

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA



JEFFREY P. and KATHY L. NEES; MARK A. CAMP, TRUSTEE OF THE MARK A. CAMP 2005 TRUST and CAMILLE L. CAMP, TRUSTEE OF THE CAMILLE L. CAMP 2005 TRUST; SAMUEL EDWARD, II and JENNY C. DAKIL; CHARLES W. and CONNIE J. HOLLEN; G. MIKE JOLLEY and JENNIE L. JOLLEY, TRUSTEE OF THE JENNIE L. JOLLEY FAMILY TRUST; P. MARK and P. MEGAN MOORE; JAMSHID and CHERYL F. MOTIEI; STANTON M. and KERRY S. NELSON; MICHAEL D. and GAIL M. SELLERS; ROBERT A. and CAROL L. STOOPS; WILLIAM D. and ANGELA L. WRIGHT, Individually and on behalf of others similarly situated,

Plaintiffs,

v.

ASHTON GROVE, L.C., an Oklahoma limited liability company; W. DOW HAMM III CORPORATION, a Texas corporation; ASHTON GROVE MASTER ASSOCIATION, INC., an Oklahoma not for profit corporation; WILLIAM DOW HAMM, III; WILLIAM DOW HAMM, JR.; and JONATHAN H. BRINDSEN,

Defendants.

STATE OF OKLAHOMA } S.S
CLEVELAND COUNTY }
FILED In The
Office of the Court Clerk

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DEPUTY

Case No. CJ-2006-313 *BT*

**DEFENDANT ASSOCIATION, DEFENDANT HAMM III, DEFENDANT HAMM JR.
AND DEFENDANT BRINDSEN'S MOTION TO DISMISS AND BRIEF IN SUPPORT**

COMES NOW Defendants Ashton Grove Master Association, Inc., an Oklahoma not for profit corporation (the "Association"), William Dow Hamm, III, William Dow Hamm, Jr. and Jonathan H. Brinsden (collectively "Defendants"), and respectfully request that this Court dismiss Plaintiffs' Petition pursuant to 12 O.S. § 2019 for failure to join indispensable parties. In support of their Motion, Defendants state as follows:

HEARING FOR THIS MOTION

Time:

4-25-2006 2:00 pm

Judge:

Herb...

INTRODUCTION

Plaintiffs are lot owners and/or homeowners of thirteen (13) lots in section one of a residential subdivision in Norman, Oklahoma known as Ashton Grove. Platted section one of Ashton Grove has forty-two (42) lots.¹

Defendants are the property owners' association for the subdivision ("homeowners' association"), former directors of the homeowners' association, the developer of the subdivision and the manager of the developer of the subdivision.

Plaintiffs filed their Petition on February 24, 2006 alleging numerous claims against the Defendants. Plaintiffs' Petition also includes separate derivative claims on behalf of the Master Association. (Petition at p. 6 ¶ 32). Plaintiffs also assert claims for reformation of the recorded Declaration and Covenants filed with the Cleveland County Clerk's office on April 26, 2000 and June 1, 2005. Plaintiffs seek an accounting and seek specific performance of certain improvements in the subdivision to the common areas. (Petition at ¶ 63). Plaintiffs also seek an accounting and money damages, including punitive damages. Finally, it further appears from Plaintiffs' Petition that Plaintiffs seek to void a real estate conveyance of 34.42 acres of common areas from the Developer to the Master Association. (Petition at p. 3, 7 ¶¶ 14, 37-39). This Quit Claim Deed conveyance was recorded on the same date the plat for the subdivision was recorded, April 26, 2000. It was re-recorded on May 4, 2000. Plaintiff's challenge this conveyance. Plaintiffs also challenge the prior real estate conveyance to the Master Association of the land underlying the Rock Creek gate. (Petition at p. 3, 7 ¶¶ 14, 37-39).

Plaintiffs' Petition also seeks to establish that a conveyance of streets to the City of Norman occurred and that the City of Norman accepted the streets. (Petition at p. 15, ¶ 74.)

¹ The remaining sections of Ashton Grove are contemplated to have approximately 190 additional lots.

This allegation is made despite the City of Norman previously denying that any such conveyance and/or acceptance occurred.

As set forth herein, Plaintiffs have failed to join necessary parties to this action. Plaintiffs' claims for reformation of the Declaration and Covenants of the Ashton Grove subdivision require the joinder of the remaining record lot owners in the subdivision. Additionally, Plaintiffs' claims concerning the voiding of common area conveyances and specific performance claims seeking the destruction of certain existing common area improvements also require the joinder of the remaining lot owners, who unquestionably have a substantial investment and substantial rights in the demolition of the common area improvements and real property at issue in this litigation.

Finally, the City of Norman should also be joined because of Plaintiffs' disputed claims concerning legal ownership of certain streets in the subdivision.

BRIEF IN SUPPORT

I. Plaintiff's Reformation Claims Require The Joinder Of All Parties To The Subject Contract.

The Oklahoma Pleading Code provides that "a person who is subject to service of process shall be joined as a party in the action if:...he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may....as a practical matter, impair or impede his ability to protect that interest..." 12 O.S. §2019. 12 O.S. 2012(B) mandates the dismissal of claims for failure to join indispensable parties.

The subject of the pending action is the construction, validity and reformation of a contractual agreement between parties and non-parties to this lawsuit, namely the Declaration of Easements, Covenants, Conditions and Restrictions for the Ashton Grove Planned Development Unit (the "Declaration and Covenants") filed in Cleveland County, on April 26, 2000, and the

First Amendment to Declaration of Easements, Covenants, Conditions and Restrictions for Ashton Grove Planned Development Unit (the "First Amendment") filed on June 1, 2005. More particularly, Count II of Plaintiffs' Petition seeks reformation of the contract between the parties. In order to fulfill the requirements of Section 2019, all parties to the contract should be made a party to this action.

Oklahoma law recognizes that real estate covenants are "in the nature of a contract." Falconhead Prop. Owners Ass'n, Inc. v. Fredrickson, 2002 OK CIV APP 67, 50 P.3d 224, 225 (Okla. Civ. App. 2002). Oklahoma Courts have consistently applied basic contract principles to real estate covenants. *Id.*; see also, Moore v. White, 1958 OK 59, 323 P.2d 352 (Okla. 1958). Moreover, as with contracts, the parties to a covenant can bring an action for enforcement of its terms. 60 O.S. § 856.

In this case, the Declaration plainly binds all Ashton Grove lot owners. In Article XIX, the Declaration provides:

Each grantee of the Developer or of any Owner, by the acceptance of a deed of conveyance . . . , and the heirs, successors and assigns of the foregoing Persons, accepts the same subject to all restrictions, conditions, covenants, reservations, liens and charges, and the jurisdiction, rights and powers created or reserved by this Declaration, and all rights, benefits and privileges of every character hereby granted, created, reserved or declared, and all impositions and obligations hereby imposed shall be deemed and taken to be covenants running with the land and equitable servitudes, and shall bind any person having at any time any interest or estate in said land, and shall inure to the benefit of any such Person in like manner as though the provisions of this Declaration were recited and stipulated at length in each and every deed of conveyance, purchase contract or instrument evidencing or creating such interest.

Thus, by its plain terms, the Declaration is a *binding contractual agreement* among each Ashton Grove lot owner and the homeowners' association. In fact, Plaintiffs expressly acknowledge the contractual relationship between the parties in Paragraph 50 of their Petition, wherein they state, "The Declaration constitutes a contract between the Developer and the

owners of lots in Ashton Grove” It is this Declaration and the First Amendment to the Declaration that the Plaintiffs seek to reform in this lawsuit.

The rights and obligations in real estate declarations and covenants are contractual. *Id.* Oklahoma law clearly recognizes that “judgment reforming a contract would materially affect the legal or equitable status of all parties thereto” Terrill v. Laney, 1948 OK 109, 193 P.2d 296 (Okla. 1948). In Terrill, the plaintiff sought to recover possession and quiet title to a lot on which defendant lived. The defendant’s ex-husband granted the lot to the plaintiff, and the plaintiff argued that the defendant ex-husband had proper title to the land as defendant had ostensibly relinquished her rights to the lot in a property settlement agreement with her former husband wherein she released all claims to any property owned by her husband. The defendant responded that she did not understand the nature of the release in the property settlement agreement, nor did she intend to relinquish her rights thereby to all real property, but only to personal property. The Court, upheld the property settlement agreement, noting that defendant did not make any attempt to reform the contract on the ground of fraud or mistake, and she did not make her husband (as the plaintiff’s grantor) a party to the action. Recognizing that the legal and equitable status of all the parties to the contract would be materially affected by a reformation, the Court noted that defendant’s husband was a necessary party to the action.

The Declaration and Covenants at issue here were recorded in the Cleveland County Clerk’s Office in 2000 and 2005. Plaintiffs’ Petition expressly states a reformation claim seeking this Court’s reformation of the previously recorded Declaration of Ashton Grove. Defendants dispute and deny virtually all of the allegations in Plaintiffs’ Petition. Defendants do not seek to litigate the merits of Plaintiffs’ claims in this Motion. In this Motion, Defendants do not even challenge Plaintiffs’ right to assert such reformation claims. However, because such

claims have been raised by Plaintiffs, all necessary parties must be joined pursuant to 12 O.S. § 2019. Plaintiffs' Petition fails to join all indispensable parties. Therefore, it should be dismissed or Plaintiffs should be required to join necessary parties if they seek to proceed with their claims.

As noted above, Plaintiffs have petitioned this Court for reformation of the contractual agreement [the Declaration and First Amendment] between the parties. Moreover, Plaintiffs expressly acknowledge throughout their Petition that the rights of all owners of Ashton Grove lots are affected by the parties' contract. (Plaintiffs' Petition, ¶¶ 9, 22 and 50). Still, Plaintiffs have failed to join, as parties to the contract, all Ashton Grove lot owners. Such persons have a substantial interest in the subject of this action, and their absence may significantly impede or impair their ability to protect their respective rights. Consequently, this Court should dismiss Plaintiffs' Petition for failure to join necessary parties.

II. Plaintiffs' Separate Claims For Specific Performance To "Demolish" Common Area Improvements Also Require The Joinder Of The Remaining Lot Owners.

All lot owners in the subdivision have a substantial interest in the common areas of the subdivision, including the perimeter fencing, walls and the drive-through entry gates.

Plaintiffs' Petition seeks, in part, "a judgment for specific performance ordering the Developer to demolish the Inadequate Common Area Improvements..." which are defined as the Rock Creek drive-through gate, the 48th Ave NW² drive-through gate, the brick walls and the perimeter wrought iron fencing. (Petition at p. 15, ¶ 75; pp. 13-15, ¶¶ 65-75).

As expressly set forth in their Petition, Plaintiffs, the lot owners of thirteen lots, seek an Order of the Court ordering the Developer to demolish these common area improvements. The

² The Petition incorrectly refers to the 48th Ave NW Gate as the "48th Street Gate". In fact, the gate is on 48th Ave NW.

non-party lot owners of the twenty-five (25) other lots have a substantial property right in these existing common area improvements. Therefore, they should be required to be joined in this lawsuit if Plaintiffs seek to proceed with their specific performance claims. 12 O.S. § 2019(A).

III. Plaintiffs' Failure To Join All Ashton Grove Lot Owners As Parties To This Action Creates A Substantial Risk To Defendants Of Multiple Lawsuits And Potentially Inconsistent Obligations.

Plaintiffs' failure to join all of the Ashton Grove lot owners also contravenes Section 2019 because it subjects Defendants to a substantial risk of multiple lawsuits, potentially resulting in inconsistent obligations. Here, Plaintiffs, the owners of thirteen lots in the subdivision, have raised various claims seeking reformation and specific performance.

The Petition asserts various claims for specific performance. These specific performance claims seek the destruction and reconstruction of certain common area improvements, including the fencing along the perimeter of the subdivision and the drive-in entry gates to the subdivision on both Rock Creek Road and 48th Ave NW. (Petition at p. 15, ¶ 75; pp. 13-15, ¶¶ 65-75).

Plaintiffs assert that the fencing and entry gates are "Inadequate" and should be reconstructed pursuant to Plaintiffs' demands. However, even assuming Plaintiffs prevail on these claims, Plaintiffs' demands for demolition and reconstruction may differ or be in conflict with other lot owners in the subdivision. For instance, it appears Plaintiff is seeking the reconstruction of the drive-in entry gate to be located further into the subdivision. Any expansion of the entry gate further into the addition might have an adverse effect on those lot owners who are in closer proximity to the existing entry gate. If not joined in this action and provided an opportunity to raise any claims they may have concerning these issues, those lot owners may thereafter sue as a result of any reconstructed gate and allege that the reconstructed gate adversely affects their lot and property rights.

Plaintiffs claims for specific performance and reconstruction of existing common area improvements substantially affects the property rights of other lot owners. Without joining those other lot owners in this action, Defendants have a substantial risk of multiple lawsuits and liability, potentially resulting in inconsistent obligations.

For these reasons, the Motion to Dismiss should be granted, and Plaintiffs should be permitted to pursue said claims only on the condition that they join all indispensable parties.

In Colton, et al. v. Huntleigh, 2005 OK 46, 121 P.3d 1070 (Okla. 2005), the Oklahoma Supreme Court held that Transportation Security Administration ("TSA") was an indispensable party in an action by the security screening employees of Huntleigh for wages owed under a contract which had been assumed by TSA as part of the process of federalizing airport security. Specifically, the Huntleigh employees claim to wages was based on an allegation that Huntleigh had received certain bonus funds from TSA for payment to employees. However, Huntleigh maintained that the funds had not been paid, and that it was in the midst of negotiations with TSA for the funds. Consequently, Huntleigh argued that TSA's absence in the lawsuit would subject it to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of TSA's interest. The Supreme Court agreed.³

Also, in Liberty Bank & Trust Co. of Okla. City v. Perimeter Ctr. Ltd. P'ship, 1998 OK CIV APP 51, 958 P.2d 814 (Okla. Civ. App. 1998), the plaintiff lender filed a declaratory action against the developer to determine the applicability of a certain Declaration for a Planned Unit Development ("PUD 5") to certain tracts within the development and to construe language regarding improvements. Prior to the action, the City had twice determined that use of the tracts

³ Because TSA is a federal agency, after finding it an indispensable party the Court engaged in further analysis regarding the feasibility of joinder. The Court's feasibility analysis is inapplicable to the present case as all Ashton Grove lot owners are capable of being joined in the present lawsuit.

in question was restricted to office space under the PUD 5 Declaration, but on a third request inquiry, granted an application for commercial use of the tracts in contravention of the PUD 5 restrictions. The Court of Appeals found that “the [City] Board of Adjustment’s ruling lies as such an impediment to the conclusion of the trial court and the resolution of this matter that the City is an indispensable party to this action.” *Id.* at 817. Thus, the Court of Civil Appeals determined that the absence of the City as a party to the action, created a substantial likelihood of inconsistency and prejudice.

In the present case, Plaintiffs’ failure to join all Ashton Grove lot owners creates a substantial risk that other lot owners may later bring separate law suits, and thus may subject Defendants to inconsistent obligations. Therefore, Plaintiffs’ Petition should be dismissed for failing to join the necessary parties.

IV. The City Of Norman Is Also an Indispensable Party Because of Plaintiff’s Claims Concerning the City’s Purported Acceptance of Certain Streets in the Subdivision.

Plaintiffs’ Petition expressly challenges the Master Association’s ownership of the streets in Section 1 of the subdivision. Plaintiffs’ Petition asserts that “the Master Association could not accept [and be granted] ownership of those real property fixtures [including the Rock Creek Gate] because they were constructed in the streets previously dedicated to and accepted by the City of Norman.” (Petition at p. 15, ¶ 74.)

The Developer and the City of Norman dispute this claim. The subject streets are and always have been considered private streets. As further evidence of the private nature of the streets, the subject streets have been enclosed and gated for many years.

Plaintiffs have put before the Court the issue of whether the streets in the subdivision were “previously dedicated to and accepted by the City of Norman.” (Petition at p. 15, ¶ 74.) Resolution of the issues and claims raised in Plaintiffs’ Petition are dependent upon resolution of

whether the streets in the subdivision were “previously dedicated to and accepted by the City of Norman.” (Petition at p. 15, ¶ 74.)

If the streets were dedicated to and accepted by the City of Norman, as Plaintiffs’ allege in their Petition, the City of Norman would have substantial maintenance and other obligations with respect to said streets. Therefore, the City of Norman has a substantial interest in the issue of whether it has accepted the subject streets as City streets. Pursuant to the authorities set forth above, the City of Norman should be joined in this action to answer and address this issue.

CONCLUSION

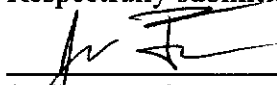
Plaintiffs, by their Petition, request that this Court reform a contract that governs the relationship and rights between Defendants and all Ashton Grove lot owners. Failure to join all Ashton Grove lot owners of record necessarily impairs and impedes the ability of the non-joined persons to protect their interest in their rights under the contract. It would be unjust to permit a reformation claim to proceed in this Court without joinder because the adjudication here would modify the non-parties property rights and contractual rights.

Furthermore, Plaintiffs’ request for specific performance requiring the Developer to “demolish” certain common area improvements impairs and impedes the ability of the non-joined persons to protect their respective interests in their rights in the common areas. Furthermore, Plaintiffs’ failure to join the remaining lot owners subjects Defendants to a substantial risk of double, multiple or otherwise inconsistent obligations. Consequently, Defendants pray this Court will dismiss Plaintiffs’ Petition for failure to join all Ashton Grove lot owners as indispensable parties, or, in the alternative, require Plaintiffs to join the remaining Ashton Grove lot owners if they seek to proceed with their claims.

Finally, Defendants request that Plaintiffs join the City of Norman as an indispensable party concerning the allegations set forth in the Petition concerning the City's purported "accept[ance]" of certain streets in the subdivision.

WHEREFORE, it is respectfully requested that the Motion to Dismiss be granted and Plaintiffs' Petition be dismissed, or for such other relief this Court deems just and proper.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on this 4th day of April, 2006, a true and correct copy of the above and foregoing Motion to Dismiss was sent via first-class mail, postage prepaid, to:

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