IN THE CHANCERY COURT OF HANCOCK COUNTY, MISSISSIPPI

BOB MARTHOUSE, STEWART NUTTING and GARY BECKER **PLAINTIFFS**

VS **CAUSE NO. 23CH1:18-cv-654-CB**

DIAMONDHEAD COUNTRY CLUB AND PROPERTY OWNERS ASSOCIATION, INC. **DEFENDANT**

AND

COMMITTEE FOR CONTRACTURAL COVENANTS COMPLIANCE, INC., PATRICK MCCROSSEN, JOSEPH FLOYD and CITY OF DIAMONDHEAD, MISSISSIPPI **INTERVENORS**

BRIEF IN SUPPORT OF RESPONSE AND OPPOSITION TO PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT

COME NOW, Intervenors, Committee for Contractual Covenants Compliance, Inc. (hereinafter "CCCC"), Patrick McCrossen (hereinafter referred to as "McCrossen") and Joseph Floyd (hereinafter referred to as "Floyd") (hereinafter collectively "Respondents"), by and through their attorney of record, Michael D. Haas, Jr., Haas & Haas Attorneys, and file this their Brief in Support of Response and Opposition to Plaintiffs' Motion for Declaratory Judgment.

I. Background

At issue are the various Declarations of Covenants that currently affect the owners of certain lots situated in Diamondhead, Mississippi. Specifically, Plaintiffs have alleged that the amendment clauses of these Declarations are unreasonable because they appear to be unattainable based on voter participation rates in Diamondhead Country Club and Property Owner's Association, Inc.'s (hereafter "DPOA") "elections and other actions". (Doc. 2, p.

3). Plaintiffs have filed a Motion for Declaratory Judgment in this matter that is essentially a restatement of their Complaint and have prayed for identical relief.

As summarized by the Plaintiffs in their Motion for Declaratory Judgment, from 1970 through 1984 Diamondhead was developed into three (3) phases, comprised of multiple units, subdivisions, condominiums and townhomes. (Doc. 31, p. 2). During this time, the developer drafted and recorded a declaration of covenants for each of the sections and buyers purchased their lots subject to those covenants.

Each of these Declarations of Covenants includes an amendment clause and most of them require the consent of the owner or owners of record of eighty-five percent (85%) of the lots in each affected phase. [1] Plaintiffs have produced a chart summarizing the amendment requirements in the various phases, units, subdivisions, condominiums and townhomes. (Doc. 31, Exhibit "C"). Since their inception, the amendment clauses have never been modified with the consent of the requisite lot owners and the DPOA has never attempted to obtain their consent to amend same.

The majority of the covenants will begin to expire, by their terms, on dates certain beginning June 17, 2020. Undoubtably this will result in a dramatic shift in the way that the DPOA manages and maintains its properties and amenities. However, instead of appealing to the property owners of Diamondhead, the DPOA has appealed to the courts to modify the covenants for

[1] A large majority (36 out of the 44) of the Declarations require the consent of 85% of the lot owners and some require the consent of additional persons.

the past three (3) years. This effort began on June 17, 2016 when the DPOA filed a Petition for Declaratory Judgment (Cause No. 23CH1:16-cv-403-SS) requesting that the Court delete or amend the expiration terms of the various covenants. That matter was eventually resolved after the DPOA filed a Motion for Voluntary Dismissal pursuant to Miss. R. Civ. Pro. 41(a)(2) on October 17, 2018 and the parties agreeing to a Stipulation of Dismissal effective October 28, 2018, which was accepted by the Court.

Concurrently with the dismissal of the original lawsuit, on October 19, 2018 three of the Directors of the DPOA, including its President, Bob Marthouse, instituted a "friendly" lawsuit against the DPOA naming no other parties. [2] In its Answer to Complaint, filed by DPOA Secretary Karen Rice on November 7, 2018, the DPOA agreed to all factual allegations and agreed that the Plaintiffs were entitled to the requested relief. Thereafter, the Court entered Agreed Orders allowing the City of Diamondhead, MS to intervene in this matter on November 29, 2018 and allowing the Respondents to intervene as defendants in this matter on January 8, 2019.

The matter before the Court is the Plaintiffs' Motion for Declaratory Judgment requesting that the Court 1) find that amendment terms are unreasonable and 2) amend them "to allow amendment by a majority of 60% of votes cast in person or by proxy." (Doc. 31, p. 7). This request is identical to the

[2] The Court should note that the DPOA has acknowledged by Response to Request for Admission that it has paid or agreed to pay the Plaintiffs' attorney's fees to Honorable David C. Goff.

Plaintiffs' prayer for relief in their Complaint filed in the court file herein. (Doc. 2, pp. 4-5).

II. Standard of Review

The Court may consider matters regarding the rights and obligations arising from a written contract even when an active controversy has not yet matured. The interested party seeking clarification should pursue a declaratory judgment under Rule 57 of the Mississippi Rules of Civil Procedure. Rule 57(a) states that "Courts of record within their respective jurisdictions may declare rights, status, and other legal relations regardless of whether further relief is or could be claimed." Rule 57 further directs that the procedure for obtaining such relief "shall be in accordance with these rules," meaning that the requirements of pleading and practice are the same as in other civil actions.

III. Legal Authority

The construction and interpretation of restrictive covenants "are the same as those applicable to any contract or covenant." *Carter v. Pace*, 86 So.2d 360, 362 (Miss. 1956). Historically, the Mississippi Supreme Court has disfavored restrictive covenants. "Such covenants are subject more or less to a strict construction and[,] in the case of ambiguity, construction is usually most strongly against the person seeking the restriction and in favor of the person being restricted." *Kemp v. Lake Serene Property Owners Ass'n, Inc.*, 256 So.2d 924, 926 (Miss. 1971).

In recent years, the Mississippi Supreme Court has recognized that a declaration of covenants "gives rise to review in law or in equity by any lot owner"

and that such "[r]eview by the court must be guided by the intent stated in the declaration of purpose and judged by a test of reasonableness." *Perry v. Bridgetown Community Ass'n, Inc.*, 486 So.2d 1230, 1234 (Miss. 1986) (internal citation omitted). This review power, however, "**does not** provide the trial court with the authority to rewrite entire provisions the court may deem unreasonable" and, in the event that the chancellor determines that a term is unreasonable, "the court should **strike it** [...]" (emphasis added). *Griffin v. Tall Timbers Develop., Inc.*, 681 So.2d 546, 554 (Miss. 1996). Further, "[t]he power of the chancellor **to substitute his own judgment** for that found in the original covenant, or [...] to **alter** the substance of a writing, **is not reflected** in the case law of this or any other jurisdiction [...]" (emphasis added). *Id.* at 555.

This restriction on courts reinforces the principle that "[t]he right of persons to contract is fundamental to our jurisprudence and absent mutual mistake, fraud and/or illegality, the courts do not have the authority to modify, add to, or subtract from the terms of a contract validly executed between two parties." *Wallace v. United Mississippi Bank*, 726 So.2d 578, 584 (Miss. 1998) (quoting *First Nat'l Bank of Vicksburg v. Caruthers*, 443 So.2d 861, 864 (Miss. 1983)). This restriction also aligns with the premise that "[c]ourts do not have the power to make contracts where none exist, nor to modify, add to, or subtract from the terms of one in existence." *Griffin,* 681 So.2d at 555 (quoting *Glantz Contracting Co. v. General Elec. Co.*, 379 So.2d 912, 916 (Miss. 1983).

IV. Analysis

A. Whether the terms are clear and unambiguous

The Plaintiffs do not contest that the terms providing for amendment of the covenants are ambiguous. In fact, Plaintiffs have admitted that they are clear and unambiguous. (Plaintiffs' Response to CCCC's Request for Admission No. 4). They merely allege that the terms are unreasonable. The terms at issue require the consent of up to 85% of lot owners to annul, amend or modify the restrictions, conditions, easements, covenants, liens and charges to which they have individually and collectively agreed to be bound. (*see* Doc. 31, Ex. "C"; *see also* Doc. 2, Ex. "A", Art. XXI). These terms are clear and unambiguous on their face and the Court should enforce same.

B. Whether the amendment clauses are unreasonable as to the purpose of the covenants

These Declarations of Covenants were drafted and recorded by the developer of the Diamondhead community, who owned a substantial portion of the lots at the time. Requiring the consent of 85% of the lot owners in each subdivision was not unreasonable at the time and is not unreasonable today. On the contrary, it is a reasonably high burden for such a broad power that serves to protect the investments of not only the purchasers of lots, but also the developer while it was in the process of selling the lots.

This is particularly so in this case since the zoning and architectural requirements and even the obligation to pay assessments to the DPOA are all solely provided for in the covenants. (Doc. 2, Ex. "A", Art. IV and XV). If a mere 60% of votes cast, in person or by proxy, could amend or even delete these terms,

as suggested by the Plaintiffs, the results would be "extremely detrimental (even disastrous) to the Diamondhead community". (Doc. 31, p. 7). A stronger argument could be made that a lower requirement would be unreasonable based on the intent stated in the covenants' declarations of purpose. In addition, requiring the consent of 85% of lot owners should not shock the conscience of the Court. [3] The Court should find that the amendment terms are reasonable and should deny Plaintiffs' request to amend same.

C. Whether the amendment clauses are unreasonable due to their effect on the DPOA

The Plaintiffs' argument focuses, almost exclusively, on the fact that the DPOA relies on the covenants for their continued operation. Doc. 31, pp. 3-5. Relevancy issues aside, all of the evidence shows that the covenants themselves were written at a time when the DPOA existed. [4] Article XV of the Declaration of Restrictions, Conditions, Easements, Covenants, Agreements, Liens and Charges Diamondhead, Phase 1 specifically provides for the DPOA to have the authority to charge and collect dues and assessments to lot owners. Furthermore, Article I of the Phase 1 covenants specifically state that "[a]ll of the provisions, restrictions, conditions, agreements, **liens and charges** [...] shall exist and be binding upon **all parties and all persons** claiming under them **for a period of fifty (50) years** from the date or (sic) recordation hereof, unless sooner annulled, amended or modified pursuant to the provisions of Article XXI

[3] The Covenants in the *Kephart* case required the filing of a Supplement executed by at least 90% of the owners of the lots. (Appellant Brief, p. 4).

[4] According to its Charter, the DPOA was incorporated on June 8, 1970. (Doc. 31, Ex. "A"). The first Declaration of Covenants was dated June 17, 1970. (Doc. 31, Ex. "B").

hereof" (emphasis added). Therefore, the existence of the DPOA and its need for dues and assessments was clearly contemplated by the drafters of the covenants and this clear and unambiguous language demonstrates that regardless of whether the DPOA existed in perpetuity, the covenants themselves, and the obligations thereunder, would eventually expire. [5] The Court should find that the amendment articles are not unreasonable since the drafters clearly considered the needs of the DPOA when drafting them.

V. Conclusion

The Plaintiffs' requested relief in their Complaint and Motion for Declaratory Judgment is not allowable under the laws of Mississippi. The amendment requirements are not unreasonable and, if the Court determines that they are, the sole remedy available to the Plaintiffs is for the Court to strike the terms, which would result in there being no means of amending the covenants. There is no authority for the Court to "amend it to something attainable", as suggested by the Plaintiffs. (Doc. 31, p. 7). The Mississippi Supreme Court has been clear and consistent in this regard. *See Griffin*, 681 So. 2d 546; *see also Pittman v. Lakeover Homeowners' Ass'n*, 909 So.2d 1227 (Miss. App., 2005). Since the Court has no authority to grant Plaintiffs' prayer for relief, the motion should be denied and this matter should be dismissed with prejudice in accordance with Miss. R. Civ. Pro. 12(b)(6). That the Court should allow and award court costs and attorneys fees to the Respondents.

---

[5] 24 of the 44 declarations of covenants expire on dates specific beginning June 17, 2020. (Doc. 31, Ex. "C").

RESPECTFULLY SUBMITTED, this the 18th day of July, 2019.

Committee for Contractual Covenants Compliance, Inc., Patrick McCrossen and Joseph Floyd, Intervenors

By: */s/ Michael D. Haas, Jr.*
Michael D. Haas, Jr., attorney for Intervenors

Michael D. Haas, Jr., MS Bar No. 5091
Caroline E. Haas, MS Bar No. 104525
Haas & Haas Attorneys
201 N. Second Street
Bay Saint Louis, MS 39520
Tel: (228) 467-6574
Fax: (228) 467-6575

CERTIFICATE OF SERVICE

I, Michael D. Haas, Jr., do hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

A) Honorable August N. Rechtien
7610 Country Club Circle
Diamondhead, MS 39525
Attorney for Diamondhead Country Club & Property Owners Association, Inc.

B) Honorable David C. Goff,
Wise Carter Child & Caraway, P.A.
2510 14th Street, Suite 1125
Gulfport, MS 39501
Attorney for Plaintiffs

C) Honorable Derek R. Cusick
Symmes, Esteses & Cusick
2200 25th Avenue
Gulfport, MS 39501
Attorney for City of Diamondhead, MS

This the 18th day of July, 2019.

/s/ Michael D. Haas, Jr.
MICHAEL D. HAAS, JR., attorney for Committee for Contractual Covenants Compliance, Inc., Patrick McCrossen and Joseph Floyd, Intervenors

Michael D. Haas, Jr., MS Bar No. 5091
Caroline E. Haas, MS Bar No. 104525
Haas & Haas Attorneys
201 N. Second Street
Bay Saint Louis, MS 39520
Tel: (228) 467-6574
Fax: (228) 467-6575