Rel: August 28, 2020

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2020

1190103

Capitol Farmers Market, Inc.

v.

Cindy C. Warren Delongchamp

Appeal from Montgomery Circuit Court
(CV-17-901470)

BRYAN, Justice.

Capitol Farmers Market, Inc. ("Capitol Farmers Market"), appeals from a judgment entered by the Montgomery Circuit Court ("the circuit court") in favor of Cindy C. Warren Delongchamp.

Background

John Huddleston and Judith B. Huddleston owned certain real property located in Montgomery County, certain parcels of which they conveyed to other persons. In July 1982, the Huddlestons executed and recorded in the Montgomery Probate Court ("the probate court") a "Declaration of Restrictive Covenants" ("the 1982 Declaration"). The 1982 Declaration particularly described certain of the Huddlestons' property and specifically excepted from that description those portions of the property that had been conveyed to other persons before the 1982 Declaration.

In pertinent part, the 1982 Declaration provided the following regarding the Huddlestons' property:

> "1. The Subject Property shall not be subdivided into or sold in parcels of less than five (5) acres.
>
> "2. Only one single-family dwelling of not less than 2,500 square feet heated and cooled shall be erected on each five-acre parcel, which dwelling shall be used solely for residential purposes. In addition:
>
> "....
>
> "B. No dwelling or accessory building or structure shall be located within 100 feet of the property line ....
>
> "5. The Owners herein reserve unto themselves,

> their heirs and assigns, and in unanimous concert with the Grantees of other platted tracts, within this subdivision, their heirs or assigns, the right, by appropriate written instrument, to waive, release, amend or annul any one or more of the foregoing provisions."

In 2003, Delongchamp acquired two adjacent parcels of property ("the Delongchamp property"). The parties agree that the Delongchamp property is included within the property described by the 1982 Declaration and is, therefore, burdened by the restrictive covenants noted above. In 2015, Capitol Farmers Market acquired two parcels of property that are adjacent to one another. The parties agree that one of the parcels ("the Capitol Farmers Market property") is included within the property described by the 1982 Declaration. The Capitol Farmers Market property abuts the Delongchamp property. It is undisputed that the other parcel acquired by Capitol Farmers Market is not subject to the restrictive covenants set out in the 1982 Declaration.

Near the Delongchamp property and the Capitol Farmers Market property is certain property purchased by Southern Boulevard Corporation, which, the record indicates, is now known as Alfa Properties, Inc. ("Alfa"). It is undisputed that certain of the property owned by Alfa ("the Alfa

property") is also burdened by the restrictive covenants set out in the 1982 Declaration.

In September 2017, Delongchamp filed a complaint in the circuit court that, as amended, sought a declaratory judgment and injunctive relief regarding the Capitol Farmers Market property. Delongchamp alleged that Capitol Farmers Market was planning to "subdivide the Capitol [Farmers Market p]roperty into a high density residential subdivision with proposed lots being substantially less than the required five (5) acre minimum." Delongchamp sought a judgment declaring that the Capitol Farmers Market property was encumbered by the restrictive covenants set out in the 1982 Declaration and that Capitol Farmers Market was required to abide by the restrictive covenants on the Capitol Farmers Market property. Delongchamp also sought an injunction restraining Capitol Farmers Market from "violating" the restrictive covenants set out in the 1982 Declaration "to include, but not limited to, subdividing the Capitol [Farmers Market] property into lots less than five (5) acres." Capitol Farmers Market answered Delongchamp's complaint and amended complaint and asserted a separate counterclaim; the counterclaim is not pertinent to

this appeal.

The circuit court entered an order appointing a special master "to recommend a resolution of all issues." Capitol Farmers Market later moved for a summary judgment regarding the relief requested in Delongchamp's amended complaint. In January 2019, the special master conducted what he called "the final hearing." He stated: "I will take into account the motion for summary judgment and all the arguments there. But when I rule, it will be final." The parties presented arguments and evidence, including ore tenus testimony, to the special master at the hearing. In August 2019, the special master filed a report of his findings and his recommendation in the circuit court.

The circuit court thereafter entered an order, providing, in pertinent part:

> "Based upon the report and recommendations of the Special Master the Court makes the following findings and enters the Orders as set forth herein:
>
> "The relevant facts obtained through these proceedings conclude that the property in question belonging to [Delongchamp], and the property in question belonging to [Capitol Farmers Market], as well as additional property were all subject to a set of restrictions pursuant to the [1982 Declaration] and recorded on July 7, 1982, in the [probate court].

"Delongchamp purchased her property by deed recorded on June 23, 200[3], in the [probate court]. At the time the Delongchamp [property] was encumbered by the [1982] Declaration and remains so encumbered to this date.

"Capitol Farmers [Market] purchased its property by deed recorded in the [probate court] on July 2, 2015 .... Prior to the date of the recording of the Capitol Farmers [Market] deed, Judith B. Huddleston, as one of the original Declarants under the [1982] Declaration unilaterally executed a document purporting to be a revocation of the [1982] Declaration. Said document is recorded in the [probate court] ('the Revocation'). At the time of the Revocation, Mrs. Huddleston owned no interest in any of the properties subject to the [1982] Declaration, including but not limited to the Delongchamp [property] and the Capitol Farmers [Market property]. In fact, no property that was originally subject to the [1982] Declaration has ever been released from the encumbrance of the [1982] Declaration prior to, nor since the date of the purported Revocation. ...

"Since the time of the execution and recording of the [1982] Declaration, substantial growth has occurred in East Montgomery and in particular along Taylor Road and Vaughn Road in the vicinity of the property in question. However, there has been no change in the use of the restricted properties. ...

"The operative portions of the [1982] Declaration applicable to the Capitol Farmers [Market property], the Delongchamp [property], and [a] parcel ... belonging to [Alfa] provide, among other things, as follows: (i) 'No dwelling or accessory building or structure shall be located within 100 feet of the property line ...'; (ii) no parcel 'shall be subdivided into or sold in parcels of less than five (5) acres'; and (iii) any dwelling shall not be less than 2,500 square feet on the

> property. Section 5 of the [1982] Declaration provided that 'the Owners herein reserve unto themselves their heirs and [a]ssigns, and in unanimous concert with the Grantees of other platted tracts with this subdivision, their heirs and assigns, the right, by appropriate written instrument, to waive, release amend or annul any one or more of the foregoing provisions.'
>
> "Capitol Farmers [Market] proposes to develop the Capitol Farmers [Market property] into more than twenty (20) lots with most of those lots being fifty (50) feet wide and approximately one hundred (100) feet deep. The total number of lots proposed by Capitol Farmers [Market] on the restricted parcel and the adjacent unrestricted parcel is 57. ..."

The circuit court's order included lengthy analyses addressing the issues presented. Based on its analyses, the circuit court's order concluded, in relevant part:

> "1. The [1982] Declaration and the terms and restrictions contained therein are not ambiguous, or if ambiguous, the requirements to waive, amend, release or annul such restrictions require the consent of all parties burdened and benefitted by the [1982] Declaration;
>
> "2. The present owners and properties benefitted and burdened by the [1982] Declaration are [Delongchamp], [Capitol Farmers Market,] and [Alfa] and the Delongchamp [property], the Capitol Farmers [Market property,] and the properties belonging to [Alfa];
>
> "3. The attempted waiver of the [1982] Declaration by [Capitol Farmers Market] and ... one of the original 'Grantors' was insufficient to waive the application of the restrictions contained in the [1982] Declaration;

> "4. [Delongchamp] purchased the Delongchamp [property] in reliance upon the benefits and burdens of the restrictions contained in the [1982] Declaration;
>
> "5. There exists no change in condition or use of any of the properties encumbered by the [1982] Declaration which would prohibit or preclude the enforcement of the restrictions against the Capitol Farmers [Market property] or any of the other properties encumbered by the [1982] Declaration;
>
> "6. The [1982] Declaration continues to encumber the Capitol Farmers [Market property] and the Delongchamp [property] and may be enforced by either party against the property of the other described in the [1982] Declaration ...."

Capitol Farmers Market thereafter filed a motion, asserting that the circuit court had improperly entered its order without affording Capitol Farmers Market sufficient time and a hearing to object to the special master's recommendation, as contemplated by Rule 53(e)(2), Ala. R. Civ. P. The circuit court granted Capitol Farmers Market's motion and set the matter for a hearing. Capitol Farmers Market thereafter filed objections to the special master's findings and recommendations. In September 2019, the circuit court modified its earlier order to dispose of Capitol Farmers Market's counterclaim, which, as noted above, is not pertinent to this appeal. Capitol Farmers Market appeals from the

circuit court's final judgment.

Analysis

The issue presented on appeal is whether the circuit court erred in determining that the restrictive covenants set out in the 1982 Declaration remain enforceable. Capitol Farmers Market argues that the circuit court's judgment should be reversed because, it says: (1) the neighborhood surrounding the restricted property at issue has changed so radically that the purpose of the restrictive covenants can no longer be accomplished and (2) the terms of the 1982 Declaration regarding whose consent is required to revoke the restrictive covenants are ambiguous.

As noted above, the circuit court determined that three portions of real property are burdened by the restrictive covenants at issue: the Delongchamp property, the Capitol Farmers Market property, and the Alfa property. Alfa, however, is not a party to these proceedings. In pertinent part, Rule 19, Ala. R. Civ. P., provides:

> "(a) Persons to Be Joined If Feasible. A person who is subject to jurisdiction of the court shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the

> action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.
>
> "(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

(Emphasis added.)

In Holland v. City of Alabaster, 566 So. 2d 224, 226 (Ala. 1990), this Court explained the process provided in Rule

19:

> "Rule 19, [Ala.] R. Civ. P., provides a two-step process for the trial court to follow in determining whether a party is necessary or indispensable. Ross v. Luton, 456 So. 2d 249, 256 (Ala. 1984), citing Note, Rule 19 in Alabama, 33 Ala. L. Rev. 439, 446 (1982). First, the court must determine whether the absentee is one who should be joined if feasible under subdivision (a). If the court determines that the absentee should be joined but cannot be made a party, the provisions of [subdivision] (b) are used to determine whether an action can proceed in the absence of such a person. Loving v. Wilson, 494 So. 2d 68 (Ala. 1986); Ross v. Luton, 456 So. 2d 249 (Ala. 1984). It is the plaintiff's duty under this rule to join as a party anyone required to be joined. J.C. Jacobs Banking Co. v. Campbell, 406 So. 2d 834 (Ala. 1981)."

In City of Gadsden v. Boman, 104 So. 3d 882, 887 (Ala. 2012), we stated:

> "The purposes of Rule 19 'include the promotion of judicial efficiency and the final determination of litigation by including all parties directly interested in the controversy.' Byrd Cos. v. Smith, 591 So. 2d 844, 846 (Ala. 1991)."

There is no indication that Delongchamp or Capitol Farmers Market sought to add Alfa as a party below, and neither party raises an issue concerning Alfa's absence on appeal.

> "However, failure of the plaintiff or the trial court to add a necessary and indispensable party, and of the defendant to raise the absence of such party in his or her pleadings, does not necessarily

> dispose of the issue. This defect can be raised for the first time on appeal by the parties or by the appellate court ex mero motu. Mead Corp. v. [City of] Birmingham, 350 So. 2d 419 (Ala. 1977); Davis v. Burnette, 341 So. 2d 118 (Ala. 1976)."

J.C. Jacobs Banking Co. v. Campbell, 406 So. 2d 834, 850 (Ala. 1981). See also Miller v. City of Birmingham, 235 So. 3d 220, 230 (Ala. 2017)(noting that the failure to join an indispensable party can be raised by a court on its own motion but explaining that the absence of an indispensable party does not deprive a circuit court of subject-matter jurisdiction); and Boman, 104 So. 3d at 887 ("Although no one has argued on appeal that a necessary party was not joined below, 'this Court is entitled to raise the absence of a necessary party ex mero motu.' Chicago Title Ins. Co. v. American Guarantee & Liab. Ins. Co., 892 So. 2d 369, 371 (Ala. 2004).").

The record demonstrates that the parties were aware of Alfa's potential interest in this litigation and absence as a party from these proceedings. During the special master's "final hearing," the following exchange took place between the special master and counsel for Capitol Farmers Market concerning whose consent was needed to revoke the restrictive covenants in the 1982 Declaration and how the circuit court's

resolution of that issue could impact Alfa's rights:

> "[Counsel for Capitol Farmers Market]: ... We're not asking that the covenants be nullified as to the Delongchamp property or the [Alfa] property. ...
>
> "Special Master: Isn't it, though, that as a result of your position, taking each one alone or in concert with one another, isn't the end result that there are no restrictions on the [Alfa] property or the Delongchamp property, should they merely say we don't want them to be there, and then go to whomever and get them to sign a revocation?
>
> "[Counsel for Capitol Farmers Market]: It's our position that the Court could determine that the covenants are null and void solely as to the Capitol [Farmers Market] property and not disturb the --
>
> "Special Master: But what I'm asking though, is, taking your argument, wouldn't Alfa have the right to come in and say to whomever -- I don't know if Judith Huddleston is still alive, but just assuming that she's alive, hey, we no longer want those restrictions to apply, so isn't the end result of your argument that the restrictive covenants are no more enforceable than the deed covenants which are a one-party -- two-party document. And, therefore, to argue as you are now, that you're not arguing that they're off here, the end result of your argument is all the owners of these adjoining properties have to do is say we revoke and get Mrs. Huddleston to agree.
>
> "[Counsel for Capitol Farmers Market]: That is our argument based on the ambiguities that's in the revocation provision.
>
> "Special Master: So there's no protection then or no enforceability rights on any other person within the covenant-described property?"

The special master, counsel for Capitol Farmers Market, and counsel for Delongchamp then proceeded to discuss how the revocation provision of the 1982 Declaration should be interpreted. Counsel for Delongchamp proffered his interpretation that the consent of Delongchamp, Capitol Farmers Market, and Alfa, "[t]hose assigns, together with everyone, in unanimous concert is what it takes to revoke the covenant."

After that discussion, the following exchange occurred:

> "Special Master: I'm troubled -- I mean, we've referenced in testimony and in argument, Alfa, Southern Boulevard Corporation. If I rule as you are arguing -- Excuse me. If I rule as [counsel for Delongchamp] and Delongchamp[] are arguing, am I making a ruling that's binding on Alfa, and are they an indispensable party to this action?
>
> "[Counsel for Delongchamp]: Let me say this. They're aware of this case.
>
> "Special Master: They would love for the answer to be --
>
> "[Counsel for Delongchamp]: I don't know that they would. ... I don't know that they have a position at this point.
>
> "[Counsel for Capitol Farmers Market]: They haven't objected.
>
> "[Counsel for Delongchamp]: They haven't objected either way so far.

> "Special Master: I may go into this a little bit more when we get off the [r]ecord, because I don't think I have a position to make a ruling according to that. So if there are no further arguments, then I guess --
>
> "[Counsel for Delongchamp]: I think they would have had the right to come in and enforce [the restrictive covenants] like ... Delongchamp. But on the flip side, they're not trying to remove covenants on [the Alfa property,] so I don't know that it affects their property specifically. So I don't think they are indispensable at this point."

We disagree with the conclusion apparently reached by the parties' counsel at the "final hearing" insofar as they determined that Alfa is not a party "to be joined, if feasible." See Rule 19(a). On that point, we find the circumstances of this case analogous to those of Withington v. Cloud, 522 So. 2d 263 (Ala. 1988).

In this case, Capitol Farmers Market "wishes to divide its property into residential lots smaller than five acres" and is seeking relief from the restrictive covenants set out in the 1982 Declaration so that it may do so. Capitol Farmers Market's brief at 8-9. Similarly, in Withington, the owners of property located within a subdivision brought an action against the developer of the subdivision, seeking a judgment permitting them to subdivide their property into two lots,

which was prohibited by the restrictive covenants of the subdivision. The trial court dismissed the action under Rule 12(b)(7), Ala. R. Civ. P., because the plaintiffs had not joined as parties to the action the other owners of property in the subdivision, giving the plaintiffs 30 days to do so. The plaintiffs appealed, and we affirmed the trial court's judgment.

On appeal, in summarizing the developer's argument that the other owners of property in the subdivision were indispensable parties, we noted:

> "The [developer] cite[s] cases holding that owners of property subject to restrictive covenants have mutual easements appurtenant. McCown v. Gottlieb, 465 So. 2d 1120 (Ala. 1985); Callahan v. Weiland, 291 Ala. 183, 279 So. 2d 451 (1973); Allen v. Axford, 285 Ala. 251, 231 So. 2d 122 (1969); Hall v. Gulledge, 274 Ala. 105, 145 So. 2d 794 (1962); Scheuer v. Britt, 218 Ala. 270, 118 So. 658 (1928). The [developer] cite[s] several cases for the proposition that 'In an action where the final decree affects title, ownership, or interest in real property each possessor of title, ownership or interest must be made a party.' Johnson v. White-Spunner, 342 So. 2d 754, 759 (Ala. 1977); Wilson v. Thomason, 406 So. 2d 871 (Ala. 1981); Holley v. Wright, 408 So. 2d 129 (Ala. Civ. App. 1981). The [developer] assert[s] that it follows from these two propositions that the trial court did not err in dismissing the complaint for failure to join the other property owners.
>
> "None of the cases cited by the [plaintiffs]

contradicts these propositions."

Withington, 522 So. 2d at 264.

We acknowledge the statements made by counsel for Capitol Farmers Market at the "final hearing" indicating that it is seeking a determination regarding the enforceability of the restrictive covenants as they pertain only to the Capitol Farmers Market property -- not the Delongchamp property or the Alfa property. However, because "owners of property subject to restrictive covenants have mutual easements appurtenant," Withington, 522 So. 2d at 264, a determination regarding the restrictive covenants as they relate to the Capitol Farmers Market property necessarily affects the interests of Delongchamp and Alfa.

The circuit court's judgment confirms this principle:

> "5. There exists no change in condition or use of any of the properties encumbered by the [1982] Declaration which would prohibit or preclude the enforcement of the restrictions against the Capitol Farmers [Market property] or any of the other properties encumbered by the [1982] Declaration;
>
> "6. The [1982] Declaration continues to encumber the Capitol Farmers [Market property] and the Delongchamp [property] and may be enforced by either party against the property of the other described in the [1982] Declaration ...."

(Emphasis added.) In Withington, this Court explained:

> "[I]t remains true that the other property owners have an interest in the character of the [subdivision] as a whole by virtue of the restrictive covenants, which include a prohibition against subdivision of lots. Thus, they have an interest in the [plaintiffs]' property under the cases cited and are at least 'persons to be joined if feasible,' in the terms of Rule 19. The [plaintiffs] have shown nothing to indicate that it is not feasible to join the other property owners."

522 So. 2d at 265.

Like the other owners of property located within the subdivision at issue in Withington, Alfa, as one of the three parties determined by the circuit court to own property burdened by the restrictive covenants set out in the 1982 Declaration, has "an interest in the character of the [property] as a whole by virtue of the restrictive covenants." 522 So. 2d at 265. Therefore, Alfa is at least a party "'to be joined if feasible,' in the terms of Rule 19." Withington, 522 So. 2d at 265. See Rule 19(a).

We also acknowledge the statements made by the parties' counsel at the "final hearing" indicating that Alfa had notice of this action and that the parties' counsel are not aware of any objection Alfa would have to the ultimate outcome of this litigation. Again, this Court considered a similar assertion in Withington:

> "[The plaintiffs] assert that none of [the other property owners in the subdivision] has expressed any opposition to the proposed change, but there are no affidavits or any other cognizable proof of this assertion. Moreover, even if this is true, it would be better practice to join them and give them the opportunity to oppose the change than to assume that they have notice of it and would intervene if they object."

522 So. 2d at 265.

"[S]tatements of counsel are not evidence." Prattville Mem'l Chapel v. Parker, 10 So. 3d 546, 558 (Ala. 2008). The statements made by the parties' counsel regarding notice to Alfa and Alfa's position concerning this litigation do not amount to evidence regarding those issues. Moreover, even if there was such evidence in the record, "it would be better practice to join [Alfa] and give [it] the opportunity to oppose the change than to assume that [it] has notice of it and would intervene if [it] object[s]." Withington, 522 So. 2d at 265. In other words, Alfa's position regarding whether the restrictive covenants in the 1982 Declaration should be enforced cannot be presumed in Alfa's absence, nor can it be presumed that Alfa will not initiate subsequent litigation concerning its rights regarding the restrictive covenants.

Based on the foregoing, we conclude that, as one of the parties determined by the circuit court to be an owner of the

property restricted by the covenants in the 1982 Declaration, Alfa possesses an interest

> "relating to the subject of th[is] action and is so situated that the disposition of the action in [Alfa]'s absence may (i) as a practical matter impair or impede [Alfa]'s ability to protect that interest or (ii) leave [Delongchamp and Capitol Farmers Market] subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."

Rule 19(a). At this time, we do not hold that Alfa is an indispensable party; we hold only that Alfa is a necessary party that should be joined, if feasible, in accordance with the requirements of Rule 19(a). See J.R. McClenney & Son, Inc. v. Reimer, 435 So. 2d 50, 52 (Ala. 1983)(discussing the conceptual distinction between indispensable parties and necessary parties). "There is no prescribed formula to be mechanically applied in every case to determine whether a party is an indispensable party or merely a proper or necessary one. This is a question to be decided in the context of the particular case." Reimer, 435 So. 2d at 52.

The record does not indicate that any effort was made to join Alfa as a party to these proceedings. Therefore, it is unclear, at this time, whether Alfa can be made a party to the action.

> "[B]ecause there is no indication that [Alfa] 'cannot be made a party,' Rule 19(b), the [circuit] court was not forced to choose between allowing the action to 'proceed among the parties before it,' id., or dismissing it. Rule 19(a) requires that, once it is determined that a 'person needed for just adjudication' has not been joined, 'the court shall order that [it] be made a party. ... 'The absence of a necessary and indispensable party necessitates the dismissal of the cause without prejudice or a reversal with directions to allow the cause to stand over for amendment.' J.C. Jacobs Banking Co. v. Campbell, 406 So. 2d 834, 851 (Ala. 1981), citing Rogers v. Smith, 287 Ala. 118, 248 So. 2d 713 (1971).'"

Withington, 522 So. 2d at 265; see also Boman, 104 So. 3d at 887 ("Rule 19(a) is mandatory ....").

Thus, we reverse the judgment and remand the cause. On remand, the circuit court is directed to join Alfa as a party to this action, if feasible. See Rule 19(a); Boman, 104 So. 3d at 888-89. If Alfa cannot be made a party, the circuit court should consider the reasons Alfa cannot be joined and decide whether the action should proceed in Alfa's absence. See Rule 19(b) and (c). In light of the foregoing, we express no opinion concerning the merits of the arguments made by the parties on appeal.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Parker, C.J., and Shaw, Mendheim, and Mitchell, JJ., concur.