NO. 20-0333

CK RIVIERA PARTNERSHIP, LLC, AND CK MAZATLAN PARTNERSHIP, LLC, *Plaintiffs,*	§	**IN THE DISTRICT COURT**
V.	§	**_____ DISTRICT**
KEY ALLEGRO CANAL AND PROPERTY OWNERS' ASSOCIATION, INC., *Defendant.*	§	**OF ARANSAS COUNTY, TEXAS**

PLAINTIFFS' ORIGINAL PETITION AND REQUEST FOR DISCLOSURES

INTRODUCTION

In 2017, a few subdivision homeowners, acting as the directors of a nonprofit corporation tasked with canal maintenance, decided they should be in control of the entire subdivision. They summarily declared themselves in charge by recording a completely new set of restrictive covenants which purported to make them so! In essence, a few owners in the subdivision staged a coup by paperwork when no one else was looking.

In this lawsuit, two owners who cry foul seek the court's protection from an illegitimate regime.

I. DISCOVERY CONTROL PLAN LEVEL

1. Plaintiff intends to employ Discovery Level 2.

II. RULE 47 ALLEGATION

2. Plaintiffs seek monetary relief of less than $100,000 and non-monetary relief.

III. PARTIES AND SERVICE

3. Plaintiff CK Riviera Partnership, LLC ("CK Riviera") is a Texas domestic limited liability company located at 201 Blue Ridge Trail, Austin, Travis County, TX 78746.

4. Plaintiff CK Mazatlan ("CK Mazatlan") Partnership, LLC, is a Texas domestic limited liability company located at 201 Blue Ridge Trail, Austin, Travis County, TX 78746.

5. Defendant Key Allegro Canal and Property Owners' Association, Inc. ("Canal Association") is a Texas domestic nonprofit association whose registered agent for service of process in Texas is Spectrum Association Management of Texas, LLC, 17319 San Pedro Suite 318, San Antonio, TX 78232.

6. The subject matter in controversy is within the jurisdictional limits of this court.

7. Venue in Aransas County is proper in this cause under Section 15.002(a)(1) of the Civil Practice and Remedies Code because all or a substantial part of the events or omissions giving rise to this lawsuit occurred in this county, or under Section 15.011 concerning disputes involving interests in real property.

IV. FACTS

7. Plaintiff CK Riviera Partnership, LLC ("CK Riviera") owns 35 Riviera Drive, Rockport, Aransas County, TX 78382, situated in the Key Allegro Unit 1 subdivision.

8. Plaintiff CK Mazatlan Partnership, LLC, owns 3 Mazatlan Drive, Rockport, Aransas County, TX 78382, situated in the Key Allegro Unit 1 subdivision.

9. The principals of the plaintiff entities use and occupy their Key Allegro houses themselves and also rent them out at other times for short terms.

10. Plaintiffs' properties are subject to restrictive covenants recorded in 1962. Among the features of those restrictions are as follows:

a. They allow leasing without any restrictions, thus, leasing – and for any duration – is clearly and unambiguously allowed under the authority of *Tarr v. Timberwood Park Owners Assoc., Inc.*, 556 S.W.3d 274 (Tex. 2018);

b. They allow "nullification" of the restrictions by a majority vote of the owners;

c. They contain no provision allowing amendments;

d. They do not authorize any mandatory property owners' association. Instead, the "Key Allegro Canal Owners Association" was empowered to step in and fix the canal if an owner did not – that's all;

e. The deed restrictions do not allow assessments, liens, or foreclosure of assessment liens;

f. There is authorization for an architectural control committee (ACC), which in turn is empowered to adopt rules and regulations consistent with the 1962 restrictions. The ACC is also empowered to "alter or vary" the 1962 restrictions when an owner requests such a variance. Nothing, however, provides that the ACC can write completely new restrictions, or nullify existing ones, without a vote of all the ownership.

11. Defendant purports to be the successor to the corporation authorized by the 1962 restrictions to maintain the canals surrounding the subdivision (the "Key Allegro Canal Owners' Association").

12. In late 2016, the Canal Association's board of directors, without any vote of the ownership, purported to adopt "amended and restated" deed restrictions, which it then recorded in 2017. The 2017 restrictions incorporate some of the 1962 restrictions but also vastly expand the governing regime by adding numerous entirely new provisions, among them provisions purporting to empower the Canal Association in various new and unprecedented ways, including the power to assess, impose liens, and foreclose on homes. Stated another way, an entity separate and unrelated to the actual owners of the subdivision lots, and an entity with no authority under the 1962 restrictions except canal maintenance, decided to hijack the amendment process and install itself as king.

13. Plaintiffs, including those in privity with them, did not vote for the 2017 restrictions.

14. The 2017 restrictions represent a cloud and encumbrance on Plaintiffs' title because they purport to authorize a mandatory property owners' association and give that association lien and foreclosure power.

V. CLAIMS FOR RELIEF

15. The foregoing allegations are incorporated herein by reference.

A. Plaintiffs are entitled to a declaratory judgment that the 2017 amended and restated restrictions are unenforceable.

1. There was no vote at all of the owners collectively.

16. The 1962 deed restrictions do not authorize any mandatory property owners' association, assessments, assessment liens, foreclosure, or even amendment. Lacking any amending clause or authorization for assessments by an entity representing the homeowners, a 100% vote of the owners is required for any amendment.

17. In the alternative, should Texas Property Code Chapter 209 apply to the subdivision on the basis that an entity representing the owners has assessment power, a 67% vote of the owners would nevertheless be required for amendment.

18. In the alternative, at a minimum, a majority of owners would be required to "nullify" the 1962 restrictions.

19. Not 67%, nor 100%, nor a majority of the subdivision owners voted to adopt the 2017 restrictions; only a few members on the Defendant's board of directors purported to adopt the 2017 restrictions.

20. Therefore, Plaintiffs seek a declaratory judgment that the 2017 restrictions cannot be enforced against them because the required percentage of owners did not approve the 2017 restrictions.

2. They are unenforceable because they exceed "nullification" of the 1962 restrictions, and there is no amending clause.

21. The 1962 deed restrictions do not authorize anything other than "nullification"; there is no amending clause.

22. Texas Property Code Chapter 209 does not fill in the gap to allow a 67% vote of the owners to amend the 1962 restrictions because Chapter 209 does not apply to this subdivision, which lacks a mandatory property owners' association empowered to make assessments. Thus, a 100% vote of the owners would be necessary to amend the restrictions. Plaintiffs did not vote for the 2017 restrictions, so 100% of the owners did not approve the 2017 restrictions.

23. Therefore, Plaintiffs seek a declaratory judgment that the 2017 restrictions are not a mere "nullification" of the 1962 restrictions and thus cannot be enforced against them.

3. They are unenforceable if they are "rules."

24. The Canal Association may not have any relationship to the ACC authorized by the 1962 restrictions. A valid ACC may not even exist for this subdivision.

25. But even if the authorized ACC exists in one form or another, any rules it adopts cannot conflict with the 1962 deed restrictions. Rules, being subordinate to restrictive covenants, must not conflict with restrictive covenants. *See* Tex. Prop. Code § 209.0041(i) ("A bylaw may not be amended to conflict with the declaration."); *Vann v. Homeowners Ass'n for Woodland Park of Georgetown, Inc.*, No. 03-18-00201-CV, 2018 WL 4140443, at *5 (Tex. App. – Austin Aug. 30, 2018, no pet.) ("the Rules and Regulations are subordinate to the Articles of Incorporation and Bylaws"); *see generally* Gregory S. Cagle, *Texas Homeowners Association Law* §§ 1.4.1, 9.1 (2d. Ed. 2013); *see, e.g.*, *McGuire v. Post Oak Lane Townhome Owners Ass'n, Phase II*, No. 01-88-00813-CV, 1989 WL 91519, at *1 (Tex. App. – Houston [1st Dist.] 1989, writ denied) (in pre-TUCA case, Association could adopt rules because expressly authorized to do so by restrictive

covenants); *Holleman v. Mission Trace Homeowners Ass'n*, 556 S.W.2d 632, 636 (Tex. Civ. App. – San Antonio 1977, no writ) (same)

26. The 2017 restrictions do not purport to be rules adopted by the ACC but instead purport to replace the 1962 restrictions. But even as "rules," they far exceed the permissible scope of rules.

27. Accordingly, Plaintiffs seek a declaratory judgment that to the extent the 2017 restrictions exceed the rulemaking powers of the ACC, they are unenforceable against Plaintiffs.

4. Those provisions in the 2017 restrictions which are all-new are unenforceable against Plaintiffs.

28. In the alternative or in the addition, even if the 1962 deed restrictions could be "amended" and not merely "nullified" by some percentage of the owners less than 100%, the 2017 deed restrictions cannot be enforced against Plaintiffs to the extent the 2017 restrictions contain new and unexpected restrictions on property use.

29. In Texas, deed restrictions can be amended to correct, improve, or reform the restrictions. *Couch v. S. Methodist Univ.*, 10 S.W.2d 973, 974 (Tex. Comm'n App. 1928). Owners can vote to remove restrictions and thereby increase property rights, but they cannot impose new and additional restrictions against an existing owner. *Id.*

30. Many other jurisdictions recognize that a tyrannical majority of homeowners cannot subject a minority to unlimited and unexpected deed restrictions on the use of land merely because deed restrictions allow a majority to make changes. *See, e.g.*, *Meresse v. Stelma*, 100 Wash. App. 857, 866, 999 P.2d 1267, 1273 (2000); *Boyles v. Hausmann,* 246 Neb. 181, 517 N.W.2d 610, 617 (1994); *Lakeland Property Owners Ass'n v. Larson,* 121 Ill.App.3d 805, 77 Ill.Dec. 68, 459 N.E.2d 1164, 1167, 1169 (1984). "This

rule protects the reasonable, settled expectation of landowners by giving them the power to block new covenants which have no relation to existing ones and deprive them of their property rights." *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wash. 2d 241, 256, 327 P.3d 614, 622 (2014) (cleaned up); *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 559, 633 S.E.2d 78, 87 (2006) ("[A] provision authorizing a homeowners' association to amend a declaration of covenants does not permit amendments of unlimited scope; rather, every amendment must be reasonable in light of the contracting parties' original intent.").

31. The imposition of a new, mandatory property owners' association, assessments, assessment liens which can be foreclosed, an amending clause, and other new restrictions which are not reasonably encompassed within or suggested by the 1962 deed restrictions thwart the reasonable and settled expectations of owners who relied on the 1962 deed restrictions. *See Wilkinson*, *id.* The new portions of the 2017 deed restrictions are not an "improvement" on prior restrictions since they do not relate to them; nor do they remove restrictions and thereby give owners more property rights. *See Couch*, 10 S.W.2d at 974.

32. Plaintiffs purchased their respective properties in reasonable reliance on the restrictions in force as of the time of purchase. They will effectively be deprived of the bargain they struck when they purchased under the prior restrictions. They had settled rights which a majority seeks to take away.

33. Under Texas law, the other owners could *improve* the restrictions; they could even *remove* restrictions. What they cannot do is *impose new restrictions which take*

away settled rights under prior restrictions. That is true under either settled law or public policy.

34. Plaintiffs therefore seek a declaration that, at a minimum, the Canal Association cannot enforce the new restrictions of 2017 against Plaintiffs, irrespective whether those new restrictions or amendments run with the land as concerns subsequent purchasers.

B. Suit to quiet title.

35. In addition or in the alternative, title should be quieted in Plaintiffs as against any lien or claim made or asserted by the Canal Association by virtue of the recordation of restrictions which purport to impose a contractual lien on the Plaintiffs' properties.

36. Plaintiffs have a fee simple interest in their respective properties in Key Allegro Unit 1.

37. The Canal Association asserts a lien or claim in Plaintiffs' properties in that it asserts a contractual lien based on assessment powers contained in the 2017 deed restrictions. The Canal Association also asserts other powers and authority over Plaintiffs by virtue of the 2017 restrictions..

38. However, no such contractual lien exists because the restrictive covenants and assessment power thereunder are not valid as against Plaintiffs.

39. Therefore, title should be quieted in Plaintiffs as against the Canal Association as concerns any contractual lien or other powers or authority asserted by the Canal Association.

40. Because the Canal Association has recorded instruments which purport to be in the chain of title of Plaintiffs' properties, a judgment quieting title is necessary to clarify title for Plaintiffs and all subsequent purchasers as well as lenders.

VI. CLAIM FOR BREACH OF RESTRICTIVE COVENANT

41. The 1962 restrictive covenants are enforceable among and between the owners and Canal Association in the manner of a contract.

42. The restrictive covenants define the scope of the Canal Association's authority.

43. The Canal Association authorized by the 1962 restrictions has power concerning canal repair, but it has no power beyond that.

44. The Canal Association has exercised powers beyond the scope of those authorized by the 1962 deed restrictions.

45. Accordingly, the Canal Association breached the 1962 restrictive covenants.

46. Plaintiffs seek specific performance of the restrictive covenants or in the alternative a permanent injunction barring the Canal Association from acting outside the permissible scope of its authority. Irreparable harm need not be demonstrated for equitable relief in a restrictive covenant case. *See Jim Rutherford Invs. v. Terramar Beach Cmty. Ass'n*, 25 S.W.3d 845, 849 (Tex. App. – Houston [14th Dist.] 2000, pet. denied).

47. Plaintiffs have been damaged because the value of their properties is diminished by the Canal Association's breaches, including the Canal Association's recordation of bogus restrictions not validly adopted by vote of the owners. Buyers pay

more for properties with a greater bundle of rights and no mandatory property owners' association.

48. Plaintiffs' damages are within the jurisdictional amount of the court.

VII. ATTORNEY'S FEES

49. Plaintiffs seek recovery of their reasonable and necessary attorney's fees as may be equitable and just as permitted by Texas Civil Practice and Remedies Code Chapter 37, the Uniform Declaratory Judgment Act.

50. Plaintiffs seek recovery of their reasonable and necessary attorney's fees as permitted by Texas Property Code § 5.006 for breach of restrictive covenant.

51. Plaintiffs seek recovery of their reasonable and necessary attorney's fees as permitted by Texas Civil Practice and Remedies Code Chapter 38 for breach of contract. inasmuch as Plaintiffs have been damaged.

VIII. CONDITIONS PRECEDENT

52. All conditions precedent to Plaintiffs' claims for relief have been performed or have occurred.

IX. REQUEST FOR DISCLOSURE

53. Under Texas Rule of Civil Procedure 194, Plaintiffs request that Defendant disclose, within 50 days of the service of this request, the information or material described in Rule 194.2.

X. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs CK Riviera Partnership, LLC, AND CK Mazatlan Partnership, LLC, respectfully pray that the Defendant be cited to appear and answer herein, and that upon a final hearing of the

cause, judgment be entered for Plaintiffs against Defendant for the declaratory relief sought herein; quieting of title as pled herein; breach of restrictive covenant; pre-judgment interest at the maximum rate allowed by law; post-judgment interest at the legal rate, costs of court; attorney's fees and costs; and all the other relief to which Plaintiffs may be entitled at law or in equity.

Respectfully submitted,
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