IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

JOHN BARNER, ET AL.,

Plaintiffs,

CASE NO. 2010 CA 5791 NC

vs.

THE LANDINGS MANAGEMENT ASSOCIATION, INC., a Florida corporation,

Defendant.

______________________________/

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KAREN E RUSHING
CLERK OF CIRCUIT COURT
SARASOTA COUNTY FLORIDA

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Plaintiffs JOHN BARNER, ET AL. ("Plaintiffs"), by and through undersigned counsel and pursuant to Fla. R. Civ. P. 1.510, hereby file this Motion for Summary Judgment and Incorporated Memorandum of Law, and state in support thereof:

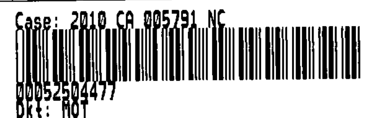
I. INTRODUCTION

1. The Plaintiffs are all residents of The Landings, a development in Sarasota County, Florida, and all own lots abutting a piece of property herein referred to as "Tract F" (later defined herein as the "Surrounding Lots"). The Defendant is a Florida not-for-profit corporation that was organized for the purposes described in Paragraph 17 of this Complaint. The dispute in this case arose over the proposed use of Tract F by the Defendants in this case. The facts, as explained below, are largely agreed upon. Those facts that have not been agreed upon are not material to the disposition of this case as a matter of law, as will also be explained below.

II. DISCUSSION

A. The Summary Judgment Standard

2. The Second District Court of Appeals, in *Manfrin v. Auto Owners Ins. Co.*, 805 So.2d 973 (Fla. 2d DCA 2001) set forth the generally accepted summary judgment standard,



which provides that summary judgment is appropriate where the record demonstrates that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law. *See also, Collections, USA, Inc. v. City of Homestead*, 816 So.2d 1225 (Fla. 3d DCA 2002). As the Florida Supreme Court held, in *Landers v. Milton*, 370 So.2d 368, 370 (Fla. 1979):

> A movant for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact. But once he tenders competent evidence to support his motion, the opposing party must come forward with counterevidence sufficient to reveal a genuine issue. It is not enough for the opposing party merely to assert that an issue does exist.

Id. at 370 (*citations omitted*). In making the inquiry into whether a genuine issue of material fact exists, the court must consider all admissible evidence presented by the parties; particularly, the "record is examined to consider the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any." *D & M Jupiter, Inc. v. Friedopfer*, 853 So. 2d 485, 487 (Fla. 4th DCA 2003) (*citing* Fla. R. Civ. P. 1.510(c)). Here, summary judgment is appropriate as to all issues because an examination of all the admissible evidence presented by the parties reveals that no genuine issue of material fact exists.

B. The Viability of the Restrictive Covenant in this Case

3. The following facts are agreed upon by the parties, as indicated by their respective pleadings. Citations following each fact are found for the Plaintiff's Complaint ("COMPLAINT"), Defendant's Answer and Affirmative Defenses ("ANSWER"), and Defendant's Counterclaim ("COUNTERCLAIM"). These facts are presented under the summary judgment standard outlined herein, wherein this court must assume all factual allegations by the non-moving party to be true and all inferences given on that party's behalf.

4. This court has jurisdiction to decide this case. COMPLAINT ¶ 2; ANSWER ¶ 2.

5. In 1978, the Board of County Commissioners of Sarasota County, Florida, adopted Resolution No. 78-202 (the "Resolution"), which approved Special Exception Petition No. 675 authorizing use of The Landings development (the "underlying property") for single family detached dwellings and cluster housing. A copy of the Resolution is attached to the Complaint as Exhibit "A." COMPLAINT ¶ 6; COUNTERCLAIM ¶ 2.

6. The Resolution subjected The Landings to sixteen (16) stipulations. Stipulation Nine (9) required "[t]hat an undeveloped reserve area, 300' from all directions from the eagle nesting site, be provided." COMPLAINT ¶ 7; ANSWER ¶ 7.

7. Before The Landings was developed in accordance with the Resolution, The Landings property was acquired by deed dated January 27, 1978, and recorded in Official Records Book 1217, page 849, Public Records of Sarasota County, Florida. COMPLAINT ¶ 8; ANSWER ¶ 8.

8. In 1980, C & M Associates ("C&M") and Landings Development Company ("LDC"), as owners of the underlying property, recorded the Landings – Unit One subdivision plat (the "Plat"). Tract F is legally described in the Plat as follows:

> Tract F, THE LANDINGS - UNIT ONE, as per plat thereof recorded in Plat Book 27, page 12, Public Records of Sarasota County, Florida.

COMPLAINT ¶ 11; COUNTERCLAIM ¶ 3.

9. Tract F is generally circular in shape with a radius of approximately 300 feet. Today, a portion of Tract F abuts Landings Boulevard for approximately 100 feet along its northern boundary, and the remainder of Tract F is surrounded by single-family residential lots (the "Surrounding Lots") owned by the Plaintiffs in this action. Those lots are legally described as follows:

> Lots 162, 163, 170, 171, 173 - 183, and 186 - 189, THE LANDINGS - UNIT ONE, as per plat thereof recorded in Plat book 27, page 12, Public Records of Sarasota County, Florida.

COMPLAINT ¶ 12; COUNTERCLAIM ¶ 4.

10. Contemporaneously with the recording of the Plat, C&M, along with LDC as "Developer," recorded in Official Records Book 1372, page 1217, a Declaration of Maintenance Covenants and Restrictions on The Commons for The Landings (the "Declaration"). A copy of a portion of the Declaration is attached to the Complaint as Exhibit "D." COMPLAINT ¶ 13; COUNTERCLAIM ¶ 5.

11. Pursuant to Paragraph 1 of the Declaration, all the underlying property, ***other than Tract F***, was made subject to the Declaration. COMPLAINT ¶ 14; COUNTERCLAIM ¶ 6.

12. Paragraph 29 of the Declaration reads in relevant part:

> 29. EAGLES' NEST AREA. The property described as "Tract F" in Exhibit "A" attached hereto is not subject to the provisions of this Declaration . . .

COMPLAINT ¶ 15; COUNTERCLAIM ¶ 7.

13. Pursuant to Paragraph 13 of the Declaration, Defendant, The Landings Management Association, Inc., was organized "for the purpose of operating, maintaining, managing and improving the common areas of The Landings and for the purpose of enforcing these covenants and restrictions as such rights of enforcement may be assigned to it from time to time by the Developer." COMPLAINT ¶ 17; COUNTERCLAIM ¶ 13; ANSWER ¶ 17 ("Admitted that Paragraph 13 of the Declaration speaks for itself. . .").

14. Pursuant to Paragraph 2(h) of the Declaration, "The Commons" or the "Common Areas" are limited to "real property (or interest therein) located in The Landings which may hereafter be specifically set aside by Developer for the common use and enjoyment of all owners in The Landings as members of [Defendant]." COMPLAINT ¶ 18; COUNTERCLAIM ¶ 8.

15. Paragraph 7 of the Declaration states that "ownership of each portion of the Commons shall remain in Developer unless and until Developer shall transfer title thereto." COMPLAINT ¶ 19; COUNTERCLAIM ¶ 9.

16. When the Plat and Declaration were recorded in 1980, the LDC was the "Developer," and Tract F was owned by C&M, as Paragraph 29 of the Declaration itself makes clear: "Tract F . . . is owned by C & M Associates and is not intended for development." COMPLAINT ¶ 20; COUNTERCLAIM ¶ 10; ANSWER ¶ 20 (Admitted that the Declaration speaks for itself).

17. Tract F was not part of the common areas or subject to the terms of the Declaration at the time the Plat and Declaration were recorded. COMPLAINT ¶ 21; COUNTERCLAIM ¶ 11.

18. Defendant is only authorized to improve common areas. COMPLAINT ¶ 22; COUNTERCLAIM ¶ 14; ANSWER ¶ 22.

19. On March 17, 1987, C&M, the then-owner of Tracts A, B, and F, quitclaimed to Defendant all of its right, title, and interest in Tract F, by deed recorded in Official Records Book

1936, page 2549, Public Records of Sarasota County, Florida. This deed included, *inter alia*, the following language:

> Grantee, by the acceptance of this conveyance, hereby expressly assumes the obligation of and agrees to be bound by and to comply with all of the covenants, terms, provisions and conditions contained in the [Declaration].
>
> The Property is conveyed to [Defendant] in its capacity as the management association for The Landings and is to be held and used by [Defendant] in accordance with its Charter and Bylaws and the [Declaration].

A copy of the foregoing deed is attached to the Complaint as Exhibit "E." COMPLAINT ¶ 23; COUNTERCLAIM ¶ 12; ANSWER ¶ 23 (Admitted that the document is a true and correct copy and that it speaks for itself).

20. On July 19, 1995, LDC, by assignment dated July 19, 1995, assigned to Defendant all of its existing rights, title, interest, easements, powers, duties, obligations, and privileges under the Declaration. COMPLAINT ¶ 24; ANSWER ¶ 24.

21. Paragraph 29 of the Declaration states in its entirety:

> 29. EAGLES' NEST AREA. The property described as "Tract F" in Exhibit "A" attached hereto is not subject to the provisions of this Declaration. This property, approximately 7.4 acres in size, is owned by C & M Associates and is not intended for development. An eagles' nest is located on this property and it is the intent of C & M Associates to preserve the site as a nesting area for eagles. The site may be completely or partially fenced or otherwise barricaded to deter human intrusion. An observation stand, however, may be constructed on the site to permit viewing of the eagles and their habitat. The site is not intended as a park for the use of property owners in The Landings. The site is private property, and C & M Associates expressly reserves the right to restrict or prohibit access to the property and to impose and enforce such other restrictions as it may deem necessary to preserve the site. An easement appurtenant to the site for ingress and egress, utilities, and drainage is hereby granted to and reserved by C & M Associates over and under all private roads in The Landings. All rights granted to or reserved by C & M Associates hereunder and all other rights it may have pursuant to law may be assigned to an enforced by any other person, association, corporation, or entity.

See Exhibit D of the Complaint, Paragraph 29.

22. The parties' disagreement starts in Paragraph 17 of the Defendant's Counterclaim. In that paragraph, the Defendant asserts the proposition that the quitclaim deed executed in 1987 caused the Eagles' Nest Area to become part of the common areas under the Declaration because the "Defendant's Charter does not contemplate or allow its ownership of property other than the commons or common areas as defined by the Declaration as amended." *See* COUNTERCLAIM ¶ 17. However, this allegation is not material to the action before this court.

C. Equitable Servitudes/Restrictive Covenants in Florida

23. It is well-established Florida law that a deed containing a restrictive covenant executed pursuant to a general scheme for the purpose of preserving the character of real property will create an equitable servitude in favor of all property included in that general scheme. *Osius v. Barton*, 109 Fla. 556, 147 So. 862, 865 (1933).

As stated in *Osius* at 865:

> The general theory behind the right to enforce restrictive covenants is that the covenants must have been made with or for the benfit [sic] of the one seeking to enforce them. . . . The action of a court of equity in such cases is not limited by rules of legal liability and does not depend upon legal privity of estate, or require that the parties invoking the aid of the court should come in under the covenant, if they are otherwise interested. The rule is well established that where a covenant in a deed provides against certain uses of the property conveyed which may be noxious or offensive to the neighborhood, inhabitants, those suffering from a breach of such covenant, though not parties to the deed, may be afforded relief in equity upon a showing that the covenant was for their benefit as owners of neighboring properties.

As further stated in *Osius* at 868:

> The theory adopted in this state is that the contract which embodies the restriction may be enforced against both the promisor and those who take from him with notice, thereby including amongst those who may enforce the obligation not only the promisee, but those who take from him and those in the neighborhood who may be considered as beneficiaries of the contract.

24. The presence of language in the chain of title clearly indicating the grantor's intent to provide mutual or reciprocal benefits to separate parcels renders a general building scheme unnecessary to enforce the covenant. *Rea v. Brandt*, 467 So.2d 368, 369 (Fla. 2d DCA 1985). The court in *Rea* summed up the Florida rule by stating, "[b]asically, the right to enforce a restrictive covenant requires proof that the covenant was made for the benefit of the party seeking to enforce it." *Id.* (*citations omitted*). The rule of law set forth above does not depend on

whether the restrictive covenant is considered to run with the land. *Hagan v. Sabal Palms, Inc.*, 186 So.2d 302, 307 (Fla. 2d DCA 1966), *citing* 26 C.J.S. Deeds § 167(2).

25. As the Defendant has recognized in its own Counterclaim, the two main purposes for the creation of the Defendant Association was to manage the common areas "and for the purpose of enforcing these covenants and restrictions as such rights of enforcement may be assigned to it from time to time by the Developer." COUNTERCLAIM ¶ 13. In addition, the quitclaim deed executed in 1987 specifically passed to the Defendant all of its existing rights, title, interest, easements, powers, duties, obligations, and privileges under the Declaration. COMPLAINT ¶ 24; ANSWER ¶ 24. The plain language of these documents indicates that such rights and obligations included the Eagles' Nest Area covenant, as outlined in the Declaration in paragraph 29.

26. Even if this Court were to assume that the factual allegations made by the Defendant in this case were true—as it must for summary judgment purposes—the legal requirements for enforcing the covenant with regard to the Eagles' Nest area are met as a matter of law. As discussed above in *Osius*, enforcement of a restrictive covenant does not require privity of contract, does not require the Defendant to be able to hold property that is not considered a common area, and does not require that the Defendant itself have signed the original covenant. 147 So. at 865. It requires only that the party against whom the covenant is to be enforced to have had knowledge of it and that the party seeking to enforce it be an intended beneficiary of that covenant. *Rea v. Brandt*, 467 So.2d at 369; *Hagan v. Sabal Palms, Inc.*, 186 So.2d at 307. The undisputed facts of this case can only be construed to support this proposition.

27. It is worth noting that Defendant has alleged in paragraph 21 that the language of the original Declaration could not have created a covenant designed to run with the land. Not only is this a legal—not factual—allegation, it is insufficient to bar enforcement of the covenant in this case. The Court in *Hagan* held that a covenant need not be considered to "run with the land" if it is part of a community development scheme. 186 So.2d at 307. The undisputed facts of this case lead only to such a finding. Therefore, even if the covenant did not run with the land, it is still enforceable.

28. The Defendant in this case accepted a deed in 1987 which clearly put it on notice of the covenant relating to the Eagles' Nest Area by expressly incorporating the specific

covenants and obligations found in the Declaration, in which the covenant language of paragraph 29 is found. *Supra,* ¶ 19. It is clear that Defendant had notice of the covenant in this case, since its own chartered purpose is located within the same text. *See* COMPLAINT, Exhibit "D." The residents whose homes surround this preserve area were also the clear beneficiaries of this covenant. Therefore, as a matter of law, the covenant in this case should be held enforceable.

D. The Inapplicability of Estoppel to this Case

29. Once an equitable servitude, or restrictive covenant is established, failure to prosecute all violations of that covenant does not itself cause that covenant to become extinguished. *Mizell v. Deal*, 654 So.2d 659, 663 (1995). "[I]n the context of restrictive covenants, there must be a 'long-continued waiver or acquiescence in the violation of a restrictive covenant' and 'conscious acquiescence in persistent, obvious and widespread violations for waiver or abandonment to occur.'" *Mizell* at 663, *quoting Siering v. Bronson*, 564 So.2d 247,248 (Fla. 5th DCA 1990).

30. Further, Florida courts have allowed those holding the right to enforce restrictive covenants to selectively enforce those restrictions, subject to some qualifications. *Killearn Acres Homeowners Ass'n, Inc. v. Keever*, 595 So.2d 1019, 1021 (1992).

> The party challenging enforcement of the covenant thus has the burden to prove defensive matters that preclude enforcement, such as that the enforcing authority has acted in an unreasonable or arbitrary manner . . . [t]he burden of proving that the party seeking enforcement has abused its discretion is a heavy one.

Id. at 1021. In *Killearn*, a homeowner who wanted to install a satellite dish in violation of a restrictive covenant asserted that the homeowner's association should be estopped from enforcing the restrictive covenant based on the fact that it had not enforced the same covenant against a number of other homes that were guilty of similar behavior. *Id.* at 1022. Despite the fact that there had been apparent selective enforcement, the court allowed the association to enforce it against the defendant homeowner in that case, since there was no evidence that selective enforcement of the covenant had been the result of arbitrary or unreasonable abuse of discretion. *Id.*

31. Even assuming that the allegations in Defendant's counterclaim are true, the activity which has been either allowed or requested in the Eagles' Nest Area is (a) not inconsistent with proper preservation of the area as provided under Paragraph 29 of the

Declaration, and (b) insufficient as a matter of law to establish estoppel. Even if the activities which have been alleged by Defendant in this case were found to be in violation of the covenant, their occurrence does not constitute "persistent, obvious and widespread violations" sufficient to evidence waiver (which has not been pled in any event). Further, unless the Plaintiff has abused or been unreasonable in exercising its discretion over enforcing the covenant in the past, it cannot be estopped from doing so now as a matter of law. The facts in this case cannot support such a proposition.

32. Plaintiffs request that this Court exercise its jurisdiction under Chapter 86, Florida Statutes to declare that (1) Tract F is not subject to the Declaration (besides Paragraph 29); (2) Tract F is not part of the "common areas" under the Declaration; (3) the use of Tract F is restricted to use as a site for eagles' nests, as described in Paragraph 29 of the Declaration; (4) stipulation (9) of the Resolution continues to prohibit any development or use of Tract F that is in any way inconsistent with its intended use as a site for eagles' nests; (5) Defendant does not have a right to make any amendments to the Declaration that would alter its duties or the restrictions provided with regard to Tract F under Paragraph 29 of the original Declaration; and (6) that Plaintiff is not estopped from enforcing the covenant relating to the Eagles' Nest Area.

WHEREFORE, Plaintiffs request that this Court (1) issue the Declaration described in Paragraph 36 above; (2) order Defendant to pay Plaintiffs' costs, as provided in Section 86.081, Florida Statutes; and (3) grant Plaintiffs such other and further relief as it may deem just and proper.

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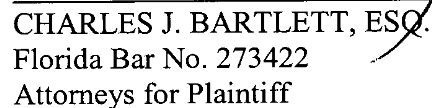

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and by U.S. Mail this 28th day of January, 2011 to: James K. Parker, Esquire and Joseph G. Riopelle, Esquire, 400 North Ashley Drive, Suite 1150, Tampa, FL 33602 and David D. Davis, Esq.,1820 Ringling Blvd., Sarasota, Florida 34236.

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