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| DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: 270 S. Tejon Colorado Springs, CO 80903 | EFILED Document CO El Paso County District Court 4th JD Filing Date: Jun 8 2009 4:23PM MDT Filing ID: 25550033 Review Clerk: Donna Maes |
| Plaintiffs: MICHAEL COLGATE and BARBARA COLGATE vs. Defendants: GOLDEN HILLS HOMEOWNERS ASSOCIATION, a Colorado Nonprofit Corporation, and all unknown persons who claim any interest in the subject matter of this action | COURT USE ONLY |
| Defendants' Attorney: Lenard Rioth #2942 Stephen J. Lebel # 8367 Bryce Meighan #34979 ANDERSON, DUDE & LEBEL, P.C. 111 South Tejon, Suite 400 Colorado Springs, CO 80903 Telephone: (719) 632-3545 Facsimile: (719) 632-5452 e-mail: bmeighan@adllaw.com | Case Number: 2008CV3403 Div: 13 |
| REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION IN THE ALTERNATIVE TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTIES OR TO REQUIRE JOINDER | |

COMES NOW the Defendant Golden Hills Homeowners Association (the "Association"), by and through its attorneys, ANDERSON, DUDE & LEBEL, P.C., and respectfully submits this Reply, together with authority and analysis.

I. SUMMARY OF ARGUMENT

1. Plaintiffs filed this action against the Association and "all unknown persons who may claim any interest in the subject matter of this action." However, now that the Association has advised this Court that such parties exist and can easily be identified, the Plaintiffs ask this Court to ignore the caption of this action and limit this action to claimants "in actual possession of the claimed property." This argument has no merit.

2. As their arguments against joinder of the other owners/members of the Association, the Plaintiffs argue (1) that the Plaintiffs are already in actual possession of the property (which the Association disputes); (2) that they already own the property by operation of law (which the Association disputes); (3) that they are not trying to change the governing documents (as the Association asserts); and (4) that the rights of the other owners are limited to easements and will not be affected by Plaintiffs' lawsuit (Response, Section C, Pages 4-5) (which argument is directly contrary to Plaintiffs' quiet title lawsuit which seeks ownership of areas from which Plaintiffs would then seek to exclude other owners.)

II. ARGUMENT

3. Plaintiffs' first two arguments assert disputed facts and disputed conclusions of law as the basis of a self-serving conclusions. The very point of Plaintiffs' lawsuit is that they seek ownership of a portion of the Common Area which would allow Plaintiffs to exclude parties with a clear interest in preventing that outcome. All of the cases which are cited in Plaintiffs' Response are cases that required adjudication with all interested parties participating in order to achieve the conclusion that Plaintiffs would seek. None of those cases support the exclusion of any indispensable parties.

4. Plaintiffs' third argument is their only rebuttal to the clear authority furnished by the Association. As a result, at page 3 of their Response, the Plaintiffs begin part "B" of their argument with the claim that the Association's cases only apply to a declaratory judgment "seeking to change . . . the declaration of covenants applicable to all of the properties." However, that is exactly what the Plaintiffs are attempting in this action.

5. Plaintiffs' final argument appears to be completely inconsistent with their lawsuit. Plaintiffs' attempt to assert that the only rights held by other owners are easement rights and that Plaintiffs do "not seek a determination of the status of the alleged easement interests". (Response Page 2). However, those easement rights are completely inconsistent with Plaintiffs' claim of exclusive ownership and possession. The Plaintiffs' own claims require adjudication of the other owners' easement rights. In addition, Plaintiffs' claims violate at least six other owners' rights under the provisions listed in Paragraph 3 of the Motion filed by the Association. Further, those are only some of the provisions in the Declaration of Covenants which the Plaintiffs seek to change. By way of example, Section 2 of the Covenants provides that there is a prohibition against subdivisions. The gravamen of the Plaintiffs' action is an attempt to change the boundaries of their property to add property to their boundary, even though the property they claim is common property held for the use of all owners, pursuant to the other cited provisions.

6. Plaintiffs cannot pick and choose the provisions of the Declaration of Covenants which they want and ask this Court to ignore the rest of the Declaration. The rules of contract construction are applicable to protective covenants. *Wilson v. Goldman*, 699 P.2d 420, 423 (Colo. App. 1985). Every word of a restrictive covenant must be given a meaning. *Flaks v. Wichman*, 260 P.2d 737, 740 (Colo. 1953). Restrictive covenants must be construed as a whole in view of their underlying purposes. Construction should, if possible, give effect to all provisions contained in the covenants. *Richey v. Olson*, 709 P.2d 963, (Colo. App. 1985). *Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670, 681 (Colo. 1982).

7. Plaintiffs' argument in their Response that the Plaintiffs are seeking an order quieting title to property which they already own by operation of law is erroneous. In Section A of their Response, the Plaintiffs argue that they have not discovered any Colorado case law supporting the fact that the use restrictions imposed by the Covenants supplant the doctrine of adverse possession. However, the Plaintiffs have not furnished any case holding that an adverse possession claim can be used by parties bound by a Covenants to try to change that those Covenants and deprive their fellow owners of their rights.

8. Contrary to Plaintiffs' argument, the Colorado courts have found that an easement is an interest in real property as contemplated by the limitation period set forth in C.R.S § 38-41-101(1). The Colorado Supreme Court has ruled as follows:

Because the statute [C.R.S. § 38-41-101(1)] plainly states that it applies to *any* real property interest, and because the statute does not distinguish between possessory interests such as title to land and non-possessory interests such as title to an easement, we conclude that it applies to an action seeking to terminate an easement by adverse possession.

Matoush v. Lovingood, 177 P.3d 1262, 1269 (Colo. 2008). Every homeowner within the Association possesses a real property interest in the form of an easement to all Common Areas, including the portion which is the subject of this action brought by the Plaintiffs. The Supreme Court ruled in Matoush that adverse possession can terminate an easement under C.R.S. § 38-41-101(1). Therefore, an easement constitutes a "real property interest" and so every homeowner within the Association has an interest in the real property which may be affected by the outcome of this case and so is an indispensable party for a determination of such rights.

9. According to C.R.C.P Rule 19(a), a person who is properly subject to service of process in this action "shall be joined as a party" if he or she satisfies one of the following criteria:

(1) In his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) As a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

10. Each homeowners' ability to protect his or her easement right to the Common Area which is the subject of this suit will be impaired and impeded if they are not made a party to this action. The homeowners of the Association satisfy both parts A and B of Section 2 of C.R.C.P Rule 19(a) and are therefore indispensable parties to this suit. Failure to join indispensable parties may deprive the Court of jurisdiction to proceed in the lawsuit. Weng v. Schleiger, 273 P.2d 356, 359 (Colo. 1954).

11. Plaintiffs' own Response admits that all of the homeowners within the Association have claims to the areas in dispute. In Paragraph 3, Section B of their Response, Plaintiffs acknowledge that homeowners may seek to enter the Common Area which is the subject of this dispute under a claimed right of use deriving from the easement granted the homeowners by the Covenants. The Plaintiffs then admit they would have to address that issue with each claimant. See Paragraph 3, Section B of the Plaintiffs' Response. It is inconsistent for the Plaintiffs to argue on the one hand that none of the homeowners have an interest in this real property that requires they be made a party to this suit but on the other hand acknowledge that every homeowner within the Association has easement rights which may need to be adjudicated at some future date.

12. The Plaintiffs are also mistaken in their belief that the homeowners within the Association would only be indispensable parties to this action if those homeowners had actual possession of the claimed property. See Paragraph 3, Section B of the Plaintiffs' Response. C.R.C.P. 105(a) states in part:

An action may be brought for the purpose of obtaining a complete adjudication of the rights of all parties thereto, with respect to any real property and for damages, if any, for the withholding of possession. The court in its decree shall grant full and adequate relief so as to completely determine the controversy and enforce the rights of the parties. (Emphasis added).

13. Any person claiming a real property interest in property, which is subject to a quiet title lawsuit, is an indispensable party under Rule 19(a) and must be joined under the quiet title provisions of Rule 105. As Justice Davidson ruled in Keith v. Kinney, 961 P.2d 516 (Colo. App. 1997), rehear denied, cert. denied):

Actions to quiet title originated as claims in equity to invalidate claims adverse to the claimant. The equitable proceeding, known as a "bill *quia timet*" or bill of peace, addressed two types of situations. In the first type, one person challenged the claims of several others to the property. In the other, one person threatened a multitude of suits involving title to the property. F. Williams, Quieting Title in Colorado § 1 (1939); see Logan v. Clough, 2 Colo. 323 (1874). All parties with any claim to the property, or material interests which might be affected, were considered necessary to quiet title. F. Williams, *supra*, § 40.

* * * *

Thus, it is clear from the language of the rule that a C.R.C.P. 105 proceeding should completely adjudicate the rights of all parties to the action claiming interests in the property. See Hopkins v. Board of County Commissioners, 193 Colo. 230, 564 P.2d 415 (1977); Merth v. Hobart, 129 Colo. 546, 272 P.2d 273 (1954); Vogt v. Hansen, 123 Colo. 105, 225 P.2d 1040 (1950); 961 P.2d at 518-9.

None of those cases required that the party claiming the adverse right be in possession of the property. Plaintiffs must admit that the easements to use the Common Area constitute real property rights, and so their arguments are without merit or support.

14. As explained above, all homeowners within the Association have an easement/real property right to all of the Common Area, including that portion which is the subject of this suit. If every homeowner is not made a party to this suit, this Court will be unable to adjudicate completely the rights of all parties with respect to the real property in dispute and fully determine the controversy. Clearly, under C.R.C.P. 105(a), C.R.S. § 38-41-101(1) and C.R.C.P. Rule 19(a), all of the homeowners within the Association are indispensable parties to this action.

15. Finally, the Plaintiffs state in Section C of their Response "That the property is still arguably subject to an easement for use is a limitation that they [the Plaintiffs] are willing to

bear.” By that statement, the Plaintiffs appear to concede that each homeowner in the Association has an easement right to use this portion of the Common Area. However, it is unclear whether the Plaintiffs are agreeing to remove the fence which they have constructed blocking some portions of the claimed property and interfering with the use and enjoyment of that portion of the Common Area by the other homeowners in the Association. Once again the Plaintiffs’ arguments are inconsistent. The Plaintiffs first state that every homeowner within the Association may have easement rights which may need to be addressed (Paragraph 3, Section B of their Response), but on the other hand argue that such dispute may be postponed for the future (Section C of their Response).

16. No matter how hard the Plaintiffs attempt to argue that the other homeowners in the Association are not indispensable parties to this action, the Plaintiffs themselves repeatedly are forced to admit that each and every homeowner within the Association has an easement right for the use and enjoyment of the Common Area which is the subject of this dispute, that will be impaired and impeded if they are not made a party to this action, and that this Court will be unable to completely adjudicate the rights of all parties with respect to the real property and fully determine the controversy.

17. Finally, it should be pointed out that the Plaintiffs fail even to discuss the other rights which the homeowners have under the Covenants and which were listed in Paragraph 3 of the Association’s Motion or otherwise contained in the Declaration of Covenants.

II. CONCLUSION

The Association respectfully requests that this Court enter an order either (i) that the Complaint against the Association be dismissed for failure to join the indispensable parties, or (ii) in the alternative, that the Plaintiffs be required to join all of the homeowners within the Association as indispensable parties and that this Court award the Association its attorneys fees and costs and such further relief as the Court deems just and proper.

Respectfully submitted this 8th of June, 2009.

ANDERSON, DUDE & LEBEL, P.C.

/s/ original signature on file

By: _____
Bryce Meighan

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2009, a copy of the foregoing was served via Lexis Nexis File & Serve on the following:

Debra L. Fortenberry, P.C.
660 Southpointe Court, Suite 210 .
Colorado Springs, CO 80906

/s/ original signature on file

Roni Reynolds