IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK CROM AND BONNIE CROM,
Appellants,
vs.
MOMENTUM DEVELOPMENT, LLC, A NEVADA LIMITED LIABILITY COMPANY, AND DAVID MARRINER, AN INDIVIDUAL,
Respondents.

No. 39783

FILED

APR 25 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a district court order denying appellants' motion for a preliminary injunction in a real property case. Presently before the court is respondents' motion to dismiss. Appellants have filed an opposition, to which respondents have replied. As explained below, we conclude that this appeal is moot, and we grant the motion to dismiss.

Appellants Patrick and Bonnie Crom owned a parcel of real property in Incline Village adjacent to a parcel owned by respondents David Marriner and his construction firm, Momentum Development, LLC (collectively, "Marriner"). The parcels are subject to the Vivian Lane covenants, conditions and restrictions ("CC&Rs"), and certain deed restrictions benefiting the parcel that had been owned by the Croms. The deed restrictions precluded Marriner from building a home that is larger than 6,000 square feet, that intrudes upon the Croms' privacy, or that is located outside a designated building envelope.

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Marriner began construction of a home on his parcel. Six months later, when the home was partially built, the Croms sued Marriner for violating the deed restrictions and a CC&R concerning minimum set-back requirements. The Croms sought monetary, declaratory, and injunctive relief, and recorded a notice of lis pendens.

The Croms moved the district court for a preliminary injunction, which the district court denied on the basis of laches. The Croms appealed. During the pendency of the appeal, the Croms sold their home and moved away.

Marriner argues, among other things, that the Croms' sale of the benefited real property rendered their appeal moot because the Croms will not derive any benefit if they succeed on appeal and ultimately obtain an injunction. As recognized in the Restatement Third on Property, "[a]n original party or successor to a servitude benefit that runs with an interest in property is entitled to the benefit only during the time the party or successor holds the benefited property interest."[1] Thus, a person who transfers his or her interest in the benefited estate and retains no property benefited by the servitude loses the right to enforce the servitude.[2] Upon selling their Incline Village real property, the Croms

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[1]1 Restatement (Third) of Property § 4.4(2) (2000).

[2]2 Id. § 8.1 cmt. d; 20 Am. Jur. 2d Covenants, Etc. § 254 (1995); Maurice T. Brunner, Annotation, Who May Enforce Restrictive Covenant or Agreement as to Use of Real Property, 51 A.L.R. 3d 556, 567 (1973); see, e.g., Waikiki Malia Hotel v. Kinkai Properties, 862 P.2d 1048, 1059 (Haw. 1993); McLeod v. Baptiste, 433 S.E.2d 834, 835 (S.C. 1993).

divested themselves of any right to enforce the deed restrictions and CC&Rs benefiting the property.

The Croms maintain, however, that their appeal remains viable under this court's opinion in Dickstein v. Williams.[3] There, appellants Dickstein and Palcanis were enjoined from further construction on their home after their neighbors, the Williamses, and other subdivision residents sued for violations of deed restrictions covering the Dickstein and Palcanis property. This court rejected Dickstein and Palcanis' argument that the appeal had become moot as to the Williamses, who had sold their home during the pendency of the appeal. This court's reasoning was limited to just four words, "This is not so," and followed by the observation that, even if the appeal were moot as to the Williamses, "the decision of the district court must be affirmed for the benefit of the remaining respondents, who are all property owners and residents of the subdivision."[4]

In the present case, the Croms were the only residents of the subdivision to sue Marriner. Thus, the justiciability of the Croms' appeal turns on Dickstein's cryptic "This is not so." The Croms suggest that the cryptic language be connected to a statement the Dickstein court made in closing concerning the benefit of enforcement accruing to remaining residents:

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[3]93 Nev. 605, 571 P.2d 1169 (1977).

[4]Id. at 609, 571 P.2d at 1172.

> Several of the respondent residents testified that they were concerned about the detrimental effect of [Dickstein and Palcanis'] violation of the restriction on the future character of the subdivision. Furthermore, the effect on the Williamses' former property remains the same. The beneficial results of private-land-use restrictions have previously been recognized by this court. The covenant must be enforced, whether or not the Williamses remain parties to the suit.[5]

From the underlined language, the Croms conclude that their appeal is not moot because Marriner's alleged violations of the deed restrictions and CC&Rs still affect their former real property. But any effect of those violations is felt only by remaining residents, and those residents have not participated in the Croms' lawsuit. We decline to extend Dickstein to a case, such as this, in which the litigant proponents of the deed restrictions and CC&Rs retain no enforceable interest.

In addition to Dickstein, the Croms cite an Arkansas case, Forrest Construction, Inc. v. Milam.[6] In Forrest, subdivision residents obtained an injunction prohibiting the developer from violating restrictive covenants they alleged precluded the developer from splitting undeveloped lots into smaller parcels.[7] While the developer's appeal was pending, the developer's lender acquired most of the split lots at a foreclosure sale. The

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[5]Id. at 610, 571 P.2d at 1172 (underline added; internal citation omitted).

[6]43 S.W.3d 140 (Ark. 2001).

[7]Id. at 143.

Arkansas Supreme Court concluded that the developer's appeal was not moot because a ruling on the merits would have the practical legal effect of determining what actions may or may not be taken with respect to the subdivision lots.[8]

But Forrest Construction is distinguishable from the Croms' case based on the selling party's identity in relation to the restrictive covenants. In Forrest Construction, it was the covenant violator whose lots were sold. But here, it was the covenant proponents whose lot was sold. This distinction is significant because any change in the offending property's ownership during appeal has no effect on the litigating covenant proponents' enforcement interest. Thus, in Forrest Construction, even though the appeal had become moot as to the covenant violator, a ruling on appeal would still settle the covenant proponents' right to relief in existing litigation. In contrast, here, because a sale of the benefited property extinguished the covenant proponents' enforcement interest, an appellate ruling would have no practical effect on any existing litigation.

The Croms further contend that the appeal should be considered because it presents matters which are capable of repetition yet evading review. The Croms argue that "there will be future homeowners who simply cannot live with their neighbor's blatant violations of restrictive covenants and who choose to sell their homes." But the

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[8]Id. at 144.

capable-of-repetition-yet-evading-review exception is not triggered by speculative assertions.[9]

As the Croms no longer retain a real property interest capable of enforcement by injunctive relief, we conclude that the Croms' appeal from the district court's denial of injunctive relief is moot. Accordingly, we grant Marriner's motion, and we

ORDER this appeal DISMISSED.[10]

Agosti, C.J.

Shearing, J.

Becker, J.

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[9]Murphy v. Hunt, 455 U.S. 478, 482 (1982); Cotten v. Fooks, 55 S.W.3d 290, 293 (Ark. 2001); Collins v. Lombard Corp., 508 S.E.2d 653, 655 (Ga. 1998).

[10]To the extent Marriner asks this court to expunge the Croms' notice of lis pendens, we deny the request. Whether a notice of lis pendens should be expunged often requires an evidentiary hearing, NRS 14.015(2), which this court is ill-equipped to afford.

Finally, the Croms' motion for leave to present supplemental points and authorities is denied.

cc: Hon. Janet J. Berry, District Judge
McDonald Carano Wilson LLP/Reno
Hale Lane Peek Dennison Howard & Anderson/Reno
Washoe District Court Clerk