REL: 10/07/2011

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2011-2012

2100498

Mark Slaby and Maria Slaby

v.

Mountain River Estates Residential Association, Inc.

Appeal from DeKalb Circuit Court
(CV-09-171)

MOORE, Judge.

Mark Slaby and his wife, Maria Slaby, appeal from a judgment of the DeKalb Circuit Court ("the trial court") enjoining the Slabys from the short-term rental of their property, a lot on which a cabin is situated, based on its

determination that such a short-term rental is prohibited by a restrictive covenant burdening their property. We reverse and remand.

Procedural History

On June 19, 2009, Mountain River Estates Residential Association, Inc. ("the Association"), filed a complaint against the Slabys in the trial court. The Association asserted that the Slabys had violated a restrictive covenant burdening the lots in the Mountain River Estates subdivision in DeKalb County, which states:

> "The subject property is restricted to single family residential purposes only. No commercial, agricultural or industrial use shall be permitted."

Specifically, the Association asserted that the Slabys had rented their property in the Mountain River Estates subdivision to various persons who are not related family members of the Slabys and, thus, that they had used their property for commercial purposes in violation of the restrictive covenant. The Association requested a permanent injunction enjoining the Slabys from using their property for purposes other than as a single-family residence and from using their property for commercial purposes.

The Slabys filed an answer to the Association's complaint on August 11, 2009. A trial was held on April 12, 2010, and both the Association and the Slabys filed briefs in the trial court upon the completion of the trial.

On January 18, 2011, the trial court entered a judgment, which stated, in pertinent part:

> "Single-family Residential Purposes Only
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> "The covenant restricts the use of the subject property to single-family residential purposes only. A single-family residence has been appropriately defined as a house occupied by one family. See Hooker v. Alexander, 129 Conn. 433, 29 A.2d 308 (1942). It follows that the term single-family residential purpose manifests an intent that a residence not be used for residential purposes by multi-family or non-family groups.
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> "Construing the term residential purposes employing the common and ordinary meaning of the words used, it denotes the occupying of a premises for the purpose of making it one's usual place of abode. It does not mean occupying a premises for vacation or transient purposes.
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> "The Texas Court of Appeals has held that a deed restriction providing that no lot in a subdivision could be used except for 'single-family residence purposes' prohibited the homeowners from renting their property on a weekly and/or weekend basis, though the restriction did not prohibit all rental of property. Benard v. Humble, 990 S.W.2d 929 (Texas. Ct. App. 1999).
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> "The court finds that the use of the Slabys' property by multi-family and non-family groups on an

ongoing basis for vacation and transient purposes clearly violates the intent of the restriction that limits its use to single-family residential purposes.

"Commercial Use

"The covenant also prohibits commercial use of the subject property.

"The word commercial is commonly used to describe a wide array of business and trade enterprises that involve the exchange of goods or services for money. Here, the [Slabys] are providing persons the use of their house in exchange for money. They provide short-term lodging to transitory occupants, much like the lodging provided by a motel or a bed and breakfast. Like a motel or a bed and breakfast, they also collect and pay lodging taxes to the State. The [Slabys] advertise extensively and promote the rental of their house in a manner that is consistent with that of a commercial or business endeavor.

"The District Court of Florida has held that a covenant that permitted rental of residential property but that prohibited its use for business or commercial purposes precluded the use of the property as a bed and breakfast. The Court opined that the rental of a residence in the context of such deed restriction permitted the rental only as a residence and not as a facility serving temporary or transient guests from the general public. Robins v. Walter, 670 So. 2d 971 (Fla. Dist. App. 1995).

"The Court of Appeals of Michigan recently held that a prohibition against commercial use prevented property owners from using their property for vacation rentals for a week or less to transient guests. Enchanted Forest Property Owners Association v. Schilling, [(No. 287614)] (Mich. [Ct.] App. March 11, 2010) [(not reported in N.W.2d)].

> "The court finds that the covenant restriction against commercial use of the property clearly and unambiguously precludes the rental use that [the Slabys] are making of their property.
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> "....
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> "ADJUDICATION
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> "For the reasons set forth, the court finds that the use being made by the [Slabys] of the subject property, i.e., short-term rentals to transitory guests including multi-family groups, is a violation of the applicable restrictive covenant. Accordingly, it is adjudged that the [Slabys] are permanently enjoined from engaging in a commercial use of the property by renting it on a short-term basis of one week or less and from renting it to multi-family and non-family groups."

The Slabys filed a motion to stay the execution of the trial court's judgment pending appeal on February 23, 2011; that motion was granted, and the trial court set a supersedeas bond in the amount of $7,500. The Slabys appealed to the Alabama Supreme Court on February 28, 2011; that court transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.

Facts

Mark Slaby testified that, on February 15, 2006, he and his wife purchased two lots in the Mountain River Estates subdivision in Mentone on which to construct a vacation home.

At the time they purchased the property, the Slabys became members of the Association. Mark testified that he and his family began construction of a five-bedroom log cabin around December 2006. According to Mark, he had built the cabin as a vacation home for his family, but, as the economy grew worse, the Slabys decided, around June or July 2007, to change the cabin so that it could be used for rentals. He testified that they first rented the property in October 2007.

Mark testified that the name of their cabin in the Mountain River Estates subdivision is "Little River Harmony." He testified that he had brochures drawn up and that the Slabys dispensed those brochures for one year at the DeKalb County Tourist Bureau; those brochures informed people how to contact the Slabys if they wanted to rent their cabin. He testified that they have one Web site that they maintain and that that Web site, in turn, links to another Web site for which they pay an annual amount to have their cabin listed for rental. He testified that persons who want to make a reservation to rent the cabin contacted Maria Slaby via e-mail or telephone. According to Mark, at the time of trial, they were advertising the cabin on their Web site; he stated that

Maria handles all the advertising and that they do not list the cabin with any rental company or management company. He further stated that they do not maintain a real-estate office, a business office, or a rental office on the premises. He stated that all rental money is exchanged offsite, via the Internet.

He testified that there are 2 different levels in the cabin; "D.C. al Fine," which is the top floor, has 4 bedrooms and sleeps up to 14, and "Pizzicato," which is the downstairs area, sleeps 6. Each level is accessible from the outside. He testified that either the top level or the bottom level can be rented or the entire cabin can be rented. He testified that Maria had told him that up to 25 people had stayed there at once.

Mark presented a chart revealing that the average monthly rental revenue from the cabin is $2,773 and that the total revenue from October 2007 to November 2009 had been $74,858. He stated that the cost to buy the lots and to build the cabin was approximately $500,000. He testified that the average rental amount does not cover all the debt associated with the property and that they had not made any profit from renting

the cabin. According to Mark, they rent the cabin as a means of trying to offset some of the debt that they incur on the cabin. If they are not able to offset that debt to some extent, Mark stated, it would jeopardize their ability to maintain the cabin. He testified that they had hired someone to clean the property and that Maria pays that person. Maria testified that she collects lodging tax and remits it to the State of Alabama and to the county.

With regard to the policies in effect at the cabin, Mark testified that he did not think there was a restriction on who could rent the cabin. He testified that they have rented to families, to church groups, to youth groups, and to women and mothers seeking a weekend vacation; he also testified that family reunions are popular because of the location of the property. He stated that the typical size of the group that rents the cabin is 10 to 15 people. Mark testified that they do not provide services for renters to purchase or transportation, food, or beverages for the renters. He testified that there is no restaurant on the premises and that renters must prepare their own meals, change their own linens, take out the garbage, do their own laundry, and clean the

house during their stay. Mark stated that people use the cabin to "eat, sleep, and hang out."

Mark testified that the Slabys screen their renters, that people are screened economically because the rental fees are high, that the Slabys make it clear that the cabin is their home, and that the Slabys do not encourage "spring breakers." He testified further that Maria talks to or e-mails potential renters and that they had never had college kids stay as a group. Mark testified that they had never received any complaints from neighbors or Association members about the conduct or activities of any of their renters.

A number of property owners in the Mountain River Estates subdivision testified at trial and requested that the trial court rule to prohibit the Slabys' rental of their property.

Discussion

The Slabys first argue on appeal that the trial court erred in concluding that the rental of their cabin is prohibited by the restrictive covenant at issue. Specifically, they assert that the trial court (1) misconstrued the phrase "residential purposes" in the restrictive covenant, (2) erred in its interpretation of the

requirement in the restrictive covenant that the property be used for "single family residential purposes only," and (3) erred in concluding that the rental of the Slabys' cabin violated the portion of the covenant prohibiting "commercial use" of the property.

> "Restrictive covenants will be recognized and enforced when established by contract, but they are not favored and will be strictly construed. Carpenter v. Davis, 688 So. 2d 256, 258 (Ala. 1997). Our Supreme Court has held that
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> > "'in construing restrictive covenants, all doubts must be resolved against the restriction and in favor of free and unrestricted use of property. However, effect will be given to the manifest intent of the parties when that intent is clear .... Furthermore, restrictive covenants are to be construed according to the intent of the parties in the light of the terms of the restriction and circumstances known to the parties.'
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> "Hines v. Heisler, 439 So. 2d 4, 5-6 (Ala. 1983). If 'there is no inconsistency or ambiguity within a restrictive covenant, the clear and plain language of the covenant is enforceable by injunctive relief.' Carpenter, 688 So. 2d at 258.
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> > "'"[W]hether or not a written contract is ambiguous is a question of law for the trial court." "An ambiguity exists where a term is reasonably subject to more than one interpretation." "The mere fact that adverse parties contend for different constructions does not in itself force the

> conclusion that the disputed language is ambiguous."'
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> "Ex parte Awtrey Realty Co., 827 So. 2d 104, 107 (Ala. 2001) (citations omitted). Moreover, the parties cannot create ambiguities by setting forth 'strained or twisted reasoning.' Twin City Fire Ins. Co. v. Alfa Mut. Ins. Co., 817 So. 2d 687, 692 (Ala. 2001). Nor does an undefined word or phrase create an inherent ambiguity. Id."

Hipsh v. Graham Creek Estates Owners Ass'n, 927 So. 2d 846, 848-49 (Ala. Civ. App. 2005). See also Grove Hill Homeowners' Ass'n v. Rice, 43 So. 3d 609, 614 (Ala. Civ. App. 2010).

Although the appellate courts of this state have not yet ruled on a case involving circumstances similar to those in the present case, a number of other jurisdictions have addressed the issue whether restrictive covenants similar to the one at issue in this case prohibit property owners subject to those covenants from engaging in the short-term rental of their property.

In Lowden v. Bosley, 395 Md. 58, 73, 909 A.2d 261, 269 (2006), cited by the Slabys, the Maryland Court of Appeals determined that the owners of a vacation home subject to a restrictive covenant requiring that lots in the subdivision be used for "'single family residential purposes only'" were not in violation of that covenant based on the short-term rental

of that home. Specifically, the Maryland Court of Appeals determined that the owners' receipt of rental income was not inconsistent with the use of the property at issue as a residence, noting that the covenant, on its face, did not prohibit the short-term rental of the home. 395 Md. At 67, 909 A.2d at 266. That court stated that "'[r]esidential use,' without more, has been consistently interpreted as meaning that the use of the property is for living purposes, or a dwelling, or a place of abode." 395 Md. at 68, 909 A.2d at 267. Although the circumstances in Lowden are similar to those in the present case, we note that the restrictive covenant in that case did not prohibit commercial use of the property, as does the restrictive covenant in this case.

In Yogman v. Parrott, 325 Or. 358, 360-63, 937 P.2d 1019, 1020-22 (1997), also cited by the Slabys, the Supreme Court of Oregon concluded that references in a restrictive covenant limiting the property to "'residential'" purposes and prohibiting any "'commercial enterprise'" on the property were ambiguous. The court concluded that it could not determine the contracting parties' intent and that, strictly construing the covenant, the rental of the property was permissible

because that use was not "'plainly within the provisions of the covenant.'" 325 Or. at 366, 937 P.2d at 1023.

The Supreme Court of Idaho, in Pinehaven Planning Board v. Brooks, 138 Idaho 826, 70 P.3d 664 (2003), determined that restrictive covenants disallowing "'commercial or industrial ventures or business of any type'" from being maintained on any lot in the subdivision were not ambiguous and, "according to their plain meaning, clearly allow the rental of residential property," whether short-term or long-term. 138 Idaho at 827, 829, 70 P.3d at 665, 667. Specifically, the Supreme Court of Idaho concluded that the rental of the single-family dwelling on the property "to people who use it for the purposes of eating, sleeping, and other residential purposes does not violate the prohibition on commercial and business activity as such terms are commonly understood." 138 Idaho at 830, 70 P.3d at 668.

The Slabys cited a number of other cases that also support their argument that the short-term rental of their property is not prohibited by the restrictive covenant at issue. See Applegate v. Colucci, 908 N.E.2d 1214, 1219-21 (Ind. Ct. App. 2009) (although the rental of property subject

to restrictive covenants requiring parcels to be "'used only for residential purposes,'" prohibiting commercial business from being carried on, and stating that "'[n]othing herein contained shall prevent the leasing or renting of property or structures for residential use ....'" was not prohibited, the maintenance of a rental office on the property created a question of fact as to whether covenants were violated); Scott v. Walker, 274 Va. 209, 218, 645 S.E.2d 278, 283 (2007) (rental of property not prohibited by restrictive covenants requiring lots to be used for residential purposes because covenants were silent as to leases or rental agreements and the term "residential purposes" was ambiguous); Catawba Orchard Beach Ass'n v. Basinger, 115 Ohio App. 3d 402, 409, 685 N.E.2d 584, 589 (1996) (short-term rental of property did not violate restrictive covenant when no business was conducted on property and property was used as single-family residences for one family each); Siwinski v. Town of Ogden Dunes, 922 N.E.2d 751, 754 (Ind. Ct. App. 2010) ("'single-family dwelling'" in zoning ordinance refers to physical activity conducted upon the property rather than the profit-making intentions of the homeowners); and Mason Family Trust

v. DeVaney, 146 N.M. 199, 202, 207 P.3d 1176, 1179 (N.M. Ct. App. 2009) (strictly and reasonably construed, a restriction stating that property shall be used for dwelling purposes only and not for business or commercial purposes does not forbid short-term rental for dwelling purposes).

The Slabys also cite cases for the proposition that when a covenant fails to include language requiring buildings to be "'owner occupied,'" the owners of the property "are not constrained in the character of their residential use of the property by the deed covenants." Silsby v. Belch, 952 A.2d 218, 222 (Me. 2008). See also Bear v. Bernstein, 251 Ala. 230, 232, 36 So. 2d 483, 484 (1948) ("courts should not extend, by construction, the restraint beyond its proper scope by writing into it what is not clearly prohibited").

The Association relies on Enchanted Forest Property Owners Ass'n v. Schilling, (No. 287614, March 11, 2010) (Mich. Ct. App. 2010) (not reported in N.W.2d), also relied on by the trial court, in which the Michigan Court of Appeals interpreted a restriction stating that "'[a]ny structure erected shall be a private residence for use by the owner or occupant .... No part of said premises shall be used for

commercial or manufacturing purposes.'" The Michigan Court of Appeals concluded that the restriction "expresses a clear intent to permit use of the property only for private residential use" and that "[u]se of the property to provide temporary housing to transient guests is a commercial purpose, as that term is commonly understood." We find it noteworthy that the restriction in Schilling includes language restricting the use to the "'owner or occupant,'" thus making the covenant in that case more restrictive than the covenants in a number of other cases cited by the Slabys that do not contain such language, like the covenant in the present case. Therefore, we conclude that Schilling is distinguishable from the present case.

The trial court also relied on Robins v. Walter, 670 So. 2d 971 (Fla. Dist. Ct. App. 1995), and Benard v. Humble, 990 S.W.2d 929 (Tex. App. 1999). In Robins, the First District Court of Appeals of Florida determined that the operation of a bed and breakfast was prohibited by restrictive covenants limiting the erection of structures on the property to "'one detached single family dwelling unit'" and requiring that no structure be used for business or commercial purposes. 670

So. 2d at 973. The covenants in Robins further noted that "'the renting of the premises in whole or in part shall not be construed to be a business or commercial operation.'" Id. We note first that the covenants in the present case, unlike those at issue in Robins, are silent as to the permissibility of property rental. Moreover, based on the Florida court's determination that the operation of the bed and breakfast was prohibited by the covenants in Robins, it is clear that that court distinguished the operation of a bed and breakfast from "renting of the premises," which was expressly permitted by the restrictive covenants in that case; it stated that "[t]he rental of a residence in the context of the deed restrictions in the instant case and under common understanding involves the rental as a residence rather than just a facility serving temporary or transient guests from the general public." Id. at 975. Thus, the present case, in which the Slabys rented their cabin as a residence to specific groups, is distinguishable from Robins.

Perhaps the most indistinguishable case cited by the trial court is Benard, in which the Texas Court of Appeals concluded that the covenant at issue, which stated that "'[n]o

lot shall be used except for single-family residence purposes,'" prohibited the rental of the property for a period of less than 90 days. Id. at 932. The court in Benard focused on the definition of "residence," equating it with domicile, or "one's home and fixed place of habitation," and noted that Texas requires 90 days to establish residency for the purposes of filing a divorce action, among other purposes. Benard, 990 S.W.2d at 931. In Benard, however, the court's focus on the meaning of "residence" ignored the whole phrase used in the relevant restrictive covenant.

The Slabys cite the following from 43 Am. Jur. Proof of Facts 473 (Residential Property) § 8 (3d ed. 1997):

> "In construing the term 'single-family dwelling' as used in restrictive covenants, many courts have held that the term only refers to the type of building which may be constructed, and not to the use of such a building. Thus, where a restrictive covenant states that only a 'single-family dwelling' may be constructed on the property without further qualification, such as a limitation on the use of the property to 'residential purposes only,' the building may be put to any use as long as it has the appearance of a single-family dwelling. On the other hand, when the term 'single-family dwelling' is coupled with the phrase 'residential purposes only,' nonresidential uses may not be made of the building. However, in this latter situation, courts have also held that there is no requirement that the dwelling be inhabited by a 'single' family, as long as the building is used for residential purposes."

(Footnotes omitted.)

We agree with that reasoning and with the reasoning in the majority of the caselaw from other jurisdictions -- i.e., that a restrictive covenant restricting the use of property to single-family residential purposes only, like the covenant in this case, refers to the purposes for which the property is permitted to be used, such as for eating, sleeping, and other residential purposes, but does not impose a requirement that only the owners of the property can occupy the property. See, e.g., Lowden v. Bosley, 395 Md. at 67, 909 A.2d at 266; and Pinehaven Planning Bd. v. Brooks, 138 Idaho at 830, 70 P.3d at 668. Because the Slabys rent their property to groups who use the cabin for residential purposes only, we conclude that the Slabys' short-term rental of the property does not violate the terms of the restrictive covenant limiting the use of the property to single-family residential purposes.

We conclude also that the restriction in the covenant that commercial use is not permitted on the property similarly does not prohibit the Slabys from the short-term rental of their property. Black's Law Dictionary defines "commercial use" as "[a] use that is connected with or furthers an ongoing profit-making activity." Black's Law Dictionary 1681 (9th ed.

2009). The Association concedes in its brief on appeal that the term "commercial" is typically associated with profit, yet it asserts that, "[a]lthough the Slabys claim they did not make a profit renting their cabin, that fact does not change the commercial nature of their enterprise." We disagree. Rather, we agree with the majority of the jurisdictions that have addressed the issue and conclude that the restriction on "commercial use" in the restrictive covenant at issue in this case does not contemplate the short-term rental of the property by the Slabys. Rather, that rental falls into the category of residential use, as discussed above.

We conclude, therefore, that the restrictive covenant at issue in the present case is unambiguous and that the rental of the Slabys' property was not precluded by the restriction requiring that the property be used for single-family residential purposes only or prohibiting commercial use of the property. We limit this decision to the circumstances presented in this case, noting that any number of factors, such as those presented in cases cited above from other jurisdictions, could affect the application of restrictive covenants to the short-term rental of property subject to such

covenants. We reverse the trial court's judgment prohibiting the Slabys' rental of their property and remand the case for the entry of a judgment consistent with this opinion. Because we are reversing the trial court's judgment based on our interpretation of the covenant, we decline to address the Slabys' remaining arguments on appeal.

REVERSED AND REMANDED.

Pittman, J., concurs.

Bryan and Thomas, JJ., concur in the result, without writings.

Thompson, P.J., dissents, with writing.

THOMPSON, Presiding Judge, dissenting.

I believe that the reasoning of the trial court in reaching its decision -- most of which is quoted in the main opinion -- was sound; therefore, I would affirm the judgment of the trial court.