GEORGIA LAW REVIEW

FORE! Eleventh Circuit Upholds Implied Restrictive Covenant for Subdivision Golf Course

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In affirming an Alabama Bankruptcy Court's finding of an implied restrictive covenant on the golf course that is the centerpiece of a suburban Birmingham subdivision in *In re: Heatherwood Holdings, LLC*, No. 12-16020 (Mar. 27, 2014), the 11th Circuit agreed with the aggrieved subdivision homeowners that the property at issue was subject to an implied restriction to be used only as a golf course, and the foreclosing lender was not entitled to market and sell the property as residential lots. The original developer initially constructed the course in 1986, and based its entire marketing scheme for selling lots around creating a gold course community, where each residential lot was sold with covenants requiring "golf cart storage areas" and forbidding fences adjacent to the playing course.

However, when the existing club membership purchased the course from the developer in 1999, the warranty deed that transferred title was silent as to any covenant that ran with the land, restricting it to use as only a golf course. And indeed when the course was subsequently sold again, to a third-party golf course management company, that deed was also silent as to any restrictive covenant. However, that purchaser, Heatherwood Holdings, LLC, did commit in a contemporaneously filed side agreement to operate the golf course over the next twenty-five years. Heatherwood subsequently took out a large loan from First Commercial Bank in order to update the course and its facilities. However, after six years of six-figure losses, Heatherwood filed for bankruptcy in 2008, with First Commercial assuming that they would be able to recoup their debt by redeveloping and selling the land on which the golf course lay as residential lots.

Confirming the Alabama Supreme Court's holding that while the facts at issue had not been addressed in Alabama state court previously, they were sufficiently similar to those at issue in a decision from the Arizona Court of Appeals, *Shalimar Ass'n v. D.O.C. Enterprises, Ltd.*, 688 P.2d 682 (Ariz. Ct. App. 1984), which similarly involved a community specifically designed around a golf course, and viewed the actions of the original developers and subsequent residential lot purchasers as consistent with the creation of an implied covenant. Citing the bankruptcy court's substantial findings of the original plat maps and site plans noting the presence of a golf course, golf course themed road names, and the numerous individual covenants and easements placed on each residential lot, the Court acknowledged the principle purpose of this subdivision was the creation of a golf community. They further noted that every homeowner was required to become a member of the Heatherwood Golf Club, and all sales and marketing materials highlighted the benefits of living in a "golf course community." Most importantly, the Court recognized that based on witness testimony, most, if not all, Heatherwood homeowners had been induced to buy within the subdivision based on the presence of a golf course. Given this finding of the golf course as an integral part of the development, the Court agreed with the Alabama Supreme Court's rationale from *Shalimar* in finding an implied restrictive covenant, and thus viewed First Commercial and Heatherwood Holdings' attempt to argue there was no such restrictive covenant a naked attempt to second-guess the Alabama Supreme Court's answer to a certified question of law.

The Court also rejected the appellants' various attempts to challenge factual determinations of the bankruptcy court, rejecting arguments that the appellants were not on notice of the covenant, and thus qualify as bona fide purchasers; rejecting a defense of estoppel by deed; holding the doctrine of integration inapplicable to an attack on the validity of the side agreement; and holding that, in equity, the homeowner's benefit from the continued existence of the covenant outweighed the detriment borne by the bank and the golf course owners.

2014, Eleventh Circuit, March 2014

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