

CAUSE NO. 2019-33333

TANGLEWOOD HOMES
ASSOCIATION, INC.
Plaintiff,

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IN THE DISTRICT COURT OF

v.

HARRIS COUNTY, TEXAS

WMJK, LTD.

Defendant.

133RD JUDICIAL DISTRICT

**WMJK, LTD.'s EMERGENCY MOTION FOR CONTINUANCE
OF THA's SUMMARY JUDGMENT HEARING**

Pursuant to Texas Rules of Civil Procedure 166a(g) and 252, Defendant WMJK, Ltd. ("Miller Family"), files this Emergency Motion for Continuance of THA's Summary Judgment Hearing and shows the following:

INTRODUCTION

The Miller Family agreed to accept service of the Tanglewood Homes Association, Inc.'s ("THA") lawsuit approximately two months ago and THA filed its motion for summary judgment on July 24, 2019, approximately a month after the Miller Family answered, setting it for hearing on September 9, 2019. The Miller Family quickly reviewed the summary judgment and determined that (1) it needs discovery to properly respond to THA's motion for summary judgment, and (2) it will file a cross motion for summary judgment in conjunction with its response to THA's motion for summary judgment. Accordingly, on August 16, 2019, the Miller Family served on THA the attached discovery and request for deposition dates.¹ The same day the Miller Family served its discovery, the Miller Family's counsel contacted THA's counsel to request that THA continue its hearing date. The Miller Family's counsel explained that this would provide

¹ See Exhibits 1-4, the Miller Family's first set of discovery, which are incorporated herein: (1) Requests for Production; (2) Requests for Admission; (3) Notice of Third Party Subpoena to Anthony Deluca; and (4) Letter requesting dates for the deposition of a corporate representative for THA and other relevant individuals.

time for the Miller Family to perform needed discovery and draft its cross motion. The Miller Family further explained that it would be more efficient for the Court to hear both parties' motions at the same time rather than consider them on a piecemeal basis.

THA rejected this request because THA's counsel claims that the Miller Family does not need any discovery to respond to the motion for summary judgment. THA's counsel further stated that his client did not want to incur the expense of discovery. However, THA then asked that the Miller Family's counsel wait to seek a continuance until after the homeowner's association could meet and discuss the issue. The Miller Family's counsel agreed to wait. This willingness to wait was to no avail. THA's position remains the same—it will not agree to move the summary judgment hearing date. Accordingly, the Miller Family has no choice but to request that the Court continue the hearing date on THA's motion for summary judgment so that the Miller Family is given time to properly present its defense and counter legal arguments.

As detailed below, THA is incorrect in believing that the Miller Family does not need and is not entitled to conduct discovery. Nor is THA's desire to try and avoid the costs of discovery a compelling reason to prevent the Miller Family from conducting discovery in defense of itself. For THA to file suit and then complain about the costs of litigation is like killing your parents and then complaining you are an orphan. THA either did or should have understood the risks and costs involved in filing suit.

Moreover, THA's desire to avoid the expense of litigation is somewhat disingenuous. The Miller Family is all too familiar with the economic consequences of THA's actions. THA (and other third parties) have been conducting an aggressive and improper campaign to interfere with the Miller Family's sale of its property ("1661 Tanglewood Blvd.") to a local developer. And because of this interference, the developer withdrew from the deal. This has caused the Miller

Family to lose not only millions of dollars that would have been realized from the sale, but also hundreds of thousands of dollars in expenses that were spent in attempting to finalize the deal. Thus, while THA may want to minimize THA's costs, it has not and does not have any qualms with causing the Miller Family to incur substantial losses.

The Miller Family is the same as any other litigant. It has the right to defend itself by performing discovery as provided for by the Texas Rules of Civil Procedure and the right to properly present its case by being granted sufficient time to prepare and present its legal arguments and defenses. Accordingly, the Miller Family requests that the Court continue THA's summary judgment hearing until after the Miller Family has had adequate time to conduct discovery and prepare a cross motion for summary judgment. This continuance is not sought for delay, but so that justice may be done. *See* TEX. R. CIV. P. 252.

ARGUMENTS & AUTHORITIES

A. The Miller Family needs discovery before it can properly respond to THA's summary judgment that seeks to change the deed restrictions in a way that would prohibit the Miller Family from using its property for commercial purposes as it has been used since the inception of the Tanglewood development.

“Summary judgments deprive litigants of the right to a jury trial and are not to be granted without the procedural protections necessary to provide the nonmovant with due process. The rule on summary judgments ‘contemplates that the trial court will allow the parties a reasonable opportunity to conduct discovery before granting a summary judgment’ so they can ‘obtain the fullest knowledge of facts and issues before the disposition of their case.’ The reason is simple: discovery ensures that disputes are decided by what the facts reveal, not by what facts are concealed.” *De Anda v. Jason C. Webster, P.C.*, 14-17-00020-CV, 2018 WL 3580579, at *4 (Tex. App.—Houston [14th Dist.] July 26, 2018, pet. denied). Indeed, courts have held that a party is entitled to continuance of a summary judgment hearing when “the case had been on file for less

than seven months, and the discovery Tri-Stem sought ... was material. Tri-Stem exercised diligence in seeking the discovery, and had in fact propounded it, but received no substantive reply.” See *Tri-Stem, Ltd. v. City of Houston*, 566 S.W.3d 789, 800 (Tex. App.—Houston [14th Dist.] 2018, pet. filed). So too is the case here. While THA wants to prohibit the Miller Family from having an opportunity to discover material facts necessary for defending itself, the Court should continue the hearing because, as detailed below, this case was served on the Miller Family only two months ago, the discovery sought is material, and the Miller Family has been diligent in seeking discovery.

THA sought summary judgment within a month of the Miller Family answering THA’s lawsuit. In THA’s Amended Petition, it requested that the Court enter a docket control order pursuant to Texas Rule of Civil Procedure 190.4 (level 3). At this time though, no order has been entered. As such, the discovery period has not expired. In addition, the Miller Family has barely had time to propound discovery related to THA’s 23-page petition, much less receive responses to the recently served discovery. Despite this, THA refuses to move its hearing because it claims that the Miller Family does not need discovery to respond to its motion for summary judgment because the amendments are allegedly “unambiguous.” THA claims that its summary judgment is limited to a narrow question of law and would prefer that Court decide the motion in a vacuum. This not only ignores the legal principles that will apply in deciding the issues in this case, but it would also severely impede the Miller Family’s right to assert arguments in defense of itself.

The Miller Family can and will defend against the summary judgment in multiple ways.² Yet, the Miller Family cannot at this time present by affidavit the facts essential to justify

² The defenses and arguments listed herein are not intended in any way to limit the Miller Family in responding to THA’s Motion for Summary Judgment or filing counter motions. It is axiomatic that information gained through discovery will help shape and inform the Miller Family’s positions.

its opposition to the summary judgment and needs additional time to conduct discovery. *See* TEX. R. CIV. P. 166a(g). It needs (and is entitled to) discovery to garner the evidence necessary to fully support its defenses and counter arguments. For example, THA admits in its motion that the Court will be required to consider the covenants as a whole “*in light of the circumstances present when the parties entered the agreement,*” and will need to avoid any “construction that nullifies a restrictive covenant provision.” *See* THA’s Motion for Summary Judgment, at 7 (emphasis added) (citing *Pilarcik v. Emmons*, 966 S.W.2d 474, 478-79 (Tex. 1998)). As such, the Miller Family needs discovery related to the circumstances present at the time both the original restrictions and the alleged amendments were adopted. It is material to establishing whether the alleged amendments apply to 1661 Tanglewood Blvd. and effectively nullify Section 7’s clear language that permitted 1661 Tanglewood Blvd. to be used for commercial purposes.³

The Miller Family is entitled to discovery for several additional reasons: to challenge whether the amendments are “unambiguous”; to support the defenses of estoppel and waiver based on THA’s prior conduct relative to both 1661 Tanglewood Blvd. and other properties within the development; and importantly, to prove the 2002 and 2018 amendments are void (as to 1661 Tanglewood Blvd. and/or as to the entire development). As to the latter, the Miller Family asserts that the facts will show that THA did not properly invoke and/or is not entitled to invoke either Texas Property Code chapter 204 or 209 when attempting to amend the restrictions.

Here is the discovery sought and how it relates to issues raised in this case:

³ Section 7 Deed Restrictions and Covenants (emphasis added) states:

[Section 7 properties] shall be used for residence purposes only, *with the exception of lot four (4), block thirty-two (32) [1661 Tanglewood Blvd.] which lot may be used for commercial purposes*, however, such use shall not emit obnoxious odors or loud noises, and no structures of a temporary nature may be placed or erected thereon, and *no other restrictions herein set forth shall affect this lot four (4), block thirty-two (32) [1661 Tanglewood Blvd.]*.

- The circumstances surrounding the drafting and implementation of deed restrictions to section 5 and section 7 (applicability of which covenants control and relevancy to interpretation rules regarding whether a specific provision will control over a general provision). *See* Plaintiff's First Amended Petition, ¶¶ 25-54; Defendant's Original Answer, at 5-7.
- Whether section 5 or section 7 controls 1661 Tanglewood Blvd. (applicability of which covenants control and whether a specific provision will control over a general provision). *See* Plaintiff's First Amended Petition, ¶¶ 25-54; Defendant's Original Answer, at 5-7.
- The circumstances surrounding the alleged passage of the 2002 and 2018 amendments (interpretation of the amendments and applicability of possible waiver/estoppel claims and defenses), including but not limited to:
 - the intent of the 2002 and 2018 boards in passing the amendments;
 - whether they had the specific intent to destroy the original land use scheme established by the developer of Tanglewood with regard to the commercial use of the property at 1661 Tanglewood Blvd.;
 - whether the board or any of its members ever represented to the Miller Family or others that neither the 2002 nor the 2018 amendments were intended to limit the use of 1661 Tanglewood Blvd. for commercial purposes, and whether this conduct was fraudulent or negligent (in addition, applicability of defenses of fraud). *See* Plaintiff's First Amended Petition, ¶¶ 56-90; Defendant's Original Answer, at 6-7; Plaintiff's MSJ, at 7-11.
- Information about membership in the Tanglewood Homes Association, including but not limited to whether and if so, when, it requires mandatory membership and further how this requirement has been enforced (applicability of certain provisions of the Texas Property Code). *See* Plaintiff's First Amended Petition, ¶¶ 56-90; Defendant's Original Answer, at 6-7; Plaintiff's MSJ, at 10-11.
- Information related to the factual assertions contained in the affidavits attached to THA's summary judgment, including but not limited to Anthony Deluca's claims of reliance on the 2002 and 2018 amendments, and Steven Boyd's factual assertions regarding the amendment process. *See* THA's Motion for Summary Judgment, Exhibits A and C (applicability of certain covenants and provisions of the Texas Property Code, and determining whether the alleged reliance is reasonable).
- The basis for THA's assertion that the Miller Family had actual or constructive notice of the encumbrance THA's allege controls (THA claims that the statute of limitations applies). *See* Plaintiff's MSJ, at 8-9.

- Whether THA has ever claimed that the Miller Family's continuous use of its property for commercial purposes for the last 70 years was a violation of any restrictions (applicability of covenants and interpretation of the amendments and applicability of possible waiver/estoppel claims and defenses). *See* Defendant's Original Answer, at 1-4.
- Whether THA was aware that the Miller Family's property has always been used for commercial use (applicability of covenants and Texas Property Code provisions and interpretation of the amendments and applicability of possible waiver/estoppel claims and defenses). *See* Defendant's Original Answer, at 1-4.
- Information related to Plaintiff's claim that the building on 1661 Tanglewood Blvd. was "built as a model for the architectural style of the homes" (applicability of covenants and Texas Property Code provisions and interpretation of the amendments and applicability of possible waiver/estoppel claims and defenses). *See* Plaintiff's Motion for Summary Judgment, ¶ 1; Defendant's Original Answer, at 7.
- Whether THA has ever claimed that the Miller Family violated the restrictions in any manner (applicability of covenants and Texas Property Code provisions and interpretation of the amendments and applicability of possible waiver/estoppel claims). *See* Defendant's Original Answer, at 1-4.
- Whether THA has ever required the Miller Family to seek prior approval for construction, remodeling, or addition of structures on 1661 Tanglewood Blvd. (applicability of covenants and interpretation of the amendments and applicability of possible waiver/estoppel claims). *See* Defendant's Original Answer, at 1-4.
- Whether THA has ever asserted that another structure in the Tanglewood development was a residential structure despite being operated for commercial use (applicability of covenants and interpretation of the amendments and applicability of possible waiver/estoppel claims). *See* Defendant's Original Answer, at 1-4.
- Whether any other property owner alleges reliance on the 2002 and 2018 amendments (applicability of covenants and interpretation of the amendments and applicability of possible waiver/estoppel claims). *See* Defendant's Original Answer, at 1-4.
- The history of THA's alleged enforcement of the 2002 and 2018 amendments (applicability of covenants and interpretation of the amendments and applicability of possible waiver/estoppel claims). *See* Defendant's Original Answer, at 1-4.

- The history of collecting assessments, fees, and voting history of alleged members of THA (applicability of covenants and Texas Property Code provisions and applicability of covenants and interpretation of the amendments and applicability of possible waiver/estoppel claims). *See* Defendant's Original Answer, at 1-4.
- Authentication of documents related to the restrictions and alleged amendments (applicability of covenants and interpretation of the amendments).⁴

Accordingly, based on the materiality of the discovery sought, the short time that THA's case has been on file, and the diligence with which the Miller Family has sought discovery and a continuance, the Court should grant the Miller Family's Emergency Motion for Continuance of THA's Summary Judgment Hearing.

B. As pleaded in the Miller Family's Answer, the Miller Family seeks its own independent declaratory relief in this case.

Regardless of the need for discovery, the Miller Family also requested that THA continue its hearing to provide the Miller Family with the time it needs to prepare not only its response to THA's motion for summary judgment, but also its cross motion for summary judgment. The Miller Family believes that presenting these issues to the Court together is not only more efficient, but that it will also provide the Court with a more accurate picture of the legal and fact issues in play. As demonstrated by the extensive facts and claims outlined in the current pleadings, this case is not simple. THA's motion for summary judgment will not dispose of all issues. Thus, THA's proposal would require the Court to hold multiple hearings to address the certainty of serial motions for summary judgment. To contrary, with just a reasonable delay, the parties can develop the facts and legal arguments for a more cohesive and fulsome presentation to the Court. Accordingly, the Miller Family requests that the Court continue the summary judgment hearing to provide it adequate time to brief and present a cross motion for summary judgment.

⁴ *See also* Exhibits 1-4. This listing is not intended to limit the Miller Family's ability to conduct further discovery. The Miller Family reserves the right to identify additional issues and seek additional discovery if it finds it necessary.

PRAYER

The Miller Family respectfully requests that the Court continue THA's summary judgment hearing set for September 9, 2019, so that Defendant can conduct necessary discovery and have adequate time to prepare a response and cross-motion for summary judgment. The Miller Family requests all further relief to which they may be entitled to, at law or equity.

Respectfully submitted,

RUSTY HARDIN & ASSOCIATES, LLP

/s/ Rusty Hardin

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CERTIFICATE OF CONFERENCE

On August 16, 2019 and August 20, 2019, I conferred with Mark Maney, counsel for Tanglewood Homes Association, Inc., regarding the contents of this motion. Mr. Maney stated that THA is opposed to the relief sought in this motion.



Lara Hudgins Hollingsworth

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served to all parties and/or counsel of record on August 20, 2019, pursuant to the Texas Rules of Civil Procedure.

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