

IN THE CHANCERY COURT OF HANCOCK COUNTY, MISSISSIPPI

FILED

ELLIOTT HOMES, LLC

PLAINTIFF

AUG 02 2019

VERSUS

Cause No. 23Ch1:2019-cv-36(JP)

STATE OF MISSISSIPPI, ET AL.

TIMOTHY A. KELLAR
CHANCERY CLERK

D.C.

DEFENDANTS

LOTS 6 AND 7, THE HIGHLANDS, DIAMONDHEAD, HANCOCK COUNTY, STATE OF MISSISSIPPI, ACCORDING TO THE OFFICIAL MAP OR PLAT THEREOF ON FILE AND OF RECORD IN THE OFFICE OF THE CHANCERY CLERK OF HANCOCK COUNTY, MISSISSIPPI.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This cause came before the Court on the Motion to Dismiss filed by the defendants collectively referred to as the Highlands Residents¹ and the Motion for Summary Judgment filed by plaintiff Elliott Homes, LLC ("Elliott"). The parties were represented by counsel as follows: Michael Casano, Esq., for Elliott Homes, LLC, Amanda Traxler, Esq., for the Highlands Residents, Derek Cusick for the City of Diamondhead, =David Allen, Esq., for The People's Bank, Biloxi, Mississippi and David Crane, Esq., for the Diamondhead Property Owners Association and the Diamondhead Architectural Committee. And now, having heard and considered the arguments of counsel, as well as the parties' respective post-hearing memoranda, the court finds and determines as follows:

1. Elliott Homes, Inc. ("Elliott") is planning an approximately 108 unit residential development on 29 acres of unplatted land located in Diamondhead, MS. Access to this development will be across two platted lots, specifically Lots 6 & 7, The Highlands, also located within the city of Diamondhead. See Map, Exhibit J to Petition. According to The Highlands' Covenants, Lots 6 & 7 are marked for single family residential use.² In order to use Lots 6 & 7 for

¹The following persons and entities, referred to collectively as the Highlands Residents, or "Highlands" are: Louis W. Ertel Living Trust, dated February 19, 2008 and Teresa L Ertel Living Trust, dated February 19, 2008, John W. Wise and Helen M. Wise, Donald P. Boudreaux and Ann A. Boudreaux, Sandra Woods Caraway as trustee of the Sandra Wodds Caraway Trust Agreement dated March 31, 2005, Wendy Holmes, and James L. Gaines and Robin Browne Gaines.

²The Highlands Covenants are formally titled Declaration of Restrictions, Conditions, Easements, Covenants, Agreements, Liens and Charges, Diamondhead, The Highlands. Petition, Exhibit K.

ingress and egress, Elliott requested a variance pursuant to The Highlands' Covenants, which was granted on October 19, 2018 by the Architectural Committee. *See* Variance, Exhibit L to Petition. Specifically, Elliott was granted:

a variance...for the proposed use of Lots 6 & 7 of the Highlands subdivision
(a) for ingress and egress during construction and development of a proposed
developmentand/or (b) for use as a public right of way. *Id.*

Thereafter, Elliott's title insurance provider advised that Lots 6 & 7 would be excluded from coverage without a judicial determination of the authority of the Architectural Committee to grant the variance as to the use of Lots 6 & 7 for ingress and egress.

2. On January 17, 2019, Elliott filed its Petition for Declaratory Judgment and to Partially Vacate Plat.³ Elliott seeks the following relief: (1) a declaratory judgment pursuant to Miss. R. Civ. P. 57 stating that the Architectural Committee of the Diamondhead Property Owner's Association had the authority pursuant to the Highlands' Covenants to grant the variance as entered on October 19, 2018, (2) that the variance was validly granted, and (3) a request to partially abandon the plat with respect to Lots 6 & 7 pursuant to Miss. Code Ann. § 19-27-31.
3. On March 7, 2019, The Highlands filed its Motion to Dismiss (Dkt. 25) alleging error on several grounds including lack of subject matter jurisdiction, lack of personal jurisdiction, and insufficiency of service of process. Miss. R. Civ. P. 12.
4. Thereafter, on March 18, 2018, Elliott filed its Motion for Summary Judgment with respect to the declaratory judgment portion of its Petition. The Highlands Property Owners filed their response on March 27, 2019.
5. The parties appeared for oral argument on May 16, 2019, at which time the court requested letter briefs addressing the application of *Stokes v. Bd. of Directors of La Cav Imp. Co.*, 654 So. 2d 524, 527 (Miss. 1995) to the case *sub justice* as well as application of certain provisions of the Covenants to Miss. Code Ann. § 19-27-31.

³Elliott did not hold title to Lots 6 & 7 at the time it filed the initial Petition, but has since taken title. Elliott has filed a Motion to Amend Petition (Dkt 28) pursuant to Miss. R. Civ. P. 15(a), to reflect the change in ownership, however, this motion is not presently before the court.

Analysis

6. The Highlands Property Owners seek dismissal of Elliotts' complaint for its failure to state a claim upon which relief may be granted. "A motion to dismiss for failure to state a claim under Mississippi Rules of Civil Procedure 12(b)(6) raises an issue of law." *Black v. City of Tupelo*, 853 So.2d 1221 (Miss.2003) (internal citations omitted). "When considering a motion to dismiss, the allegations in the complaint must be taken as true, and the motion should not be granted unless it appears beyond doubt the plaintiff will not be able to prove any set of facts in support of his claim." *Id.*, at 1224.
7. Lots 6 & 7, The Highlands, Diamondhead, Mississippi are subject to the following relevant Covenants and restrictions:

III. Land Use. All lots, tracts and parcels of the subdivision shall be used only as herein set forth and zoned, and such designated usage can be changed only by the approval of the Architectural Committee as provided for herein. All lots of the subdivision shall be used *only for single family residence*, except those lots whose use is specifically indicated for purposes other than single family as set forth herein...

IV. Use and Improvement. Each and every one of the lots and tracts of the subdivision described above shall be improved, occupied and used for the respective purposes and permitted uses as designated in the following Zoning Classification:

A. Zone R-S-2+1,600 - *Residential - Single Family*...

X. Variances. A. The Architectural Committee may allow reasonable variances and adjustments of these conditions and restrictions in order to overcome practical difficulties and prevent unnecessary hardships in the application of the regulations contained herein; provided, however, that such is done *in conformity to the intent and purposes hereof*; and, provided, also that in every instance such variance or adjustment *will not be materially detrimental or injurious to other property* or improvements in the neighborhood. Variances and adjustments of height, size and setback requirements may be granted hereunder.

B. The Architectural Committee may also determine and allow in the respective classification of lots, additional uses which are of the same character.

XXII. Amendments. Any or all of the provisions of these restrictions, conditions, easements, covenants, liens and charges, may be annulled, amended or modified at any time by the consent of the owner or owners of record of eighty-five (85)

percent of the lots in all phases of Diamondhead, The Highlands.

(emphasis added)

8. The general rule concerning restrictive covenants in Mississippi is that “in the case of ambiguity, construction is most strongly against the person seeking the restriction and in favor of the person being restricted.” *Stokes v. Bd. of Directors of La Cav Imp. Co.*, 654 So.2d 524, 527 (Miss. 1995) (citing *Kemp v. Lake Serene Property Owners Assoc., Inc.*, 256 So.2d 924 (Miss.1971)). The entire document should be read, and consideration given to the circumstances surrounding its creation, in order to determine its meaning. *Id.*
9. Elliott’s proposed use of Lots 6 & 7 for ingress and egress to a new residential development does not conform to the permitted uses as contemplated by the Highland’s Covenants. The above excerpts from The Highlands’ Covenants, when read as a whole, contemplate a purely residential use for Lots 6 & 7. The various sections emphasize that use is zoned for single family residences, only, and that changes, variances, and the like may be made only as to the conditions and restrictions placed on the residences themselves (i.e. height, size, and setback”). When read as a whole, the Covenants do not allow for a use other than “single family dwellings.”
10. The language in the covenants regarding the authority of the Diamondhead Architectural Committee appears to be limited to the scope of what is permitted by the covenants; that the Diamondhead architectural committee does not have the authority to agree to a nonresidential use of lots in the subdivision.
11. The Highlands Covenants further provide that to approve the variance would require an amendment of the plat and that amendment of the plat requires approval of 85% of the Highlands property owners.
12. Although Elliott argues that using the lots for ingress and egress to a new residential development will be within the meaning and spirit of the Highlands Covenants, this threatens to become “materially detrimental or injurious to other property or improvements in the neighborhood.”
13. Accepting the factual allegations in the Complaint as true, and based on the foregoing

Mississippi law, the Court finds that Plaintiffs' have not stated a claim upon which relief may be granted. Therefore, for the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that the Defendants' Motion for to Dismiss is hereby GRANTED. It is further,

ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment is DENIED.

SO ORDERED AND ADJUDGED, this the 2 day of August, 2019.



CHANCELLOR

Copies to:

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Amanda Traxler, Esq. *CC*
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