In the Circuit Court of Jefferson County, West Virginia

Laura Goddard, Plaintiff,	)	
vs.)	)	Case No. CC-19-2018-C-14
Tyler Hockman, **Emily A. Hockman,** Defendants	)	

ORDER DENYING DECLARATORY RELIEF AND GRANTING JUDGMENT TO THE DEFENDANTS

ON A PRIOR DAY CAME the Plaintiff, Laura Goddard ("Ms. Goddard"), by counsel, and filed with the Court her Motion for Declaratory Judgment (the "Motion") to which the Defendants, Tyler Hockman and Emily A. Hockman (hereinafter the "Hockmans"), by counsel, filed their Response in Opposition, after which Ms. Goddard filed her Reply. The Court then heard oral arguments of counsel and requested further briefing. The parties have now filed supplemental briefs setting forth additional argument with the Court. The Court having now been fully informed and after due consideration, does find as follows:

Findings of Fact:

1. The Hockmans are the owners of Lot 7 in the Falcon Ridge Subdivision (hereinafter "Hockmans' Lot"), situate in the Charles Town District, Jefferson County, West Virginia, title to which the Hockmans obtained by a deed dated June 27, 2013 from Jefferson Security Bank ("JSB") which had purchased the Hockmans' Lot from at a foreclosure sale conducted under a deed of trust made for its benefit.

2. Falcon Ridge Subdivision ("Falcon Ridge") is a subdivision which was

developed by Wolverine Investments, LLC ("Wolverine") which purchased the real estate which became Falcon Ridge by a deed dated February 3, 2005.

3. Following Wolverine's purchase of the real property which became Falcon Ridge, Wolverine conveyed the same in trust for the benefit of JSB pursuant to a Deed of Trust dated February 3, 2005 and recorded with the County Clerk in Deed of Trust Book No. 1395, at page 577 (the "JSB Deed of Trust"). The real property was described in the Deed and Deed of Trust by the same metes and bounds description.

4. Wolverine thereafter developed the aforesaid real estate into Falcon Ridge pursuant to various filings with Jefferson County Planning, Zoning and Engineering, including the filing of a Community Impact Statement (the "CIS") on or about August 1, 2005.

5. The CIS, as required by Jefferson County's subdivision ordinance then in effect, described the intended improvements to the subdivision as follows:

> The internal roadway network to be constructed by the developer shall serve all of the lots. The proposed Falcon Ridge Drive is a typ. 50' right-of-way that spans 3,141 feet....There will also be a 21.78 acre commons *(sic)* area that will be used by everyone in the subdivision. It will contain of *(sic)* grassland and used *(sic)* for horse grazing and horseback riding...

The CIS further provided in paragraph 20 thereof that "[t]he proposed 21.70 acre commons area will be used for horse grazing and horse-back riding. This will complement the parent tract which is *(sic)* originally a horse farm."

6. The CIS, at paragraph 16, further provided in its description of the proposed covenants and restrictions that no building would be erected on a lot in the subdivision "other than one used as a dwelling, except that the use of a dwelling unit for a 'no-impact home-based business'" could be permitted if the same was in "strict

conformity with all applicable zoning laws, ordinances and regulations" and "in no event shall the Common Area be used by or in connection with any permitted no-impact home-based business."

7. After obtaining all necessary County approvals, the Final Plat of Falcon Ridge Farms dated December 22, 2006, and revised February 21, 2007 and February 26, 2007, was recorded with the County Clerk in Plat Book 24, at page 1 (the "Final Plat").The Final Plat was a culmination of the subdivision process completed by Wolverine, including the CIS.

8. A minor plat change was thereafter made and a Minor Plat Change of Falcon Ridge Farms dated October 2, 2007, as revised October 19, 2007, October 30, 2007 and June 5, 2008 was thereafter recorded with the County Clerk in Plat Book 25, at page 45.

9. The Final Plat clearly delineates the 21.52082 acre parcel as "COMMON AREA" and Notes 10, 11 and 13 on the Final Plat read as follows:

> 10. A HOMEOWNER'S ASSOCIATION MUST BE ESTABLISHED WITHOUT DELAY AS SOON AS 50% OF PROPERTIES ARE SOLD. MEMBERSHIP IN THE ASSOCIATION IS MANDATORY FOR ALL PROPERTY OWNERS WITHIN THE SUBDIVISION. ALL DEVELOPERS SHALL DEDICATE ALL COMMON LANDS (SWM BASIN, ROADS, RIGHTS-OF-WAY, ETC.) TO THE HOMEOWNER'S ASSOCIATION.
>
> 11. A COMMON INTEREST OWNERSHIP AGREEMENT MUST BE ESTABLISHED TO PROVIDE FOR THE MAINTENANCE OF COMMONLY-OWNED LAND, INCLUDING, BUT NOT LIMITED TO THE PRIVATE ACCESS ROADS WITHIN THE SUBDIVISION. THIS COMMON INTEREST OWNERSHIP AGREEMENT MUST BE DEVELOPED IN ACCORDANCE WITH THE UNIFORM COMMON INTEREST OWNERSHIP ACT OF WEST VIRGINIA.
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> 13. EACH PARCEL SHOWN ON THIS PLAT SHALL BE RESTRICTED TO A SINGLE FAMILY RESIDENCE ONLY UNLESS OTHERWISE

APPROVED BY THE PLANNING COMMISSION IN CONFORMANCE WITH THE PREVAILING COUNTY LAND DEVELOPMENT LAWS.[4]

10. At the time of sale of Lots 1, 4, 5, 6, and Lot 8 "Residue", the deeds of conveyance referenced the existence of the Final Plat, and further stated that the conveyance in each instance was subject to the notes on the Final Plat, as well as the covenants and restrictions as set forth in two prior deeds in Wolverine's chain of title.

11. Thereafter an Amended and Restated Declaration of Covenants, Conditions and Restrictions for Falcon Ridge Subdivision ("Declaration") dated the 2nd day of January, 2009, made by Wolverine as the Declarant was filed of record with the County Clerk on March 12, 2009 in Deed Book 1062, at page 221.

12. JSB recognized the subdivision of its collateral by releasing from the JSB Deed of Trust various lots in Falcon Ridge as those lots were sold by Wolverine to third parties. Specifically, JSB released from its Deed of Trust Lots 1, 4, 5, 6, and Lot 8 "Residue" as well as a 0.44 acre tract, and a 0.54874 acre tract.

13. One of the lots released by JSB, the Lot 8 "Residue" was a lot which was purchased by Ms. Goddard by a Deed dated August 15, 2010 and recorded in the Jefferson County land records. That Deed specifically references the Final Plat on which there is shown the Common Area as well as the original covenants and restrictions which preceded the Declaration.

14. Richard A. Pill ("Mr. Pill" or "Substitute Trustee") was appointed the Substitute Trustee under the JSB Deed of Trust, and noticed a foreclosure sale of the remaining unsold portion of JSB's collateral for December 27, 2012 at 10:03 a.m. (the "Trustee's Notice").

15. The Trustee's Notice described the real property to be sold thereunder

using the original metes and bounds description less and excepting the Pre-Foreclosure Released Lots. Specifically, the Trustee's Notice provided in pertinent part as follows:

> ....LESS AND EXCEPTING those partially released Lots 1, 4, 5, 6, 8 and .44 acres, Falcon Ridge Farms, as shown on the plat recorded in Plat Book 24, at Page 1.
>
> At the foreclosure sale, Lots 2, 3, 7 and any remaining acreage in Falcon Ridge Farms as shown on the plat recorded in Plat Book 24, at Page 1 will be sold individually and then as a group.
>
> ....The above-described property will be sold subject to any covenants, restrictions, easements, leases and conditions of record, and subject to any unpaid real estate taxes.

16. Given the nature of the "remaining acreage", the Substitute Trustee sold the remaining acreage to Brian Stephens and Sylvia L. Stephens (the "Stephens"), the high bidder for said property, for One Thousand Dollars ($1,000.00) as more fully set forth on the Trustee's Deed dated December 27, 2012 (the "Stephens Deed"). The Stephens Deed described the property using the original metes and bounds description in the Deed of Trust, but clearly excepted therefrom "Lots 1, 2, 3, 4, 5, 6, 7, and 8, Falcon Ridge Farms, as shown on the plat recorded in Plat Book 24, at Page 1."

17. Thereafter, by deed dated the 8th day of February, 2017 (the "Goddard Deed"), the Stephens sold a portion of the "remaining acreage" to Ms. Goddard for Eighteen Thousand Dollars ($18,000.00).

18. The Stephens Deed described the "remaining acreage" sold to the Stephens using the same description as set forth in the Sale Notice but additionally excluding Lots 2, 3, and 7 of Falcon Ridge which were purchased at the foreclosure sale by JSB. The Trustee's Deed into JSB described the property being conveyed only by reference to the Final Plat - "Lots 2, 3, and 7 in Falcon Ridge Farms as shown on the plat recorded in Plat Book 24, at Page 1."

19. Prior to purchasing the Common Area from the Stephens, Ms. Goddard purchased the aforesaid Lots 2 and 3 of Falcon Ridge from JSB by a Deed dated February 7, 2013.

20. The Goddard Deed, unlike the Stephens Deed, described the property conveyed thereby as "all that 'Common Area' containing 21.52082 acres, more or less, as the same is designated and described on" the Final Plat, and granted to Goddard the following "TOGETHER WITH right to use Falcon Ridge Drive and subject to the rights of others to use Falcon Ridge Common Areas including Falcon Ridge Drive." The Goddard Deed did not convey the fee simple title to Falcon Ridge Drive to Ms. Goddard, which title remained in the Stephens. Thereafter, a Deed of Correction dated July 24, 2017 from the Stephens to Ms. Goddard conveyed the fee simple title to Falcon Ridge Drive to Ms. Goddard. That Deed mirrored the Trustee's Deed into the Stephens Deed by describing the property conveyed using the original metes and bounds description in the Deed of Trust, but clearly excepted therefrom "Lots 1, 2, 3, 4, 5, 6, 7, and 8, Falcon Ridge Farms, as shown on the plat recorded in Plat Book 24, at Page 1."

21. The Trustee's Report of Sale is in the Stephens and Ms. Goddard's chain of title inasmuch as said Report of Sale is a prerequisite to the validity of the Trustee's Deed.

22. JSB, through its Substitute Trustee, chose to sell the balance of the collateral securing the indebtedness owed to it by Wolverine not as one parcel but in four separate parcels all based upon the recorded Final Plat by selling Lots 2, 3, and 7 of Falcon Ridge as distinct and separate parcels to JSB as more fully set forth in the Trustee's Deed and Report of Sale and then separately selling the "remaining acreage"

which was comprised of the Common Area including the fee simple title to Falcon Ridge Drive.

Conclusions of Law:

A. In West Virginia, by statute, the general rule is that "[a] purchaser shall not....be affected by the record of a deed or contract made by a person under whom his title is not derived." *W.Va. Code §40-1-15.*

B. The earlier version of this statute, West Virginia Code, Chapter 74, section 10, stating substantially the same rule, was construed in the case of *Carden v. Bush,* 109 W.Va. 655, 155 S.E. 914 (1930). In that case, after the lender's deed of trust was placed of record, the borrower placed restrictions upon the collateral real property. Our Supreme Court found that "[a foreclosure sale purchaser, Bush,] was an innocent purchaser for value at the trust sale, and took title of the trustee just as the trustee received it in 1924, and free in every way from the agreement of 1925." *Id.*, 109 W.Va. at 657, 155 S.E. at 915 (emphasis added). This holding, and the general rule as it pertains to bona fide purchasers without actual notice, is contained within Syl Pt.1 of *Carden*:

> A bona fide purchaser at a trustee's sale (regularly conducted) under a recorded deed of trust, takes the property sold free from a recorded contract relating thereto, made by the grantor of the trust deed, subsequent to the deed but prior to the sale, neither the trustee nor the beneficiary being a party to the contract.

Syl Pt. 1, *Carden.*

C. Central to the Court's decision in *Carden*, was the finding that the foreclosure sale purchaser, Bush, was an "innocent purchaser" *Id.*, 109 W.Va. at 657, 155 S.E. at 915. The Court noted that because of that fact "[i]t is not necessary to

consider what effect, if any, notice of [Carden's] claims would have on the standing of Bush. He denies (without controversion) actual notice thereof and under our recording acts is not affected by constructive notice." *Id.*

D. *Carden v. Bush* involved adjacent parcels of real estate and an agreement between the two lot owners which was placed of record after the recording of the deed of trust. There was no plat placed of record which affected title to other tracts of land nor was there any indication that the lender ever acquiesced in the agreement which was subsequently recorded. However, our Supreme Court has recognized that the language of a deed of trust can be modified by the subdivision of the land where the beneficiary of the deed of trust recognizes and approves of such subdivision or any plat of the same. *Walker v. Summers*, 9 W.Va. 533 (1876). In that case, because Walker had failed to establish the concurrence of Summers, the lender, in laying out the lots and dedicating the streets, the court in *Walker* refused to recognize any modification of the underlying deed of trust. *Id.* at 544-545.

E. Here, the Final Plat was likewise placed of record after the recording of the JSB Deed of Trust. However, JSB recognized and consented to the Final Plat as shown by JSB's release of the various lots created by the Final Plat. Further, JSB's Substitute Trustee foreclosed upon the remaining property subject to the JSB Deed of Trust by reference to the Final Plat. The Trustee's Notice specifically excluded the Pre-Foreclosure Released Lots by reference to "the plat recorded in Plat Book 24, at Page 1" and further gave notice that "[a]t the foreclosure sale, Lots 2, 3, 7 and any remaining acreage in Falcon Ridge Farms as shown on the plat recorded in Plat Book 24, at Page 1 will be sold individually and then as a group." JSB purchased from the Substitute

Trustee the remaining subdivided lots in the subdivision by reference to the Final Plat: "Lots 2, 3, and 7 in Falcon Ridge Farms as shown on the plat recorded in Plat Book 24, at Page 1." The Stephens, Goddard's grantor, likewise purchased based upon reference to the Final Plat inasmuch as the Trustee's Deed utilized the original description as contained within the JSB Deed of Trust and then excluded all of the numbered lots as shown on the Final Plat.

F. "When lands are laid off into lots, streets, and alleys, and a map plat thereof is made, all lots sold and conveyed by reference thereto, without reservation, carry with them, as appurtenant thereto, the right to the use of the easement in such streets and alleys necessary to the enjoyment and value of such lots." Syl. Pt. 2, *Cook v. Totten*, 49 W.Va. 177, 38 S.E. 491 (1901); Syl. Pt., *Bauer Enterprises, Inc. v. City of Elkins*, 173 W.Va. 438, 317 S.E.2d 798 (1984); Syl. Pt. 3, *Chapman v. Catron*, 220 W.Va. 393, 647 S.E.2d 829 (2007). In *Rudolph v. Glendale Improvement Co.*, 103 W.Va. 81, 137 S.E. 349 (1927), our Supreme Court recognized this "unity rule" and extended such private dedication by way of a plat to parks shown on such a plat.

G. Each of the purchasers of the subdivision lots sold pre-foreclosure, by their purchase of a lot created by the Final Plat, acquired as an appurtenance to their lot, the right to use Falcon Ridge Drive and the Common Area, all as shown on the Final Plat. Likewise, the Substitute Trustee, in selling at foreclosure sale the lots and the remaining acreage, including the Common Area, by reference to the Final Plat, conveyed each of those lots with an easement appurtenant in Falcon Ridge Drive and the Common Area as shown on the Final Plat. The lots purchased by JSB included lot 7 which was thereafter conveyed by JSB to the Hockmans and the Hockmans took what

their predecessor-in-interest had acquired from the Substitute Trustee, an easement appurtenant as respects Falcon Ridge Drive and the Common Area. Ms. Goddard's acquisition of Falcon Ridge Drive and the Common Area cannot extinguish these prior vested easements appurtenant.

H. By the use of the Final Plat in describing the property being sold to the Stephens, and thereafter to Ms. Goddard, the Stephens and Ms. Goddard were put on notice of their duty to investigate beyond the documents in their chain of title. Our Supreme Court in *Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.*, 63 W.Va. 685, 60 S.E. 890 (1908) thoroughly discussed the law as it applies to placing a purchaser upon notice. The Court held that "[w]hatever is sufficient to direct the attention of a purchaser to prior rights and equities of third parties, so as to put him on inquiry into ascertaining their nature, will operate as notice." *Id.* at Syl. Pt. 1. The Court went on to further hold that "....a purchaser, having sufficient knowledge to put him on inquiry, or being informed of circumstances which ought to lead to such inquiry, is deemed to be sufficiently notified to deprive him of the character of an innocent purchaser. *Id.* at Syl. Pt. 3. Reference made in the Stephens Deed to the Final Plat, and later, the description in the original Goddard Deed which stated that the property conveyed thereby was "all that 'Common Area' containing 21.52082 acres, more or less, as the same is designated and described on" the Final Plat, were certainly sufficient to put the Stephens and then Ms. Goddard on notice of the prior rights of other lot owners to the Common Area and to require further inquiry as to the state of the title. The Court in *Pocahontas Tanning* therefore further held

> If one has knowledge or information of facts sufficient to put a

> prudent man on inquiry, as to the existence of some right or title in conflict with that which he is about to purchase, he is bound to prosecute the same, and to ascertain the extent of such prior right; and, if he wholly neglects to make inquiry, or, having begun it, fails to prosecute it in reasonable manner, the law will charge him with knowledge of all facts that such inquiry would have afforded.

Id. at Syl. Pt. 4.

I. Prior cases decided by our Supreme Court reveal that even where there is a lack of record notice, purchasers may be charged with searches beyond their chain of title. In *Eagle Gas Co. v. Doran & Associates, Inc.,* 182 W.Va. 194, 387 S.E.2d 99 (1989), the Court found that "when a prospective buyer has reasonable grounds to believe that property may have been conveyed in an instrument not of record, he is obliged to use reasonable diligence to determine whether such previous conveyance exists. *Id.,* 387 S.E.2d at 102. *In Wolf v. Alpizar*, 219 W.Va. 525, 637 S.E.2d 623 (2006), the Court noted that in order to be a bona fide purchaser, one must be "without notice of any suspicious circumstances to put him on inquiry." *Id.* at 637 S.E.2d at 623.

J. The Stephens, in searching title to the property being sold by the Substitute Trustee and in which they were interested, and later, Ms. Goddard, knew from the Trustee's Notice that the Common Area and Falcon Ridge Drive which they ultimately purchased were shown on the Final Plat. As set forth above, Note 11 on the Final Plat referenced the requirement imposed by the Planning Commission that a declaration (referred to in the note as a "COMMON INTEREST OWNERSHIP AGREEMENT") be placed of record. The Stephens, and then Ms. Goddard, were put on inquiry notice under *Pocahontas Tanning* to search the land records for any restrictions on the use of the property purchased. Those restrictions were contained, in part, on the Final Plat, and in the Declaration which would have been found by simply searching the

source of the Substitute Trustee's title. Having failed to adequately search the land records even after they were put on notice of prior rights and equities of third parties, including JSB and then the Hockmans as to Lot 7, the Stephens and Ms. Goddard are estopped from claiming to be bona fide purchasers without notice.

K. Our Supreme Court has further recognized the "common scheme doctrine" which serves to impose the apparent intent of a developer on an individual tract of land in a subdivision. *Jubb v. Letterle*, 185 W.Va. 239, 406 S.E.2d 465 (1991). The *Jubb* Court noted:

> 'The fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs. That intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish.' Wallace v. St. Clair, 147 W.Va. 377, 390, 127 S.E.2d 742, 751 (1962)....

Id., 406 S.E.2d at 468. The Court found that "whether through actual or constructive notice, any potential purchaser would have been aware of the restrictive covenants." *Id.*, 406 S.E.2d at 468.

L. In the instant case, the recorded documents reveal that JSB concurred in the subsequent subdivision of Falcon Ridge which was accomplished pursuant to the Final Plat, and the steps leading up to the same including the CIS and the Declaration. JSB not only concurred but it took advantage of the subdivision efforts of Wolverine by the sale of the remainder of the subdivision in lots, with the residue specifically including the Common Area. Without the Final Plat, and the steps taken to achieve the subdivision of the property pursuant to Jefferson County's then subdivision ordinance, JSB could never have sold the property in lots. That Final Plat contained relevant notes

restricting the use of the lots in Falcon Ridge, including the Common Area.

M. In applying the common scheme doctrine to the instant case, it is clear that the Final Plat contained a common scheme or general plan of development for Falcon Ridge. A critical part of that common scheme was the existence of the Common Area as shown on the Final Plat as well as the restrictions contained in the plat notes and ultimately in the Declaration to which reference was made in Note 13 on the Final Plat. Ms. Goddard was conveyed Lot 8 with reference to that Final Plat in 2010. Ms. Goddard cannot argue that she did not have actual notice of the Final Plat which specifically depicted the Common Area and contained various restrictive covenants in the plat notes. Having such actual notice of the Final Plat, Ms. Goddard cannot avoid the imposition of the common scheme doctrine to this case. The clear intent as revealed by the instruments of record show that it was the intent of Wolverine to impose this common scheme for development upon all lots, including the Common Area, and intent which was followed by JSB and, ultimately, by the Stephens in the original deed conveying the Common Area to Ms. Goddard.

Based upon the foregoing, the Court does hereby FIND that the property conveyed to Ms. Goddard by the Goddard Deed and the subsequent Deed of Correction constitutes the Common Area of Falcon Ridge to be used in common with the other lot owners in Falcon Ridge, including the Hockmans, in accordance with the Final Plat, the restrictions contained in the plat notes, and the Declaration.

And it is accordingly, **SO ORDERED.**

Submitted by:
/s/ Kathy M. Santa Barbara
Kathy M. Santa Barbara, Esquire

WVSB No. 5960
THE LAW OFFICE OF KATHY M.
SANTA BARBARA, PLLC
Counsel for Defendants/Counter-Plaintiffs

/s/ David M. Hammer
Circuit Court Judge
23rd Judicial Circuit

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