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By: EVELYN PALMER
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CAUSE NO. 2019-33333

TANGLEWOOD HOMES ASSOCIATION, INC.,	§	
	§	IN THE DISTRICT COURT
Plaintiff,	§	
	§	
versus	§	133rd JUDICIAL DISTRICT
	§	
WMJK, LTD.,	§	
	§	HARRIS COUNTY, TEXAS
Defendant.	§	

TANGLEWOOD HOMES ASSOCIATION'S OPPOSITION TO WMJK LTD.'S EMERGENCY MOTION FOR CONTINUANCE OF THA'S SUMMARY JUDGMENT HEARING

Tanglewood Homes Association, Inc. (THA) opposes WMJK's emergency motion for continuance of the hearing on THA's motion for summary judgment, which is currently set on September 9, 2019, at 2:00 p.m.

INTRODUCTION

WMJK is simply wrong when it claims a right to discovery before responding to a summary judgment motion. The Texas Supreme Court has repeatedly stated that unambiguous contractual documents, like restrictive covenants, are to be construed solely from within their "four corners."

Significantly, Texas' "four corners" rule means that resolution of the motion for continuance depends on exactly the same analysis as resolution of THA's summary judgment motion—that is, whether the restrictive covenants at issue are unambiguous or not. Whether a restrictive covenant is unambiguous is a clear question of law, as is the interpretation of an unambiguous contract from its four corners. If the covenants are unambiguous, it would be improper to even consider outside evidence. On the other hand, if this Court concludes the restrictions are ambiguous, then their interpretation is for a jury, not the Court, and therefore, summary judgment would be improper even

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after extensive discovery. Thus, WMJK's threatened cross-motion following its desired discovery is fanciful.

THA's motion for summary judgment follows the straightforward path set by the Supreme Court. THA's motion requests a simple declaration that unambiguous restrictive covenants filed with the Harris County Clerk in 2002 and 2018 apply to WMJK's property at 1661 Tanglewood Boulevard. The requested declaration will conclude this matter, or at the very least, dramatically narrow this matter, limiting discovery and the issues to be decided.

Notably, not once does WMJK claim that the restrictive covenants are ambiguous as written. Indeed, these covenants expressly apply to all property within Tanglewood, a neighborhood WMJK's predecessor platted and developed with 1661 Tanglewood Boulevard as its heart.

Unable to avoid the "four corners" rule, WMJK tries to obfuscate by inundating the Court with a long list of subjects on which WMJK claims to need discovery. In all, WMJK has already requested the depositions of 22 individuals and sought the production of 60 categories of documents.

But, while WMJK's list is long, nothing on its list can contradict the four corners of the restrictions if they are unambiguous. For example, WMJK claims it is entitled to discovery into the 2002 and 2018 restrictions "to challenge whether the amendments are 'unambiguous,'" but the Texas Supreme Court has expressly foreclosed the use of parol evidence to manufacture an ambiguity in a document. WMJK Motion at 5; section 2C below.

Many of the purported discovery subjects are entirely irrelevant and can be listed only to add length. For example, while THA's motion is limited to the 2002 and 2018 restrictions, WMJK wants extensive discovery into adoption of restrictions in 1950 and 1951. The discovery will supposedly support WMJK's claim that the 1951 restrictions superseded the 1950 restrictions, but again, THA's motion does not raise the 1950s restrictions, so there is no need for the historical diversion.

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Fortunately, the course set by the Supreme Court cuts through WMJK's attempted obfuscation. First, this Court should determine if the restrictive covenants are unambiguous. If they are, then they are to be applied as written without regard to anything outside the restrictions themselves. No discovery is needed or appropriate. If the restrictions are ambiguous, discovery should commence, because the law is clear that ambiguous restrictions are to be interpreted by the Jury.

Argument

1. *WMJKI is not entitled to discovery.*

WMJK does not have a right to discovery before responding to a traditional motion for summary judgment. The Texas Rules are clear—a plaintiff can seek summary judgment at any time. Tex. R. Civ. P. 166a(a) ("at any time after the adverse party has appeared or answered"); *compare* Tex. R. Civ. P. 166a(i) (No-evidence motion can be filed only "[a]fter adequate time for discovery.").

To delay resolution on a motion for summary judgment, a defendant has to establish that there is potentially available "material" evidence. *See Tri-Stem, Ltd. v. City of Houston*, 566 S.W.3d 789, 800 (Tex. App.—Houston [14th Dist.] 2018, pet. filed); *Lucio v. John G. & Marie Stella Kenedy Mem'l Found.*, 298 S.W.3d 663, 669 (Tex. App.—Corpus Christi 2009, pet. denied).

2. *There are no material evidentiary areas related to whether the restrictive covenants are enforceable against WMJK's property.*

A. *Restrictive covenants are interpreted under Texas' "four corners" rule.*

Restrictive covenants are to be interpreted "within the four corners of the instrument." *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986) (deed); *see also Vance v. Popkowski*, 534 S.W.3d 474, 478 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (restrictive covenant). "When a restrictive covenant is unambiguous, we construe it according to the plain meaning of its express wording and enforce it as written." *Vance*, 534 S.W.3d at 478 (citations omitted).

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The four corners rule instructs this Court to ascertain the intent of the parties solely from the language in the instrument. *Concord Oil Company v. Pennzoil Exploration and Production Company,* 966 S.W.2d 451, 465 (Tex. 1998). The intent that governs is not the intent that the parties meant but failed to express but, rather, the intent that is expressed in the written terms themselves. *Luckel v. White,* 819 S.W.2d 459, 461 (Tex. 1991); *Concord Oil Co. v. Pennzoil Expl. & Prod. Co.*, 966 S.W.2d 451, 454 (Tex. 1998) ("We recognized that the intent of the parties must be determined from what they expressed in the instrument, read as a whole, and that the actual, subjective intent of the parties will not always be given effect even if we were able to discern that subjective intent.").

B. Whether a restriction is unambiguous is a question of law for the Court.

Whether restrictive covenants are unambiguous is a question of law. *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998); *see also Webb v. City of Dallas*, 145 Fed.Appx. 903, 906 (5th Cir. 2005) ("Under Texas law, both the interpretation of an unambiguous deed and the determination of whether a deed is ambiguous are questions of law for the court.").

If the contractual instrument is phrased in language that can be given a certain or legal meaning or interpretation, it is not ambiguous. *Universal C.I.T. Credit Corp. v. Daniel,* 150 Tex. 513, 243 S.W.2d 154, 157 (1951).

Likewise, the proper construction of the language in the deed is a question of law for the court. *Luckel,* 819 S.W.2d at 461; *Anderson & Kerr Drilling Co. v. Bruhlmeyer,* 134 Tex. 574, 136 S.W.2d 800, 805 (1940); *Altman v. Blake,* 712 S.W.2d 117, 118 (Tex.1986).

C. Parol evidence cannot be used to create ambiguity.

"Parol evidence is not admissible for the purpose of creating an ambiguity." *Nat'l Union Fire Ins. Co. of Pittsburgh, Penn. v. CBI Industries, Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (citations omitted). If unambiguous, "the contract will be enforced as written and parol evidence will not be received for the

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purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports." *Universal C. I. T. Credit Corp. v. Daniel*, 150 Tex. 513, 517, 243 S.W.2d 154, 157 (1951). In contrast, WMJK claims it needs discovery "to challenge whether the amendments are 'unambiguous,'" but WMJK does not even try to deny that the 2002 and 2018 restrictive covenants, on their face, unambiguously apply to WMJK's property at 1616 Tanglewood Boulevard. WMJK Motion at 5.

D. *If the restrictions are unambiguous, then no discovery is warranted, and summary judgment should be granted.*

Since this Court's analysis is restricted to the four corners of the 2002 and 2018 restrictive covenants, the proper course is to conduct that analysis now so that any needed discovery can be narrowly tailored. The court in *Paul Kadair, Inc.* was faced with WMJK's exact argument—that a "motion for summary judgment is inappropriate because further discovery is required to explore the meaning" of certain contractual terms. *Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1029–30 (5th Cir. 1983). The argument, however, failed because, as here, "the real issue before the court was a purely legal one of contract interpretation where the contract was unambiguous on its face." *Strategic Capital Corp. v. New Strong Group Ltd.*, CIV.A. H-08-1651, 2009 WL 1148234, at *8 (S.D. Tex. Apr. 24, 2009) (discussing *Paul Kadair, Inc.*).

On the other hand, if the deed restrictions, examined within their four corners, are ambiguous, granting summary judgment would be error because the interpretation of ambiguous contracts is a question of fact for a jury. *Coker v. Coker*, 650 S.W.2d 391, 393-94 (Tex. 1983); *Harris v. Rowe,* 593 S.W.2d 303, 306 (Tex.1980).

The best course forward is manifest—this Court should determine whether the 2002 and 2018 restrictive covenants are unambiguous based on their four corners and move forward from that determination.

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3. No discovery is needed on WMJK's purported defenses.

WMJK also claims to need discovery on its purported defenses, but cannot support the claim.

A. WMJK does not need discovery on the issue of waiver.

WMJK's building at 1661 Tanglewood Boulevard was built by Tanglewood Corporation (WMJK's predecessor and Tanglewood's developer) in 1951, just as Tanglewood was taking shape. Since the early 1950's, WMJK and its predecessors have maintained an office in the residential-style building on the site. This lawsuit was engendered principally by WMJK's announcement that it planned to tear down the one-story residential style building to erect a 20-story, lot-line to lot-line tower, complete with a rooftop bar and pool overlooking all of Tanglewood.

WMJK claims a waiver defense (and a need for extensive discovery) based on these admitted facts, but there are two problems (for WMJK) with the claim.

First, the waiver argument obviously applies, if at all, solely to the 2002 restrictive covenants. THA is in court within months of the 2018 restrictive covenants seeking their enforcement, so they cannot have been waived. Since the 2002 and 2018 restrictive covenants are very similar, summary judgment can be granted based on the 2018 covenants alone.

Second, partial summary judgment that the 2002 restriction covenants unambiguously restrict WMJK's use of its property *except to the extent of any waiver* would still dramatically narrow this action. Waivers of restrictive covenant are limited to uses substantially similar to the uses historically allowed. *Sharpstown Civic Ass'n, Inc. v. Pickett*, 679 S.W.2d 956, 958 (Tex. 1984) As to the 2002 restrictions (and only the 2002 restrictions), THA will concede that. But, this limited waiver does not mean that WMJK can build its proposed high-rise and rooftop bar any more than allowing a psychiatrist to see patients in his or her home means that Tanglewood has lost its right to prevent construction of a 20-story asylum next door.

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The Texas Supreme Court has definitively rejected WMJK's contention:

> Pickett's argument, followed to its logical conclusion, would require us to hold, as an example, that use of residential property for the purpose of giving piano lessons for hire, if continued for a sufficient time, would give rise to the right of the owner of that property to convert it to a service station or other equally undesirable use. We find a more reasonable interpretation of the applicable law to be that in order to support a waiver of residential restrictions *the proposed use must not be substantially different in its effect on the neighborhood from any prior violation*.

Sharpstown Civic Ass'n, 679 S.W.2d at 958 (emphasis added). WMJK's current office is smaller than most of the homes in Tanglewood, substantially different than WMJK's proposed 20-story tower.

Moreover, THA's requested declaratory relief in this case is narrow. THA seeks solely a declaration that 1661 Tanglewood Boulevard is covered by the 2002 and 2018 restrictive covenants, including that WMJK must seek preauthorization for any changes to the property. That relief does not depend on this Court establishing the existence of, much less the scope of, any waiver of past restrictions.

B. *WMJK does not need discovery on the issue of notice.*

Demonstrating that it is seeking delay, not needed information, WMJK claims to need discovery on when it received notice of the 2002 restrictive covenants. Motion at 6. But, of course, when WMJK learned of the restrictive covenants is manifestly within WMJK's knowledge and could be contested without the need of discovery from others. The claim is also odd because WMJK's President voted in favor of the 2002 restrictive covenants, and WMJK does not contest that it received notice of the covenants.

In any event, Texas law is clear that, as a matter of law, WMJK had constructive notice of the restrictive covenants when they were filed with the Harris County Clerk. The Texas Property Code states, "An instrument that is properly recorded in the proper county is … notice to all persons of the existence of the instrument…." Tex. Prop. Code Ann. § 13.002. Accordingly, a "person is charged

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with constructive notice of the actual knowledge that could have been acquired by examining public records." *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex.1981); *see also Sherman v. Sipper*, 137 Tex. 85, 152 S.W.2d 319, 321 (1941); *NETCO, Inc. v. Montemayor*, 352 S.W.3d 733, 739 (Tex. App.—Houston [1st Dist.] 2011, no pet.) ("The Sterling Bank lien was a properly recorded lien. Accordingly, we hold that the statute of limitations began to run on the closing date, December 10, 2003, as a matter of law.").

C. WMJK does not need discovery into whether the 2002 and 2018 restrictive covenants are void.

In a final effort to avoid summary judgment on the 2002 and 2018 covenants, WMJK baldly claims that the facts will show that the covenants are void. Motion at 5. WMJK, however, wholly fails to explain this assertion—either factually or legally. As a result, WMJK's bald assertion of an unexplained argument does not support a claim for a continuance.

In any event, there is no legal basis for the suggested challenge.

As to the 2002 restrictive covenants, those restrictions have encumbered WMJK's property for 17 years. Thus, any challenge to their adoption is barred (as explained in the motion for summary judgment. To justify a continuance, WMJK must do more than shout that it has an undefined defense that can be resurrected years after even the time for adverse possession has passed.

As to the 2018 restrictive covenants, WMJK voted in favor of the specific restriction that THA seeks to have declared applicable. Motion at Exhibit B-4. WMJK does not deny that vote. Nor does WMJK explain how it can now raise some undefined challenge.

4. *Denying the motion for continuance would at least narrow the issues and the discovery.*

At a minimum, this Court should deny the motion for continuance so that it can determine (1) if the 2002 and 2018 restrictive covenants are unambiguous and, if so, (2) if they apply to the property at 1661 Tanglewood Boulevard. According to the clear Texas law, these are clean questions

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of law that must be resolved entirely from the face of the instruments themselves and not from discovery.

THA believes finding that the restrictive covenants are unambiguous would resolve this matter entirely, but it is patently obvious that such a finding would at least dramatically reduce the relevant issues and topics of discovery. It would also posture this matter for negotiated resolution.

On the other hand, if the Court finds the restrictive covenants are ambiguous, then everyone will know we are not wasting our time and money on WMJK's wish list of discovery because this matter is destined for trial.

For these reasons, the motion for continuance should be denied.

Dated: August 27, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing instrument was served on counsel of record on this date.

By: */s/ Andrew Tower*

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