

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0304

GREGORY C. HENKELMANN AND CYNTHIA L. HENKELMANN

VERSUS

WHISKEY ISLAND PRESERVE, LLC

RH Pley
AGC
On Appeal from the 21st Judicial District Court
Parish of Tangipahoa, Louisiana
Docket No. 2008-0000475, Division "D"
Honorable M. Douglas Hughes, Judge Presiding

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Plaintiffs-Appellants
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Whiskey Island Preserve, LLC

BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered JUN - 1 2012

Higginbotham, J. concurs in result.

PARRO, J.

Gregory C. and Cynthia L. Henkelmann appeal a judgment in their suit against Whiskey Island Preserve, LLC, in which the trial court recognized their servitude and right of use of certain common areas in a residential development called "The Preserve at Whiskey Island," but denied rescission of their purchase of a lot in that subdivision and further denied them any damages for diminution of the value of their property. Based on the evidence in the record, we affirm the judgment.

BACKGROUND

Whiskey Island Preserve, LLC (the developer) developed a subdivision in Tangipahoa Parish called "The Preserve at Whiskey Island" (Whiskey Island), in which large residential lots were offered for sale in an upscale neighborhood with expansive common areas, natural woodlands, and many planned amenities. On June 2, 2006, a "Declaration of Rights, Restrictions, Affirmative Obligations and Conditions for the Preserve at Whiskey Island, a Subdivision" (the Declaration) was recorded, and on June 15, 2006, the Henkelmanns bought Lot 12¹ for \$286,985. The Declaration and the subdivision plat designated certain portions of Whiskey Island as common areas, on which there could be no development and which were dedicated for the use and enjoyment of all lot owners. According to the Declaration, the rights pertaining to the common areas were established by a servitude that would pass with the title to each lot in the subdivision.

When the Henkelmanns agreed to purchase Lot 12 on May 7, 2006, they amended the purchase agreement with a handwritten notation to show that one of the amenities shown on the sales literature, a marina boathouse, was to be completed within 180 days from the date of the agreement. In the sales literature, this structure included a dock, covered boat slips of various sizes, and a veranda area. Although the dock and covered boat slips were eventually built and pilings were erected to support the remaining structure, none of the other portions of the building shown on the

¹ Lot 12 was one of 44 lots shown on the subdivision plat of Whiskey Island.

prospectus were completed.

Some time after the Henkelmanns bought their lot, the developer proposed to make a major change to the subdivision and began depicting this change in the printed and online sales literature. The proposal added a number of significantly smaller waterfront lots carved out of a portion of the property previously designated as common areas. These lots were shown as "The Cove" on sales literature regarding Whiskey Island, and an amendment to the Declaration was enacted and recorded by the developer to support this proposal. An amended subdivision plat showing The Cove development was approved by the Tangipahoa Parish Planning Commission.

On February 14, 2008, the Henkelmanns filed a petition for declaratory judgment, seeking recognition by the court of their rights to the use and enjoyment of the common areas, as described in the Declaration and shown on the subdivision plat at the time of their purchase. They sought a declaration of their servitude over those areas and their right to have the common areas free from further development. They alleged that, in addition to violating the Declaration, the proposed development of the common areas included in The Cove diluted their ownership interest in those areas, thus diminishing the value of their lot. They further claimed that the planned development of The Cove, plus the developer's failure to complete the marina boathouse as specified in their purchase agreement, constituted a failure of consideration and entitled them to rescind their purchase of Lot 12. They requested a return of the purchase price and reasonable attorney fees.

The developer answered the petition, admitting that all of the Whiskey Island property, including the Henkelmanns' lot, was subject to the recorded Declaration, but averred that this document also included provisions allowing amendment. It claimed the amendment procedures were followed by the developer, and the Declaration was amended to allow the proposed development of The Cove on a portion of the property formerly designated as common areas. The developer claimed the addition of The Cove would enhance the value of the other lots in the subdivision, and stated that the delay

in completion of the marina boathouse was unavoidable due to Entergy's failure to provide utilities.

On December 30, 2009, the developer donated a conservation servitude over the common areas of Whiskey Island to the Land Trust for Southeast Louisiana under the provisions of the Louisiana Conservation Servitude Act, LSA-R.S. 9:1271. This donation covered all the common areas shown on the subdivision plat that was recorded when the Henkelmanns purchased Lot 12. The bank holding the developer's mortgage subordinated its mortgage to the conservation servitude. The purpose of this servitude was to limit development and forever conserve the open space, scenic resources, wildlife habitat, and biological diversity of the property. The Land Trust agreed to protect the conservation values of the property and prevent any activity or use inconsistent with those purposes, as more specifically defined and described in the conservation servitude document.

The parties in the Henkelmanns' lawsuit eventually agreed to submit their claims to the court on the basis of documents and depositions, rather than having a trial. After considering the evidence presented, the court ruled that the Henkelmanns had not established any conditions justifying rescission of the sale of Lot 12 and signed a judgment on December 13, 2010, in favor of the defendant. The Henkelmanns appealed the judgment to this court.

RULE TO SHOW CAUSE

Although the district court's December 13, 2010 judgment specifically denied the plaintiffs' request for rescission of the sale and stated that judgment was granted in favor of the defendant and against the plaintiffs, it did not directly address the plaintiffs' request for a declaratory judgment concerning their rights to the common areas. Accordingly, it was not clear whether the district court had (1) implicitly denied those claims,² (2) left those claims to be resolved in later proceedings, or (3) considered those claims moot due to statements made by the developer in briefs and deposition

² Silence in a judgment as to any part of a demand made or issue raised by the pleadings, and on which evidence is introduced, is considered as a rejection of that demand or issue. *Bartlett v. Reese*, 569 So.2d 195, 198 n.4 (La. App. 1st Cir. 1990), writ denied, 572 So.2d 72 (La. 1991).

testimony. Because the judgment lacked the appropriate decretal language disposing of some of the plaintiffs' claims, which is needed for a final, appealable judgment, this court ordered the parties to show cause by briefs whether the appeal should be dismissed.

In the meantime, this court issued an interim order **remanding the appeal** "for the limited purpose of having the district court sign a valid written judgment which includes appropriate language as required by La. C.C.P. art. 1918." In response to this interim order, an amended judgment was signed by the district court on August 23, 2011, and filed in the record of these proceedings. The amended judgment stated the following, in pertinent part:

IT IS ORDERED that the Judgment rendered by this Court on December 13, 2010, be amended in toto to read as follows:

This Court finding that the common area property shown on the original subdivision plat of The Preserve at Whiskey Island, having been dedicated to a conservation easement, which confirms the right of use of common area in favor of lot owners of said development consistent with [the Declaration] recorded as Instrument No. 721598, Book 1060 at page 473 in the conveyance records for Tangipahoa Parish, Louisiana, accordingly, judgment is rendered in favor of Plaintiffs declaring and establishing that the property shown as common property on the original subdivision plat is subject to said conservation easement, as well as a servitude in favor of Plaintiffs and any successive owner of a lot in The Preserve at Whiskey Island;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that subject to the dedication of the common area to the conservation easement as shown by the exhibits submitted to this Court, this Court finds that said common area may contain no obstruction, nor can same be developed pursuant to the terms and conditions of the dedication to the conservation easement;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Defendant and against Plaintiffs denying Plaintiffs' claim for damages for failure to timely construct the marina/boat house in accordance with the terms of the purchase agreement, as well as Plaintiffs' claim for rescission of the sale of Lot 12 with full restitution of the sale price and an award of attorney's fees is hereby denied.

IT IS FINALLY ORDERED, ADJUDGED AND DECREED that Plaintiffs' claim for rescission of [the sale of] Lot 12 with full restitution and attorney's fees based on a failure of the consideration that Plaintiffs urge to have received in the purchase of Lot 12 as a result of the alleged dilution of Plaintiffs' interest in the common area is denied.

The amended judgment clarifies the court's rulings on the Henkelmanns' claims for a

declaratory judgment regarding their rights to the common areas of Whiskey Island, and thus addresses all of the claims in this litigation. Therefore, we dismiss the rule to show cause, declare the existence of a final, appealable judgment, reinstate the appeal with this court after the remand, and maintain the appeal. See LSA-C.C.P. art. 2088.

DISCUSSION

The Henkelmanns' first three assignments of error deal with the failure of the district court to enter a declaratory judgment in their favor recognizing their rights to the common areas that existed when they purchased Lot 12. These assignments of error were directed to the December 13, 2010 judgment. However, the appeal was filed before the district court amended its judgment on August 23, 2011. As previously discussed, after this court remanded the appeal to the district court, that judgment was amended in response to this court's show cause and interim orders, and it addressed all of the issues raised in the first three assignments of error, granting judgment on those issues in favor of the Henkelmanns. Therefore, those assignments of error have been mooted.

The fourth assignment of error states that the district court committed an error of law in failing to award the Henkelmanns damages for the failure to timely construct the marina boathouse in accordance with the terms of their purchase agreement.³ We have reviewed all the documents entered into evidence and the deposition testimony of Wayne Glascock, one of the principals of Whiskey Island Preserve, LLC, the developer. Glascock testified that the marina boathouse was unavoidably delayed, because Entergy did not timely provide the utilities to that area, despite the developer's repeated requests. More importantly, however, the evidence in the record simply does not establish a link between the untimely completion of this building and any losses alleged by the Henkelmanns. The appraised value of Lot 12 when they purchased it was \$289,000. The property was assessed at \$178,000 in August 2008. In briefs, the Henkelmanns argue that this serious reduction in the value of their property establishes

³ At oral argument, counsel for the Henkelmanns conceded that they had withdrawn their claim for a rescission of the sale of the property.

the damages they incurred. The record also contains various photographs taken in 2008 and 2010. These appear to show that the marina boathouse was not completed, that there were washout areas behind one or more of the bulkheads, that some erosion had taken place, that the road to the marina boathouse area was not graveled or paved, and signage in 2010 still showed The Cove as part of the development. However, without any testimony in the record describing the extent of these problems or where they existed in relation to the Henkelmanns' lot, it is not possible to affix an amount by which the property value of Lot 12 and their rights in the common areas might have been damaged. The arguments of the attorneys cannot fill in the blanks left by the documentary evidence. That evidence does not prove the cause or the amount of any damages they may have incurred. Therefore, we find no error in the district court's decision not to award damages to the Henkelmanns for the developer's failure to complete the marina boathouse as required in their purchase agreement or for any of the other conditions at the site.

CONCLUSION

Based on the above reasoning, we affirm the August 23, 2011 amended and final judgment of the district court and assess all costs of this appeal to the Henkelmanns.

RULE TO SHOW CAUSE DISMISSED; APPEAL MAINTAINED; JUDGMENT AFFIRMED.