

IN THE SUPERIOR COURT OF FORSYTH COUNTY
STATE OF GEORGIA

FORSYTH COUNTY GEORGIA
FILED IN THIS OFFICE

OCT 06 2009

R. H. Oller
CLERK SUPERIOR COURT

MICHAEL PECK,

:

Plaintiff,

:

VS.

:

CIVIL ACTION FILE
NO. 07CV-2147

LANIER GOLF CLUB,

:

Defendant.

:

ORDER

This case is before the Court on Plaintiff's Motion for Class Certification. The Court having read and considered all pertinent matters of record, hereby finds as follows:

The present case arose when the owners of the Lanier Golf Club proposed to sell the land to a developer and filed an application to rezone the property. Plaintiff, who owns a lot adjacent to the golf course, filed this Declaratory Judgment action on behalf of himself and other similarly situated land owners claiming that because the golf course was a material part of the value of their property, because they paid a premium price for the golf course lots, and because the golf course was the principal incentive for the purchase of the lots, the landowners had acquired an "easement or implied covenant" in the golf course. The relief requested was that the Court declare and enforce against Defendant, or any new owners, an implied restriction limiting use of this property to golf course purposes only.

Plaintiff filed a motion to certify the class. He stated that there were 121 landowners with property adjacent to the golf course and submitted affidavits from several of the landowners stating the they owned property adjacent to the golf course,

paid a higher price for their property because of the golf course, and had seen property values decrease as a result of the closing of the course and the pending sale for development. Peck also submitted testimony from a real estate agent who testified that the lots were marketed as golf course lots and therefore people paid almost three times more for those lots than similar lots not adjacent to the golf course. Peck contended that he had stated a cognizable claim, citing Forsyth County v. Martin, 279 Ga. 215, 217 (2005).

After the hearing on Plaintiff's motion to certify the class, the trial court denied the petition for class certification, finding that Plaintiff did not have an implied restrictive covenant on the golf course, and dismissed Plaintiff's claim for lack of standing. Because the order signed by the trial court addressed only the merits of the underlying claim and did not make the required findings of fact and conclusions of law with regard to whether each factor required by O.C.G.A. § 9-11-23 had been established, the Georgia Court of Appeals reversed the dismissal and remanded the case to this Court.

Requirements of O.C.G.A. § 9-11-23 (a).

This Court finds that class actions are governed by O.C.G.A. § 9-11-23. For Plaintiff to qualify as a class representative, four requirements must be established. The four requirements are: 1) the class is so numerous that joinder of all members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and 4) the representative parties will fairly and adequately protect the interests of the class. O.C.G.A. § 9-11-23 (a). In order for the court to certify a class, each of these factors must be satisfied. McGarry v. Cingular Wireless, LLC, 267 Ga. App. 23, 25

(2004). In addition, the court must determine that the plaintiff meets one of the subdivisions of O.C.G.A. § 9-11-23 (b). Plaintiff bears the burden of demonstrating that the requirements of class certification have been met. Id.

In determining the propriety of a class action, the first issue to be resolved is not whether the plaintiffs have stated a cause of action or may ultimately prevail on the merits, but whether the requirements of O.C.G.A. § 9-11-23 (a) have been met. McGarry v. Cingular Wireless, LLC, 267 Ga. App. 23, 25 (2204). However, the U.S. Supreme Court has recognized that “the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” Id.

In the present case, Plaintiff has defined his class to encompass elements of his cause of action, as it includes all those who purchased lots adjacent to the Golf Course and who claim an easement or implied covenant in the Golf Course. Therefore, in order to determine whether class certification is proper, the Court is required to look at the issues that will also be considered in examining the merits of Plaintiff’s claims.

1. Numerosity:

In order to have a class certified, the first prerequisite that has to be met is that the class be “so numerous that joinder of all members is impracticable.” O.C.G.A. § 9-11-23 (a)(1). A class consisting of as few as 25 persons has been found to be sufficiently numerous to maintain a class action. Sta-Power Industries, Inc. v. Avant, 134 Ga. App. 952 (1975). In the present case, Plaintiff alleges that a potential class consists of some 121 individuals, who own property adjacent to the Golf Course and who claim an

easement or restrictive covenant on the Golf Course. Therefore, the numerosity requirement would be satisfied in this case.

2. Commonality:

In reviewing whether the commonality requirement has been met by the Plaintiff, the Court must analyze Plaintiff's claim of an implied easement, and determine whether the proposed class members are similarly situated. Liberty Lending Services v. Canada, 293 Ga. App. 731 (2008). Commonality requires that "a class action...involve issues that are susceptible to class-wide proof". The court must then review the evidence to determine whether this requirement is satisfied. Murray v. Auslander, 244 F.3d 807, 811 (2001).

From the face of the Complaint, it appears Plaintiff and the proposed class members share a common interest in establishing an easement or implied covenant on the Golf Course, as each owns property adjacent to the Golf Course. Although this Court must presume and accept the substantive allegations of the complaint as true in determining whether an action satisfies O.C.G.A. § 9-11-23, it may consider the merits of the litigation to the degree necessary, in determining whether the requirements are satisfied. Fortis Insurance Group et al. v. Kahn, ---S.E.2d --- (Ga. App. June 3, 2009) WL1532515.

The Georgia Supreme Court has addressed the ways in which parties may restrict the uses of land in order to increase its marketability in cases involving both express and implied restrictions. Parties may restrict the uses of land in the following ways: 1) a land owner may agree with purchasers of portions of the land to restrict the entire property to a certain use by reducing the "specific restrictions on the land to writing, specifying the

property restricted, and then recording the restrictions and the property description with the proper authorities” in order to assure enforcement of the restriction. Knotts Landing Corporation v. Lathem, 256 Ga. 321, 322-323 (1986); or 2) the parties may take actions from which courts will imply an agreement to restrict the uses allowed upon a tract of land. Id.

In order for a party to enforce an implied or non-express agreement, the area covered by the agreement must be established “and the specific content of the restrictions alleged.” Id. “This is usually accomplished by showing a common grantor’s general scheme or plan for developing the property in question.” Id. Finally, oral representations by agents and principals of the property owner that other property shown on a plat would be restricted and that these promises induced the purchasers to purchase lots, may be binding under a theory of promissory estoppel. Id.

In the present case, no written, recorded document expressly restricting the Lanier Golf Property to use as a golf course has been found. In addition, no common grantor’s general scheme or plan for developing the property in question has been submitted. Absent an express written restriction or document showing a common scheme of development, which includes the Golf Course, each of the proposed class members would have to present evidence of reliance on representations that the Golf Course would be restricted. “Where the resolution of individual questions plays...an integral part in the determination of liability, a class action suit is inappropriate.” Tanner v. Brasher, 254 Ga. 41, 45, (1985). Therefore, resolution of this case would require individual assessments of the representations of each property owner, what these representations were, and the extent to which each owner relied on the representations that the Lanier Golf Course

would be restricted to golf course use. Accordingly, Plaintiff's claim does not involve issues that are susceptible to class-wide proof because Plaintiff has not shown that he is similarly situated to other class members in any way other than the relief he seeks.

3. Typicality

In regard to the requirement of typicality, the court must be able to determine whether the named plaintiff possesses the same interest and will suffer the same injury as the putative class members. Murray, 244 F. 3d at 811. For example, the typicality requirement under O.C.G.A. § 9-11-23 (a) is satisfied upon a showing that the defendant "committed the same unlawful acts in the same method against an entire class." Kennedy v. Tallant, 710 F.2d 711 (1983).

In the present case, Plaintiff's claim to an easement or implied covenant may be typical of the claim of all the members of the proposed class as to the relief requested. However, the basis for Plaintiff's claim is that he is entitled to an easement or implied covenant simply because he bought a lot adjacent to a Golf Course at a premium price.

As set forth above, Plaintiff's position is not typical of other proposed class members who may have seen a subdivision plat showing lots platted on the Golf Course, showing the alleged restriction on the Golf Course, or who may have received oral assurances from the owner/developer of the Golf Course that they were entitled to an easement or implied covenant by virtue of purchasing lots adjacent to the Golf Course. Even though Plaintiff may enjoy the fruits of the success of another party, who is able to succeed on a claim of implied easement, he would have no right to enforce the restriction. That right would belong to the party who meets the requirements for a restrictive covenant, which is not Plaintiff. Jones v. Gaddy, 259 Ga. 356 (1989). Moreover, should a

restriction be found in favor of one or more adjacent property owners, those property owners would have the right to modify, waive or release the Golf Course as to its property, regardless of Plaintiff's consent or lack thereof, leaving Plaintiff with no remedy. Therefore, Plaintiff's claim would not possess the same interest or suffer the same injury as the putative class members and would not meet the commonality requirement.

4. Adequacy of Representation

Finally, Plaintiff bears the burden of demonstrating that he will adequately represent the class. McGarry v. Cingular Wireless Company, LLC, 267 Ga. App. 23, 34 (2004). This burden necessarily includes a showing that he is a member of the class he seeks to represent. Id. When the named plaintiff has no valid claim against the defendant, he is not eligible to represent the purported class. Dryvit Systems v. Stein, 256 Ga. App. 327, 329 (2002).

In the present case, Plaintiff admitted the he did not see a subdivision plat showing lots platted on the Golf Course and he failed to produce a recorded plat showing restrictions on the Golf Course. Therefore, Plaintiff cannot allege an express easement or covenant on the Golf Course.

In order to set out an implied or non-express restriction, Plaintiff would have to establish the area covered by the restriction and the specific content of the restrictions alleged by showing a common grantor's general scheme or plan for developing the property in question. Knotts Landing Corporation v. Lathem, 256 Ga. 321, 322-323. Although numerous plats and surveys were presented, no evidence was submitted, showing such a common scheme or plan.

Absent an express written restriction or document showing a common scheme of development, which includes the Golf Course, Plaintiff would have to present evidence of reliance on oral representations that the Golf Course would be restricted. However, Plaintiff, himself, testified that no oral representations by agents and principals of the owners of the Golf Course were made to him regarding any restriction on the Golf Course. In addition, Carol McGregor, the real estate agent who sold the lot to Plaintiff, testified that she was sure that she disclosed to Plaintiff that he had no right to receive a membership or right of use to the Golf Course. Therefore, Plaintiff cannot rely on a theory of promissory estoppel to establish an implied restrictive covenant on the Golf Course.

Based on the evidentiary deficiencies of Plaintiff's claim, which are reflected in the deposition testimony and hearing testimony, this Court concludes that Plaintiff is not an adequate representative of the class because he failed to establish that he is a member of the class he seeks to represent.

Requirements of O.C.G.A. § 9-11-23 (b)

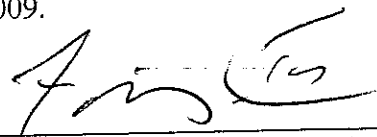
In its Order on remand, the Court of Appeals noted that Plaintiff's counsel announced at the hearing that he was relying on O.C.G.A. § 9-11-23 (b)(2). O.C.G.A. § 9-11-23 (b)(2), authorizes a class action if the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole", and satisfies the four prerequisites of subsection 23 (a). This Court finds that the instant action fits with section (b)(2), as Plaintiff is seeking injunctive relief.

However, Plaintiff does not meet all four requirements of O.C.G.A. § 9-11-23 (a).

As described above, Plaintiff's testimony is contrary to and devoid of any factual allegation, which would support his claim for an easement or implied restriction on the Golf Course. Therefore, Plaintiff is inadequate by virtue of not being a member of the class he seeks to represent and no other class representative has been identified.

Accordingly, Plaintiff's Motion for Class Certification is hereby DENIED and the Complaint is DISMISSED for lack of proper Plaintiff.

SO ORDERED, this 2 day of October, 2009.



Hon. Frank C. Mills, III, Chief Judge
Cherokee County Superior Court
Blue Ridge Judicial Circuit
Forsyth Superior Court by designation

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