

CAUSE NO. 2019-33333

TANGLEWOOD HOMES
ASSOCIATION, INC.

Plaintiff,

v.

WMJK, LTD.

Defendant.

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

133RD JUDICIAL DISTRICT

WMJK, LTD.'s REPLY TO THA'S OPPOSITION TO THE MOTION TO ABATE

Defendant WMJK, Ltd. ("Miller Family"), pursuant to Texas Civil Practice and Remedies Code section 37.006(a) and Texas Rule of Civil Procedure 39, files this Reply to THA's Opposition to the Motion to Abate and shows the following:

ARGUMENTS & AUTHORITIES

This lawsuit is not an enforcement action. As such, THA's cases regarding joinder in enforcement actions are easily distinguishable and therefore inapplicable. *See In re Corcoran*, 401 S.W.3d 136, 139 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (noting that the "relief sought by appellants is limited to ACIA's decision not to enforce an existing deed restriction in a specific instance."). THA has not made any claim that the Miller Family is violating the Restrictive Covenants, much less ever sent a demand seeking compliance. As such, it is not seeking to enforce the Restrictive Covenants or Amendments. Rather, in its First Amended Petition and in its Summary Judgment, THA is asking the Court to interpret the Restrictive Covenants and Amendments and issue declarations regarding what restrictions apply to 1661 Tanglewood. *See* First Amended Petition, at 22 (asking the Court to declare that 1661 Tanglewood Blvd. is encumbered by "the Restrictive Covenants in the 2018 Amendments, including, without limitation, the express restriction prohibiting multi-family buildings and non-residential uses."). It is black letter law that to seek these declarations, THA is required to conclusively establish that it had the

authority to invoke Chapter 209's statutory amendment process. *See Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300, 308 (Tex. App.—Fort Worth 2001, no pet.); *see also City of Pasadena v. Gennedy*, 125 S.W.3d 687, 697-98 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (stating that a party attempting to rely on an amendment to restrictive covenants had the burden to demonstrate that the deed restrictions were validly amended). And it is undisputed that any finding in this regard will impact the rights of every lot owner in Tanglewood.

In addition, the homeowners should be joined in this case because the Miller Family is prejudice by the very real possibility of inconsistent and multiple obligations. TEX. R. CIV. P. 39. In *Elgohary v. Lakes on Eldridge N. Cmty. Ass'n, Inc.*, 01-14-00216-CV, 2016 WL 4374918, at *7 (Tex. App.—Houston [1st Dist.] Aug. 16, 2016, no pet.), the court reviewed whether the trial court erred in denying a motion to abate and join additional homeowners. The court concluded that there was no error because the party seeking joinder would not “be harmed by the possibility of multiple suits, only the Association can” and thus the party seeking joinder had “failed to show that the trial court's error in denying his requested abatement ‘probably caused the rendition of an improper judgment’ as to him.” *Id.* However, as shown herein, the Miller Family is at risk of multiple lawsuits.

Importantly, THA specifically alleges that the surrounding homeowners will be affected by the dispute in this case: “Subsequent to the approval and recordation of the 2018 Restrictive Covenants, Tanglewood homes in close proximity to 1661 Tanglewood Boulevard have been purchased in reliance on the 2018 Restriction Covenants and the other covenants limiting Tanglewood to single family homes.” THA's MSJ at 6. And arguably at least some of these homeowners have an independent right to seek to enforce the restrictions. *See Giles v. Cardenas*, 697 S.W.2d 422, 427 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

Indeed, at least one resident, Anthony Deluca has signed a declaration showing the potential risk of not making him or other homeowners a party. *See id.* Exhibit C, which is attached hereto. He asserts that when he purchased his property, he relied on the 2018 Amendments that allegedly only permit one residential building per lot. *Id.* ¶ 6. He further states that if he had known that “a high-rise building would, or even could, be built at 1661 Tanglewood Boulevard or any other lot near our home” or if he had known simply that the owners of 1661 Tanglewood “could contest the restrictions that prevent the construction of a high-rise building within Tanglewood, [he and his wife] would have demanded a substantial price discount to what we actually paid for our home.” *See id.* ¶¶ 7-8. The Miller Family should not be forced to defend against a multitude of suits regarding a singular issue regarding whether 1661 Tanglewood Blvd. is encumbered by the 2018 Amendments. Accordingly, Anthony Deluca and the other Tanglewood homeowners are necessary parties and the Court should abate the case and require THA to properly join them.¹ *See Dahl v. Hartman*, 14 S.W.3d 434, 436 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *April Sound Mgmt. Corp. v. Concerned Prop. Owners for April Sound, Inc.*, 153 S.W.3d 519, 524 (Tex. App.—Amarillo 2004, no pet.); *see generally Tarrant Restoration v. TX Arlington Oaks Apartments, Ltd.*, 225 S.W.3d 721, 731 (Tex. App.—Dallas 2007, pet. dismissed w.o.j.).

Finally, THA relies heavily on *Brooks* and *Simpson* to argue that joinder is not necessary here. Yet, this is misplaced. In *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163 (Tex. 2004), the Court did not rule on whether or when joinder was inappropriate. To the contrary, the Court

¹ The Miller Family asserts that only lot owners in Section 7 have the potential ability to seek enforcement of the Restrictive Covenants against it. Again, Tanglewood is divided into separately platted sections, each with its own set of Restrictive Covenants. Tanglewood is not a single subdivision. It is a series of legally separate subdivisions created by a common developer. As such, only lot owners within a section may seek to enforce the Restrictive Covenants that apply to that section. However, THA appears to take a different position. It seems to be claiming that any homeowner in any section would have the right to seek to enforce Restrictive Covenants. And as such, all property owners with potential claims against the Miller Family should be joined.

appreciated the risk of failing to join additional homeowners. *Id.* However, because the party seeking joinder did not raise the issue until appeal, any alleged error was waived. *Id.* The Court then provided guidance for future litigants:

We appreciate the risk that, unless each homeowner is joined in one suit, Northglen may be subject to inconsistent judgments. Northglen's dilemma, however, is the product of its own inaction. ***Northglen could have sought relief at trial by urging the court, among other things, to abate the case, join absent homeowners, or grant special exceptions.*** Instead, it waited until the case reached this Court to first raise the specter of multiple or inconsistent judgment.... We conclude that Northglen “had an opportunity to raise the absence of the nonjoined person and waived it.”

Id. (citations omitted); *see also Simpson v. Afton Oaks Civic Club, Inc.*, 145 S.W.3d 169, 170 (Tex. 2004) (finding alleged error was waived because “[a]s in *Brooks*, Afton Oaks raised its jurisdictional argument for the first time on appeal” and any alleged error was waived); *Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682, 698 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (concluding that “just as in *Brooks* and *Wilchester*, the possibility that Indian Beach might be subject to inconsistent judgments was caused by its own inaction in failing to urge the trial court to abate the case, join absent homeowners, or grant special exceptions.”).

Accordingly, following the dictates of *Brooks*, and to avoid waiving the issue of joinder and face the risk of inconsistent judgments, the Miller Family did precisely what the Texas Supreme Court stated it should do—it filed a motion to abate seeking joinder of the homeowners.

CONCLUSION

Accordingly, the Miller Family respectfully requests that the Court grant the Motion to Abate until THA adds all lot owners in the Tanglewood Development. The Miller Family requests all further relief to which they may be entitled to, at law or equity.

Respectfully submitted,

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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 September 6, 2019, pursuant to the Texas Rules of Civil Procedure.

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