RENDERED: FEBRUARY 13, 2015; 10:00
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2013-CA-001552-MR

NORTON FAMILY TRUST — APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JR., JUDGE
ACTION NO. 13-CI-00008

SJ LAND HOLDINGS, LLC;
RONALD W. TIERNEY;
JUDITH N. TIERNEY; AND
TIERNEY STORAGE, LLC — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: CAPERTON,[1] JONES, AND KRAMER, JUDGES.

[1] Judge Caperton dissented in this opinion prior to Judge Debra Lambert being sworn in on January 5, 2015, as Judge of Division 1, Third Appellate District. Release of this opinion was delayed by administrative handling.

JONES, JUDGE: This case arises out of two orders of the Clark Circuit Court concerning the terms of a deed. On appeal we are asked to consider the extent of a restrictive covenant in a deed regarding certain types of business and activities and the compliance of the parties with certain terms of the deed. For the reasons set forth below, we AFFIRM the Clark Circuit Court.

## I. BACKGROUND

Appellant, the Norton Family Trust, ("Norton"), is the former owner of a tract of land located in Clark County, Kentucky ("the Property"), and the current owner of land immediately adjacent to the Property. On June 1, 2000, Norton conveyed the Property by deed to Greg and Carol Jenkins ("the Jenkins deed"). The Jenkins deed stated in relevant part:

> This property is subject to the following restrictions and covenants:
>
> (a) The property is currently zoned for light industrial as designated by the current Clark County Zoning Ordinance. Second parties, their heirs and assigns, may, at their sole option, seek a rezoning of the property to such classification as they deem appropriate, with the exception of heavy industry which shall be prohibited.
>
> The following uses, even if permitted by said ordinance are specifically prohibited:
>
> Truck terminals and freight yards, excepts as used by second parties, their heirs or assigns, in connection with their principal business. Provided, however, that truck terminals and freight yards shall not be permitted as a principal use on the property.
>
> No truck stop or appurtenant facilities of any kind shall be placed on the property.

> Establishments and lots for the display, rental, sale and repair of farm equipment, contractor's equipment and trucks. Provided, however, that trucks and heavy equipment used in the business of second parties, their heirs and assigns, may be sold when taken out of service.
>
> Used car lots.

The Jenkins deed also contained language regarding the boundary line between the two properties, requiring:

> Within ninety (90) days of the request of the Norton Family Trust, second parties, their heirs and assigns, shall erect a six-foot (6') chain link fence buffering between the subject tract and the adjacent property of the Norton Family Trust to the east. All buffering shall be as follows:
>
> Two staggered rows of five-foot (5') evergreens with trees in each row to be forty feet (40') apart, in addition to the six-foot (6') chain link fence.

Finally, the Jenkins deed contained the clause that the restrictions set forth within "shall run with the land and shall apply and be contained in all future deeds and conveyance of the subject property unless released by the written permission of a majority of the trustees of Norton or upon termination of Norton."

The Jenkinses conveyed the Property by deed to Appellees Ronald and Judith Tierney ("The Tierneys") immediately after receiving their deed on June 1, 2000. The language of the second deed ("the Tierney deed") was identical in language for all of the above recited clauses. The property was transferred to Appellee Tierney Storage, LLC on September 8, 2003. Appellee Ronald Tierney is the manager and sole member of Tierney Storage, LLC and the conveyance to

Tierney Storage, LLC recites that it is subject to all easements, conditions, restrictions and covenants.

On December 31, 2012, the Tierneys and Appellee, SJ Land Holdings, LLC, entered into a written agreement to purchase the Property. SJ Land Holdings desires and intends to construct and operate a Chevrolet, Buick, and GMC Dealership on the Property ("GM Dealership"). The GM Dealership would sell and service new cars, light trucks, heavy duty trucks, and, ancillary to the sale of new vehicles, will also sell used cars and trucks. When SJ Land Holdings was not able to reach an agreement with Norton as to the use of the land, it filed a Complaint for Declaratory Relief in the Clark Circuit Court seeking a declaration as to the scope of the deed restrictions on January 7, 2013.[2]

Prior to the commencement of the litigation, in April 2012 Norton made a formal request to the Tierneys to construct the buffer as laid out in the Tierney deed. By August 2012, the Tierneys had complied with the requirement for installing the chain link fence. On August 8, 2012, Norton sent a second request to the Tierneys requesting that the trees also be planted as a buffer in compliance with the terms of the deed. The Tierneys responded by informing Norton that it would plant trees in the fall. However, the Tierneys did not plant any trees and Norton sent another request on March 7, 2013. The Tierneys then "planted" the required evergreens by placing the trees into pots in an area where a concrete driveway had been constructed.

[2] The Tierneys and Tierney Storage were eventually added as Plaintiffs.

On May 6, 2013, Norton again contacted the Appellees about the trees and proposed dates in May for depositions related to the pending litigation. Appellees' counsel indicated that he was unavailable in May and stated that he would provide possible dates of availability for June depositions. However, on May 28, 2013, the Appellees filed for summary judgment on the land use issue. Thereafter Norton filed for leave to assert a counterclaim against the Tierneys and Tierney Storage, alleging breach of covenant regarding the tree buffer issue. Norton also filed a cross-motion for summary judgment on the tree issue on July 9, 2013.

A hearing was held on August 8, 2013, on the parties' motions for summary judgment. Regarding the land use issue, the court issued a Declaratory Judgment finding that:

> In this case, the Restrictions specifically allow all uses under the zoning ordinance except (1) heavy industry and (2) those specific exceptions shown in the Restrictions which are: (2) Truck terminals and freight yards… (b) Truck stop or pertinent facilities… (c) Establishments and lots for the display, rental, sale and repair of farm equipment, contractor's equipment and trucks… (d) Union halls… and (e) Used car lots.
>
> These specific prohibitions are by their very nature narrow in scope, and forbid certain types of business from being located on the Property, rather than certain activities being conducted on the property. In other words, the restrictions forbid use of the property as a "Used car lot" but do not forbid all sales of used cars on the Property. Similarly, the restrictions forbid use of the property for "Establishment and lots for the display, rental, sale and repair of farm equipment, contractor's

> equipment and trucks" but do not forbid all sales of trucks on the Property….
>
> Although a GM Dealership calls and services trucks and used cars as well as new cars, the Court finds and concludes that a GM Dealership is not a "Used car lot" or an "Establishment" or "lot" for "the display, rental, sale and repair of farm equipment, contractor's equipment and trucks" within the meaning of the Restrictions….
>
> For the foregoing, the Court CONCLUDES AS A MATTER OF LAW that the restrictions contained in the Deed and applicable to the Property are not ambiguous and that such Restrictions do not prohibit the use of the Property as a GM Dealership selling and servicing new and used cars and trucks.

In regards to the trees issue, the court permitted Norton to file the counterclaim and stated that "planting means in the ground." The court then ordered the Appellees to comply with the tree buffer restrictions within thirty (30) days. The Tierneys subsequently cut the concrete drive and planted the potted trees. The trees were planted in two staggered rows with one twelve (12) inches from the property line and the other eighteen (18) inches apart. The trees in each row were planted forty (40) feet apart. Norton was apparently not satisfied with the Tierneys's method of planting the trees and after efforts to resolve the matter failed, Norton moved the court to enforce its prior order regarding the trees. On October 18, 2013, the court entered an order finding that Tierney had "substantially complied" with the requirements of the deed. It is from that order and the prior order regarding the restrictions that Norton appeals.

## II. STANDARD OF REVIEW

The interpretation of a deed is a matter of law and therefore our review of the issues raised in this case is *de novo*. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593, 600 (Ky. App. 2006).

## III. ANALYSIS

### *A. GM Dealership Permitted Under the Deed*

Norton's first assignment of error is that the circuit court erred in determining that the language of the Tierney deed permitted the proposed use of the Property as a GM Dealership. The rules governing the construction of restrictive covenants generally are the same as those applicable to contracts. *See Parrish v. Newburg*, 279 S.W.2d 229, 233 (1955). Most importantly, the fundamental rule in construing restrictive covenants is that the intention of the parties governs. *See Glenmore Distilleries v. Fiorella*, 117 S.W.2d 173, 176 (Ky. 1938). This rule is further summarized in *Smith v. Vest*, 265 S.W.3d 246, 249 (Ky. App. 2007):

> In interpreting a deed, we look to the intentions of the parties, "gathered from the four corners of the instrument," *Phelps v. Sledd*, 479 S.W.2d 894, 896 (Ky.1972) (citations omitted), giving common meaning and understanding to the words used. *Franklin Fluorspar Co. v. Hosick*, 239 Ky. 454, 39 S.W.2d 665, 666 (1931). We will "not substitute what grantor may have intended to say for what was said" in the deed itself. *Phelps*, 479 S.W.2d at 896. "The rule is also well settled that the deed will be construed most strongly against the grantor and in favor of the grantee if it admits of two constructions." [*Florman v. MEBCO Ltd Partnership*, 207 S.W.3d 593, 600 fn. 23 (Ky. App. 2006), *quoting* *Franklin Fluorspar*, 39 S.W.2d at 666.

In this case, Norton points to the restrictive covenants against used car lots and "Establishments and lots for the display, rental, sale and repair of farm equipment, contractor's equipment and trucks" as prohibiting the Property's use as a GM dealership because the dealership will admittedly sell used cars and new and used trucks. We disagree.[3]

First, we do not interpret the restrictive covenant against used car lots to prohibit the Property being used as a GM dealership as the proposed dealership cannot reasonably be interpreted to be a "used car lot." We agree with Appellees that a "used car lot is a term of art generally used to describe a business engaged solely in the purchase and sale of used vehicles." Such a "lot" is clearly a distinct type of entity separate from a dealership which sells used cars incidental to its primary business of selling new vehicles. Certainly there is also a connotation for a used car lot that would not be shared by a brand new GM dealership. This distinction is notable also by the fact that the deed singled out a used car *lot* as opposed to a dealership or any business which sold used cars. *See Dennis v. Bird*, 941 S.W.2d 486 (Ky. App. 1997), "[n]o clause or word in a deed was used without meaning or intent.").

[3] We would also note that we are not persuaded that the circuit court was in error because it failed to allow depositions on this matter, as stated in Appellant's own brief, "absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2005). As we do not see these terms as ambiguous, we fail to see how a deposition was necessary or would have contributed anything other than extrinsic evidence.

We also note that there is a separate and distinct land use classification for a "used car lot" under the local zoning ordinances. The Kentucky Revised Statutes also recognize a distinction between the two found in KRS 190.010:

> 4) "**New motor vehicle dealer**" means a vehicle dealer who holds a valid sales and service agreement, franchise, or contract, granted by the manufacturer, distributor, or wholesaler for the sale of the manufacturer's new motor vehicles;
>
> (5) "**New motor vehicle dealership facility**" means an established place of business which is being used or will be used primarily for the purpose of selling, buying, displaying, repairing, and servicing motor vehicles;
>
> (6) "**Used motor vehicle dealer**" means any person engaged in the business of selling at retail, displaying, offering for sale, or dealing in used motor vehicles, but shall not mean any person engaged in the business of dismantling, salvaging, or rebuilding motor vehicles by means of using used parts, or any public officer performing his official duties;

Keeping these distinctions in mind, we turn to the deed as a whole and see a common intention to avoid the use of the property for certain heavy manufacturing or businesses with certain less desirable characteristics. *See* *Brandon v. Price*, 314 S.W.2d 521, 523 (Ky. 1958) ("An important factor also to consider is the general scheme or plan of development and surrounding circumstances."). Therefore, we are confident in concluding that a "used car lot" is a separate land use classification than the proposed GM dealership.

Second, we find the same distinction present in the types of trucks referenced in the deed and the trucks to be sold at the GM Dealership. It is our view that applying the intention of the parties' test, "[e]stablishments and lots for the display, rental, sale and repair of farm equipment, contractor's equipment and trucks," was not intended to preclude the sale of the type of consumer trucks to be sold at the GM Dealership but rather concerns trucks which may be used incidental to farm or contracting work. This intention is evident not only from the common scheme of the deed, but also by the placement of "trucks" amongst the list of farm and contractor's equipment. As the Kentucky Supreme Court explained in *Commonwealth v. Plowman*, 86 S.W.3d 47, 50 (Ky. 2002), "when a general word or phrase follows a list of specific persons or things….[t]he general word or phrase will be interpreted to include only persons or things of the same type of those listed." We therefore conclude that the trucks to be sold at the GM Dealership are not "farm equipment, contractor's equipment or trucks."

Having found that there is a distinction between the used car lots and trucks prohibited by the deed and the used cars and trucks to be sold at the GM Dealership, we agree with the circuit court that the restrictions contained in the Deed and applicable to the Property are not ambiguous and that such Restrictions do not prohibit the use of the Property as a GM Dealership selling and servicing new and used cars and trucks. Though Norton now claims its intention was to preclude such uses, "*the intention* … is the one to be gathered from the words which the parties employ in stating their contract, and not to any unexpressed or

mental intention which they may have entertained but which they did not express…." *Siler v. White Star Coal Co.*, 226 S.W. 102, 104 (Ky. 1920).

Additionally, "[w]e may not substitute what the grantor may have intended to say for the plain import of what he said….The failure to use…specific language warrants the view that it was a deliberate and intended omission." *McMahan v. Hunsinger*, 375 S.W.2d 820, 822 (Ky. 1964). In this case, Norton obviously failed to use language prohibiting a car dealership if in fact that was their actual intention at the time the deed was executed. Finally, we are reminded that "[w]hen the grantor specifically prohibits the use of property for a particular purpose, the more reasonable construction would be that no other uses are prohibited. At least an intention to further extend the limitations is very doubtful." *Connor v. Clemons*, 213 S.W.2d 438 (Ky.1948). Therefore, we hold that the restrictive covenants in the deed prohibit used car lots and "[e]stablishments and lots for the display, rental, sale and repair of farm equipment, contractor's equipment and trucks," but do not prohibit the activities of selling used cars and trucks as proposed by the Appellees.

B. *Tierneys Substantially Complied with Tree Buffer*

Norton's second assignment of error on appeal is that the circuit court erred in finding that the Tierneys had substantially complied with the terms of the deed regarding the tree buffer because the trees planted by the Tierneys "do not comply with either the spirit or intent of the parties to the Tierney deed." Specifically, Norton argues that the trees as planted into squares cut into the

concrete will constrain the trees in growth. Norton also claims that since the two rows are only six inches apart, they will not thrive. Norton therefore claims that these "nonsensical" trees will therefore not form a proper buffer as intended by the deed. Norton also argues at length that these trees do not actually create viewing barrier as intended by the deed.

Norton states in its brief that "[t]he law looks to the spirit of a contract, and not the letter of it. The question, therefore, is not whether a party has literally complied with it, but whether he has substantially done so." *City of Newport v. Newport &* C. *Bridge Co.,* 13 S.W. 720, 721 (Ky. 1890). Applying Norton's own argument that substantial compliance is acceptable, we fail to see how the circuit court erred by determining that there was substantial compliance on the part of the Tierneys regarding the tree buffer. This conclusion is especially supported by the fact that the Tierneys all but literally complied with the terms of the deed *as drafted by Norton* because they planted (in the ground) two rows of five-foot evergreens in two rows forty feet apart. Norton cannot now argue that the very buffer requirements which it set forth now somehow violate the spirit of the deed. Norton also failed to produce any evidence beyond its own conjecture that the trees would actually fail to grow and thrive. Therefore, we agree with the circuit court that the Tierneys substantially complied with the terms of the deed.

## IV. CONCLUSION

For the reasons discussed above, we AFFIRM the orders of the Clark Circuit Court.

KRAMER, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS WITHOUT OPINION.

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