SUPREME COURT OF ARIZONA

Linda W. Swain, et al., Plaintiffs/Appellees, vs. Bixby Village Golf Course, Inc., et al. Petitioners/Appellants.	ASC No. CV19-0255-PR Court of Appeals No. 1 CA-CV 18-0397 Maricopa County Superior Court No. CV2014-051035

RESPONSE TO PETITION FOR REVIEW

TIMOTHY H. BARNES, P.C.
Timothy H. Barnes, No. 003373
428 E. Thunderbird Road, #150
Phoenix, Arizona 85022
(602) 492-1528 (Telephone)
(623) 218-1340 (Facsimile)
tim@thbpc.com

Attorney for Plaintiffs/Appellees

INTRODUCTION

The September 19, 2019, Opinion ("Opinion")[1] issued by the Arizona Court of Appeals is premised on fundamental legal principles of this Court and the policy underpinning Arizona's golf course valuation statutes which Petitioners Bixby Village Golf Course, Inc., Hiro Investment, LLC, Nectar Investment, LLC, Kwang Co., LLC and Ahwatukee Golf Properties, LLC (collectively, "Petitioner")[2] would have the Court disregard. In arguing the Court of Appeals misconstrued this Court's holding in *Powell v. Washburn*, 211 Ariz. 553, 125 P.3d 373 (2006), Petitioner's analysis does not follow the standard by which restrictive covenants interpreted. As well, Petitioner's policy arguments regarding a golf course owner's property rights – apart from being premised on facts the trial court rejected – ignore Arizona's golf course statute's stated policy of "recognition of the importance of the open space and economic benefits of golf courses". A.R.S. §42-13152(A).

RELEVANT FACTS

Wilson Gee, the owner of Bixby Village Golf Course, Inc. ("Bixby") and Ahwatukee Golf Properties, LLC ("AGP"), testified during the trial that Petitioner did not purchase the Ahwatukee Lakes Golf Course ("Golf Course") with the intent

---

[1] Petitioner's Appendix A.

[2] The appeal from the trial court's judgment in this matter was taken by Petitioner and by TTLC Ahwatukee Lakes Golf Course, LLC ("TTLC"), who has not filed a petition for review.

to develop it. Findings of Fact ("FF"), ¶17 (EIR 112). The trial court determined "[t]his testimony was not entirely credible for a number of reasons, some of which have to do with the structure of the transaction" by which Petitioner purchased the Golf Course in 2006. (Id.) The $5.6 million purchase of the Golf Course and the Ahwatukee Country Club (including its golf course) was allocated with the Golf Course valued at $4 million. (Id.) No evidence was presented at trial that the Golf Course was worth $4 million in 2006. (Id.)

The "rent"[3] Bixby, Hiro Investment, LLC, Nectar Investment, LLC, Kwang Co., LLC (collectively, "GC Owners") was obligated to pay Mr. Gee's operating company AGP[4] was actually a "fixed return on investment" to the GC Owners which bore no relationship to the market rental value of the Golf Course.[5] (Id.) The AGP Lease also entitled AGP "to be paid 30% of net sale price of the property sold that exceeds $4.2 million". FF, ¶23 (EIR 112).

The trial court found "[a]nother reason to doubt Mr. Gee's testimony about Bixby's plans for the property is that, not later than 2008, Mr. Gee in fact began making efforts to redevelop the Ahwatukee Lakes Golf Course". FF, ¶ 25 (EIR 112).

---

[3] The annual rent for the Golf Course was $280,000.00. FF, ¶20 (EIR 112).
[4] In June 2006, the GC Owners entered into a Lease Agreement ("AGP Lease") with AGP. FF, ¶18 (EIR 112).
[5] Mr. Gee testified the $280,000.00 rent "was not a negotiated fair market rental amount but represented a seven percent (7%) return on the investment" to the GC Owners. FF, ¶21 (EIR 112).

The trial court found that "[t]here was no evidence that the golf course could not have been operated profitably in 2008". FF, ¶25 (EIR 112). The trial court also found that "[t]he evidence did not show that Bixby could not have operated the golf course profitably[6], with adequate maintenance, at any point in time before Bixby closed the course and stripped it". FF, ¶28 (EIR 112).

In March 2015, Bixby, AGP and True Life Companies ("TLC")[7] entered into a purchase agreement wherein TLC would purchase the Golf Course. FF, ¶36 (EIR 112). The purchase agreement acknowledged, among other things: the existence of 1992 Declaration of Covenants, Conditions, Restrictions and Easements ("1992 CC&Rs")[8] (Trial Exhibit 4, Petitioner's Appendix E); Petitioner had closed the Golf Course which "may constitute a violation of the" 1992 CC&Rs[9]; closing the Golf

---

[6] Petitioner's "Relevant Facts" included several references to the "profitability" of the Golf Course while Petitioner operated it and TTLC's conclusion that the Golf Course could not be operated profitably. See Petition for Review, 6, 7, 8 and 9. None of Petitioner's such statements were included in the trial court's Findings of Fact. Neither Petitioner nor TTLC challenged the trial court's findings of fact in their appeal to the Arizona Court of Appeals. If a trial court's ruling is based on a determination of disputed questions of fact or credibility, a balancing of competing interests, pursuit of a recognized judicial policy, or any other basis to which the appellate court should give deference, the appellate court will not substitute its judgment for the trial court's judgment *Daystar Investments., LLC v. Maricopa County Treasurer*, 207 Ariz.569, 572, 88 P.3d 1181 (App. 2004).

[7] TLC is the sole member of TTLC. FF, ¶54 (EIR 112).

[8] FF, ¶37 (EIR 112).

[9] FF, ¶41 (EIR 112).

Course could result in a penalty under A.R.S. §42-13154[10]; and the pendency of the then underlying lawsuit filed by Appellees against Petitioner.[11]

Prior to purchasing the Golf Course, TTLC was aware the Golf Course would need to be reconstructed if it were ever to be used as a golf course after June 19, 2015. FF, ¶50 (EIR 112). When it purchased the Golf Course, TTLC had no intention of reconstructing the Golf Course to put it back in the condition it was in as of May of 2013 when Petitioner closed the operation of the Golf Course. TTLC never intended, and did not at the time of the trial intend, to reconstruct the Golf Course or to operate it as a stand-alone golf course. FF, ¶51 (EIR 112). TTLC purchased the Golf Course for $9 million with the intention of developing the Golf Course for residential or commercial use. FF, ¶52 (EIR 112).

TTLC agreed to purchase the Golf Course for $9 million by paying a $750,000.00 down payment[12], three (3) annual $500,000.00 payments and the balance of the purchase price due, without recourse, in the third year. FF, ¶¶55 – 59. The Promissory Note expressly provided in the event of default, "the Holder of this Note agrees that in any action or proceeding brought on this Note or on the Deed of

---

[10] Id.

[11] FF, ¶42 (EIR 112).

[12] FF, ¶¶ 52 and 55 (EIR 112). The down payment was paid by TLC because TTLC was not yet generating revenue. FF ¶55 (EIR 112).

Trust . . . securing the indebtedness secured hereby, the Holder will look solely to the property secured by the Deed of Trust . . ." FF, ¶57 (EIR 112).

When TTLC took fee title to the Golf Course, it was aware that the Golf Course had been closed and neglected to the point that it would have to be completely reconstructed to put it back in the condition it was in as of May of 2013 when Petitioner closed the operation of the Golf Course. FF, ¶64 (EIR 112). At that same time, TTLC was also aware the water to the Golf Course had been shut down and Petitioner had removed all but obsolete irrigation heads and had shut off all power since May 2013. FF, ¶65 (EIR 112).

TTLC executive Taber Anderson testified when TTLC purchased the Golf Course there was "no chance" TTLC would build a stand-alone golf course on that property because it did not purchase the Golf Course to be a stand-alone golf course. FF, ¶69 (EIR 112). TTLC executive Aiden Barry testified TTLC went into the purchase of the Golf Course "with eyes wide open" to the challenges it faced in its effort to obtain the property so TTLC could redevelop the property into a residential use. FF, ¶70 (EIR 112).

Aiden Barry also testified the $9 million price TTLC agreed to pay for the Golf Course was not discounted in consideration of the risk of not being able to successfully modify the 1992 CC&Rs, but was based on the value TTLC placed on the Golf Course to redevelop the property into a residential community (as reflected

in the "Deal Highlights – TTLC Ahwatukee Lakes" portion of Exhibit 32). FF, ¶71 (EIR 112). Aiden Barry testified the non-recourse structure of the Promissory Note was negotiated in consideration of the risk of not being able to successfully modify the 1992 CC&Rs and the costs incurred in the process. FF, ¶72 (EIR 112).

Because TTLC did not intend to reconstruct and operate a stand-alone golf course on the Golf Course, the condition of the Golf Course when TTLC purchased the Golf Course was not a material consideration to TTLC. FF, ¶73 (EIR 112). At the time TTLC took fee title to the Golf Course, Appellees had already initiated their lawsuit against Petitioner alleging that Petitioner was in violation of the 1992 CC&Rs, which Appellees asserted required the owner of the Golf Course to affirmatively operate a golf course on the Property. TTLC. FF, ¶74 (EIR 112).

Defendant provided funds for and participated in an unsuccessful campaign to obtain 51% of Benefitted Persons' approval of TTLC's proposed modification of the 1992 CC&Rs. By April 2017, TTLC obtained approvals from approximately 2,000 of the 3,564 Benefitted Persons necessary for 51% approval. FF, ¶79 (EIR 112). When TTLC failed in its attempts to dismiss Appellees' action and obtain 51% approval by Benefitted Persons of Defendant's proposed 1992 CC&Rs modification, TTLC took the position that it had determined a material change in conditions affecting the Golf Course or the CC&Rs allowed for a modification of those covenants. FF, ¶80 (EIR 112).

REASONS THE COURT SHOULD DENY REVIEW

Petitioner's opening argument – that the Opinion grants "an Arizona court [with] the power to make a property owner run a business on their private property" and thereby "violates the prohibition against involuntary servitude found in the Thirteenth Amendment of the United States Constitution and other legal prohibitions against involuntary servitude"[13] – entirely disregards the realities of the trial court's Findings of Facts.[14] TTLC made the business decision to purchase the Golf Course which would, upon purchase, bind TTLC to comply with the 1992 CC&Rs. By itself, that voluntary decision made with full knowledge of the risks totally undermines Petitioner's "involuntary servitude" argument.

TTLC purchased the Golf Course knowing not only the existence of the 1992 CC&Rs, but also knowing that: (i) Petitioner had closed the Golf Course which "may constitute a violation of the" 1992 CC&Rs; (ii) Appellees had filed a lawsuit against Petitioner seeking an injunction to enforce the 1992 CC&Rs and require the Golf Course to be operated; and (iii) the Golf Course would need to be reconstructed if it were ever to be used as a golf course. TTLC purchased the Golf Course for $9 million with the intention of developing the Golf Course for residential or

[13] Petition for Review, 10.

[14] Petitioner was not a party at the trial, which proceeded only against TTLC.

commercial use because TTLC had no intention to reconstruct the Golf Course or to operate it as a stand-alone golf course.

At trial, TTLC's executive Aiden Barry testified the company went into the purchase of the Golf Course "with eyes wide open" to the challenges it faced in its effort to obtain the property so TTLC could redevelop the property into a residential use. Mr. Barry acknowledged the non-recourse structure of the Promissory Note was negotiated in consideration of the risk of not being able to successfully modify the 1992 CC&Rs and the costs incurred in the process. These facts reflect a calculated business decision made with full knowledge of the risks. In the face of these facts, an "involuntary servitude" argument is, at best, hollow. The involuntary servitude argument cannot be taken seriously given TTLC's admitted gamble that it could shed the restrictive 1992 CC&Rs by investing substantial sums of money in, first, a community effort to vote for its plan to change the Golf Course and, failing that effort, seeking a trial court order approving a change to the 1992 CC&Rs.

Petitioner's argument that the Opinion "turns Arizona law regarding covenants on its head" by misinterpreting this Court's *Powell v. Washburn* ruling[15] overlooks the fundamental principle of that decision. The Opinion held *Powell v. Washburn* applies to the interpretation of any restrictive covenant regardless of its

[15] Petition for Review, 11 in which Petitioner argues the Opinion "does away with the distinction between restrictive covenants and affirmative covenants".

nature. As a restricted covenant[16], the tenets of *Powell v. Washburn* apply to the interpretation of the 1992 CC&Rs. As ruled in the Opinion, the foundation of the *Powell v. Washburn* decision is that restrictive covenants "should be construed 'to give effect to the intentions of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.'" Opinion, 7-8. In the *Powell* decision, Justice Ryan explained, "the function of the law is to ascertain and give effect to the likely intentions and legitimate expectations of the parties who create servitudes, as it does with respect to other contractual arrangements." *Id.* at Ariz. 556.

Following this indisputable legal principle, the Opinion interpreted the 1992 CC&Rs accordingly – that is, determining the parties' intent in creating the restrictive covenant by evaluating "the language used in the instrument, or the circumstances surrounding creation of the servitude". In its evaluation, the Opinion concluded the 1992 CC&Rs requires "the owner of the Lakes Golf Course – TTLC in this case – to maintain and operate a golf course on the property." Opinion, 8. Looking primarily to the language of the restrictive covenants, the Opinion first focuses on the restrictive covenant's requirement that the Golf Course comply with Arizona's golf course valuation statutes.

---

[16] TTLC and Petitioner's Opening Brief (at 2) acknowledged the 1992 CC&Rs "imposed a restrictive covenant on the [Golf Course]"

The evidence of restrictive covenants cited in the Petition for Review include the 1986 Deed Restriction (Trial Exhibit 1, Petitioner's Appendix B), the 1987 Amendment to Deed Restriction (Trial Exhibit 2, Petitioner's Appendix C), the 1988 Amendment to Deed Restriction for Ahwatukee Lakes Golf Course (Trial Exhibit 3, Petitioner's Appendix D) and the 1992 CC&Rs (Trial Exhibit 4). The language of the 1986 Deed Restriction unambiguously states the restrictive covenant is premised on Arizona's golf course valuation statutes – then A.R.S. §42-125.01. The last sentence of the 1986 Deed Restriction mandated any amendment to the 1986 Deed Restriction must comply with those statutes. Accordingly, each subsequent amendment incorporated the 1986 and, in succession, the 1987 and 1988 amendments to continue the requirement that the Golf Course comply with Arizona's golf course valuation statutes.

The inclusion of the mandate to comply with Arizona's golf course valuation statutes in the restrictive covenant is significant. First and foremost, it is evidence of the parties' intentions and is therefore a factor to consider in the interpretation of the scope of the 1986, 1987, 1988 and 1992 versions of the restrictive covenant. As the Opinion recognized, the construction of what constitutes a "golf course" under the Arizona's golf course valuation statutes is necessary to determine how the courts have determined the issue of compliance with those statutes. Opinion, 8.

In *PhxAz Ltd. Partnership v. Maricopa County*, 192 Ariz. 490, 967 P.2d 1026 (App. 1998), the Arizona Court of Appeals evaluated whether Arizona's special valuation method of valuing golf courses applied before the property becomes an operating golf course. The court of appeals considered the issue of whether to affirm a trial court ruling that the golf course valuation statutes applied upon the recording of a restrictive covenant restricting the use of the property to a golf course (although the property was not yet an operating golf course).

(Then) Judge Ryan noted the appellate court's task was "not to make a public policy choice concerning how to value property on which a golf course is under construction, it is rather to interpret and apply a statute." *Id.* at Ariz. 494. Judge Ryan looked to the language of the statute defining a "golf course" and concluded the property which is not capable of being operated as a golf course did not fit the definition of "golf course" under the statute. In pertinent part, (then current) A.R.S. §42-146(G)[17] defined a "golf course" as:

> As used in this section, 'golf course' means substantially undeveloped land . . . which may be used for golfing or golfing practice by the public or by members and guests of a private club

Id. Judge Ryan focused on that phrase in the statutory definition as being "the essence of a 'golf course' under the statute. *Id.* He observed,

> It is difficult to conceive that the legislature would have made the applicability of a special valuation method with such significant

[17] A.R.S. §42-146 was renumbered to 42-13151, 42-13152, 42-13153 and 42-13154.

> consequences as that provided in section 42-146(A) turn on an unspecified degree of probability that a parcel of property would be committed to use for golfing or golfing practice at an unspecified point in the future.

Id.[18]

If compliance with Arizona's golf course valuation statute is a requirement of the restrictive covenant and compliance with that statute requires a golf course on which golfing or golfing practice is possible, than necessarily an operating golf course is required. As such, the 1992 CC&Rs require the Golf Course be an operating golf course. The Opinion's holding is consistent with the policy on which Arizona's golf course valuation statutes is based. That policy is expressly stated in the opening language of A.R.S. §42-13152(A): "In recognition of the importance of the open space and economic benefits of golf courses . . ."

Petitioner asserts the Opinion affirmed the trial court's mandatory permanent injunction and thereby "ordered that the Golf Course be rebuilt and operated when the Appellees have no right to use the Golf Course" under the 1992 CC&Rs ¶5[19]. Petition for Review, 8. Petitioner's assertion cannot be supported solely by that

---

[18] Judge Ryan reiterated his statutory analysis was supported by the express language of the statute assuring "all golf courses shall be uniformly valued" by considering, among other things, eight factors (which included the number of rounds played "during the most recent twelve months" and "during the peak month").

[19] "Nothing in this Declaration shall constitute, nor be deemed to constitute a right to or privilege for any Benefitted Person to enter upon or use the Property for any purpose."

provision of the 1992 CC&Rs. Paragraph 5 must be read in the framework of the entirety of the 1992 CC&Rs. It has long been the rule that an interpretation which gives effective meaning to all provisions of a contract is preferable to an interpretation which leaves a part of the contract ineffective. See *Taylor v. State Farm*, 175 Ariz. 148, 158, 854 P.2d 1134, 1144 (1993) (a contract should not be interpreted to render a provision superfluous).

When 1992 CC&Rs paragraph 5 is viewed in that context, Petitioner's assertion is pointless. Recital D states the 1992 CC&Rs are for the "mutual benefit" of, among others, "any other owner of property located within the Ahwatukee master planned community". Paragraph 2 states, in pertinent part, "Declaration of Use Restriction. Declarant, for the benefit of those persons or classes of persons described in Recital D above (hereafter, "Benefitted Persons") . . ." Paragraph 3 grants Benefitted Persons "an easement over those portions of the Property described on Exhibit 'A'". And paragraph 4 entitles Benefitted Persons to enforce any breach of the 1992 CC&Rs.

Determination, and implementation, of the parties' original intent in the interpretation of contracts is at the core of Arizona law by assuring parties' contract rights are protected. As shown herein, the Opinion's analysis and holding was made in full accordance with Arizona law and is consistent with the stated policy of Arizona's golf course valuation statute.

REQUEST FOR ATTORNEYS' FEES

Appellees seek an award of attorneys' fees and costs incurred for this Response to Petition for Review pursuant to the terms of Paragraph 4 ("Enforcement") of the 1992 CC&Rs which allows Appellants "reimbursement of all court costs and reasonable attorneys' fees from said defaulting owners, occupants or users".

CONCLUSION

For all the reasons set forth herein, Appellees respectfully urge the Court to deny Petitioner's Petition for Review.

Respectfully submitted this 8th day of January 2020.

TIMOTHY H. BARNES, P.C.

By /s/ Timothy H. Barnes

Timothy H. Barnes (SBN 003373)
TIMOTHY H. BARNES, P.C.
428 East Thunderbird Road, #150
Phoenix, Arizona 85022
Attorney for Plaintiffs/Appellees
(602) 492-1528 Direct
tim@thbpc.com