaration, the By-Laws or the Rules and Regulations of the Association, the Board shall have all rights and remedies available, including, without limitation, the right to maintain an action for possession against the Lot Owner and / or his or her tenants or occupants under the forcible entry and detainer provisions of the Illinois Code of Civil Procedure, an action for injunctive and / or other equitable relief, and / or an action at law for damages. All unpaid charges incurred as a result of the foregoing (including, without limitation, fines, attorneys' fees, court costs, title company charges and management company charges) shall be deemed to be a lien against the Unit and collectible in the same manner as any other unpaid regular or special assessment, including late fees and interest on the unpaid balance.

(i) Notwithstanding anything to the contrary contained in this paragraph, neither Units owned by the Association nor leases entered into by the Association (pursuant to the forcible entry and detainer provisions of the Illinois Code of Civil

> Procedure and / or other applicable law) shall be subject to the leasing restrictions contained herein."

The amendment was passed by the defendant association and recorded in July 2007.

¶ 6 The defendant filed a motion to dismiss the complaint pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)), alleging that a First District case involving condominiums should apply and that the amendment was valid under that case law. In December 2011, the circuit court denied the defendant's motion to dismiss, finding that the First District case did not apply and that this case was subject to the general principles of contract construction.

¶ 7 The circuit court held a bench trial in May 2013. The plaintiff testified that she lived in Chicago. She bought the Romeoville residence in question in 1982. She never had any intention of living in the residence, and she never made much money off the residence, and the amendment in question was an extreme hardship on her. She did not have an immediate family member who could live in the residence.

¶ 8 The plaintiff testified that she rented out the residence consistently until 2007. Most of her tenants stayed for several years and she never received any complaints from the Association's Board about her tenants or the residence. She submitted a letter to the Board in September 2007 in which she requested the hardship exception under the amendment. She received a written response declining her request, although no reason was given for the denial.

¶ 9 Edgard Hernandez testified that he had been the Board's president for the past year-and-a-half and had served on the Board since 2007. He recalled that the reason the amendment was proposed was due to problems with residences that were being rented. The amendment was adopted after the signatures of about 83% of the owners in the association were obtained.

Hernandez also stated that since the amendment was adopted, the number of violations he referenced had dropped by about 75%.

¶ 10 When asked about whether any standards existed to govern the Board's decision whether to permit an owner's family member to live in the residence, Hernandez stated:

> "Each case is individual. ***We ask for a lot of documents proving this is my son. This is my daughter. We ask them for all documentation on it. And if for some reason we didn't get the documentation and it wasn't proven, we would have the right to disapprove."

He also stated that he never saw the plaintiff's hardship letter and could not recall the Board ever ruling on it. Further, Hernandez also stated that he did not think the plaintiff's failure to live in the residence was a violation of the amendment, although with regard to potential enforcement of that portion of the amendment, Hernandez stated that he would have to consult with the Association's attorney. Additionally, Hernandez stated that the rationale behind allowing the Association to rent out units was to recoup money owed to the Association.

¶ 11 The circuit court issued its decision in October 2013. Applying the principles of contract law to the case, the court found that the amendment was arbitrary because it allowed the Association to lease the residences, but the owners could not. The court also noted that: (1) the amendment gave the Board the option to deny an owner's request to rent his or her residence to a family member; (2) the amendment required an owner to live on the property, but the Board's president did not think that the plaintiff was violating the amendment by not living in her house; (3) no complaints had even been made with regard to the plaintiff's property; (4) properties could be vacant for many reasons, including deaths, which would create violations of the amendment; (5) the hardship exception in the amendment provided no guidance on its application or on the

process for voting on requests for the exception; and (6) Hernandez, the Board's president, could not recall ever seeing the plaintiff's hardship-exception request or voting on it. The court concluded that the amendment was "vague, ambiguous, unreasonable and arbitrary in the application." Accordingly, the court ruled in favor of the plaintiff. The defendant appealed.

¶ 12 ANALYSIS

¶ 13 On appeal, the defendant argues that the circuit court erred when it ruled that the amendment was vague, ambiguous, unreasonable and arbitrary in its application to the plaintiff's property. Specifically, the defendant contends that the court applied the wrong legal standard and that the court's factual findings were erroneous.

¶ 14 Initially, we note that on July 29, 2010, the Common Interest Community Association Act (765 ILCS 160/1 (West 2012)) went into effect in Illinois, which provides comprehensive regulations for homeowner's associations. However, the amendment in this case was passed prior to that effective date, and, as such, this case does not fall under the Common Interest Community Association Act.

¶ 15 The defendant asserts that this case should fall under the purview of the First District's decision in *Apple II Condominium Association v. Worth Bank and Trust Co.*, 277 Ill. App. 3d 345 (1995). *Apple II* addressed the issue of whether a condominium association could amend its declaration to prohibit its members from leasing their units. *Id.* at 346. The *Apple II* court acknowledged that condominium associations were subject to the Condominium Property Act (765 ILCS 605/1 *et seq.* (West 1994)) and noted that the case presented an issue of first impression. *Id.* at 348-49. In looking at case law from other jurisdictions, the *Apple II* court stated:

> "We decline to make a blanket pronouncement approving or condemning condominium leasing restrictions or to adopt the reasonableness test discussed in [*Worthinglen Condominium Unit Owners' Association v. Brown*, 57 Ohio App. 3d 73 (1989)]. A higher level of deference is necessary when courts review decisions made by self-governing bodies such as condominium associations. We therefore employ what we conclude is a better-reasoned approach to the problem which was employed by the Florida Appellate Court in *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637 (Fla. App. 1981)." *Id.* at 350.

After applying that approach, the *Apple II* court held that "an Illinois condominium association may prohibit the leasing of units either by Board action or by a vote of the entire association pursuant to the terms of the condominium declaration." *Id.* at 352.

¶ 16 Contrary to the defendant's claim, there is nothing in *Apple II* to indicate that its holding would extend to homeowner's associations as well. The *Apple II* holding was limited strictly to condominium associations. See *Id.* at 348-52. Moreover, the defendant's claim that "[t]he Illinois courts, subsequently, further clarified that the test set forth in *Apple II* for restrictive covenants in a declarations [*sic*] does apply to non-condominium associations" is misleading. In support of this misleading claim, the defendant points out that *Apple II* was cited in *Scott v. York Woods Community Association*, 329 Ill. App. 3d 492, 501 (2002). While it is true that *Scott* involved homeowner's associations, *Scott* appears to be an anomaly and, given that it is a Second District case, we are under no obligation to follow it (see, *e.g.*, *In re Marriage of Reimer*, 387 Ill. App. 3d 1066, 1073 (2009) (one district of the appellate court is not bound by the decisions of another district)). Rather, we will apply the law on restrictive covenants that was established at the time in this district, just as the circuit court did in this case.

¶ 17 "Restrictions on the use of property conveyed in fee are not favored, but courts will enforce restrictive covenants if they are reasonable, clear, definite, and not contrary to public policy." *Sadler v. Creekmur*, 354 Ill. App. 3d 1029, 1036 (2004). Generally, any doubts and ambiguities within the restrictive covenant are to be construed in favor of the free use of the property involved, although that construction may not be employed to ignore or defeat specific language contained within the restrictive covenant. *Sherwood v. Rigsby*, 221 Ill. App. 3d 260, 261 (1991). The interpretation of a restrictive covenant presents a question of law that we review *de novo*. *Sadler*, 354 Ill. App. 3d at 1036; *Ripsch v. Goose Lake Association*, 2013 IL App (3d) 120319, ¶ 10.

¶ 18 Our review of the record in this case reveals no error in the circuit court's decision. The amendment purported to prohibit the rental and leasing of units within the Association's administration, yet it allowed the Association to do so, which Hernandez described as being allowed so the Association could recoup money owed to it. The amendment also purported to require occupancy, despite the fact that countless reasonable circumstances exist that could prevent an owner from complying with that mandate, which would in turn subject the owner to sanctions with no means of being able to recoup those losses. Further, the amendment provided no standards for the Association's review of non-owner occupancy or for reviewing hardship applications, thereby subjecting both types of applications to potentially arbitrary enforcement. Under these circumstances, we hold that the amendment was not reasonable, clear, or definite. Accordingly, we hold that the circuit court did not err when it ruled in favor of the plaintiff on her motion for declaratory judgment.

¶ 19 CONCLUSION

¶ 20 The judgment of the circuit court of Will County is affirmed.

¶ 21 Affirmed.