

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA**

JORGE PIEKAREWICZ, and J.D.
RAYBURN,

Plaintiffs,

vs.

CASE NO. 2014-CA-002865

PALMETTO CLUB PROPERTIES
LIMITED PARTNERSHIP, and UNITED
NATIONAL BANK,

Defendants.

JUDGEMENT IN FAVOR OF DEFENDANTS

This matter came before this Court upon the final evidentiary hearing established by this Court's Order Setting Non-Jury Trial. Based upon the parties' stipulations, the testimony presented, the evidence tendered, and upon consideration of relevant authority, this Court's judgement is rendered as follows:

FINDINGS OF FACT

1. This action was initially brought by seven (7) Plaintiffs.
2. Five (5) of the initial Plaintiffs have dismissed their claims.
3. The Plaintiffs are seeking declaratory relief and other relief related to the golf course, (hereinafter referred to as the "Golf Course"), located in the Killearn Country Club, (hereinafter referred to as "KCC"). Defendant Palmetto Club Properties Limited Partnership, (hereinafter referred to as "Palmetto"), owns the real property comprising KCC. Plaintiffs base their claims on the plats and restrictive covenants of the Killearn Estates Subdivision (hereinafter referred to

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as "Killearn"), and pursuant to the Special Restrictive Covenant (hereinafter referred to as "the Special Covenant") which encumbers the KCC.

4. Killearn was developed via the recordation of a series of platted units. Each of the platted units has a set of restrictive covenants directly tied to the unit. The restrictive covenants for the residential units are virtually identical and are interlocking amongst the units. (The covenants for the residential units shall be collectively referred to herein as "the Common Covenants.")

5. KCC, inclusive of the Golf Course, is not encumbered by the Common Covenants; rather, it is solely encumbered by the Special Covenant. Moreover, KCC is not platted and the KCC was conveyed to Palmetto via a meets and bounds legal description. The KCC has not subsequently been platted by Palmetto.

6. The Common Covenants give detailed rights, duties, and responsibilities to each residential lot owner in Killearn. The Common Covenants are for the benefit of the lot owners and the enforcement of the Common Covenants is vested in the lot owners and the Killearn Homes Association, Inc. (hereinafter referred to as "KHA"). The covenants burdening Plaintiffs' parcels limit the use of the lots to single family residences. The KHA has never assessed dues to Palmetto nor included Palmetto in its official notices of KHA meetings.

7. The Common Covenants define certain property as common property and state that said common property is for the use and enjoyment of the lot owners. The Golf Course is not defined or listed as a common property, and the Common Covenants create no rights for the lot owners and KHA as to the Golf Course. The Plaintiffs testified they have no expectation of utilizing the Golf Course absent being a dues paying member of the KCC. In addition, under the heading "Title to Common Properties" the Common Covenants state:

The Developer may retain the legal title to the Common Properties until such time as it has completed improvements thereon and until such time as, in the opinion of

the Developer, the Association is able to maintain the same but, notwithstanding any provision herein, the Developer hereby covenants, for itself, its successors and assigns, that it shall convey the Common Properties to the Association not later than the 1st day of January 1985.

See Plaintiffs' Exhibit C-10, at Official Records Page 1550.

It is undisputed the developer never deeded the KCC to the KHA. Further, Mr. JT Williams, the developer of Killearn, testified that the KCC was not common property.

8. Each Plaintiff owns a residential lot and home located in Unit 27 of Killearn.

9. Expert testimony was tendered by Palmetto relevant to the plats' depiction of the Golf Course holes abutting Plaintiffs' lots. The two holes of the Golf Course abutting their lots are depicted on the plats for both Unit 27 and Unit 26. The expert opined that the notation on the plats for these units that the Golf Course was "unplatted land" and "golf course not a part of this plat" established that the Golf Course was not part of the plats. Moreover, JT Williams testified that the Golf Course was not platted. Plaintiffs' offered no expert testimony on this issue.

10. The property burdened by the Special Covenant consist of the Golf Course, a golf Pro Shop, a clubhouse, tennis courts, a swimming pool, and related country club amenities.

11. The Special Covenant states that the purchase right created therein is for the members of KCC.

12. In 2015, the Golf Course consisted of three 9-hole courses. One of the 9-hole courses was commonly referred to as the Narrows.

13. The Special Covenant expires in 2021 and contains a condition precedent which must occur prior to the owner of KCC being able to close all or a portion of the Golf Course. The condition precedent is that the owner must give notice of an intent to discontinue golf operations along with an appraisal of the Golf Course and certain amenities to the KCC members, and further offer the Golf Course and amenities for sale to the KCC members at the appraised value.

14. Palmetto tendered the notice and appraisal required by the Special Covenant prior to closing the Narrows.

15. Upon receipt of Palmetto's notice, the KCC members selected three representatives pursuant to the terms of the Special Covenant.

16. The three representatives retained counsel who is a respected real estate attorney. The representatives also sought direction from the KCC members inclusive of asking the KCC members to express their opinions in the form of a written ballot stating whether a member wanted the members to purchase the Golf Course or reject the right to purchase.

17. More than ninety percent of those who tendered ballots to the three representatives voted to reject the purchase right. The representatives unanimously notified Palmetto that the KCC members had rejected the purchase right.

18. Subsequent to receipt of the notice of the rejection, Palmetto closed golf play on the Narrows in January 2016.

19. The Special Covenant, in setting forth the parameters of the KCC members' purchase right, makes no reference to the members being able to take title free of existing mortgages, liens, or encumbrances.

20. United National Bank has a first position mortgage recorded against Palmetto's property.

CONCLUSION OF LAW

1. Plaintiffs are seeking an interest in the Golf Course such that the Golf Course must be a golf course in perpetuity. Plaintiffs failed to tender any evidence, and the record is devoid of any evidence, showing a dedication or other type of record representation which would give Plaintiffs any interest in, or claim to, the Golf Course. Moreover, the record is devoid of any type

of recorded deed reservation or other type of a recorded instrument or plat illustrating an intent for Plaintiffs to possess an interest in, or claim to, the Golf Course. In fact, the relevant plats make it clear the Golf Course is not part of or dedicated in the plats and the Special Covenant expressly shows an intent that the Golf Course may be closed to golf play. Since the plats and covenants of record do not evidence an intent for Plaintiffs to possess a perpetual interest in the Golf Course, it follows that Plaintiffs' claim for an interest to the Golf Course based on the plats and recorded covenants must fail.

2. Neither the Golf Course nor the KCC is of like character as Plaintiffs' residential lots. Moreover, the Golf Course and the KCC are not similarly situated to residential lots and Palmetto's and Plaintiffs' properties are not burdened by one overarching uniform covenant. In addition, the Common Covenants and Special Covenant are not reciprocal in nature and neither party has any authority or power to enforce the covenants on the other party's parcels. Thus, the elements for relief under a general building scheme do not exist and Plaintiffs' claim for such relief must fail.

3. Palmetto fully complied with its duties under the Special Covenant when it tendered to the KCC members the requisite notice and appraisal. Moreover, the KCC members properly rejected the purchase right.

4. Plaintiffs argue that each individual KCC member has the individual right to purchase the Golf Course under the Special Covenant. This position is contradicted by a clear reading of the Special Covenant which provides:

WHEREAS, Developer wishes to provide by this Covenant a method by which the **members** of the Killearn Golf & Country Club, by whatever name and however constituted, may purchase, under certain conditions, so much of the real property subject hereto as is being used for golfing and for functions directly supportive thereof as herein specified.

See Plaintiffs Exhibit E-1 at Official Records Page 445 (emphasis added).

It is critical to note the Special Covenant does not reference any right vested in an individual member and all references are to the members as a combined group. The Special Covenant continues as follows:

ARTICLE V

MEMBERS' RIGHT TO PURCHASE

Upon reaching a decision to discontinue golfing play and operations upon said restricted use areas, or any portion there-of, but prior to cessation of such activities, that then owners of the real property restricted hereby shall offer to the then active **members** of Killearn Golf & Country Club, by whatever name at the time, to sell for cash such facilities (as described in items A through F inclusive set forth in Article IV hereof) at the then fair market value thereof which shall be determined in the form of a current appraisal by a competent MAI or SRPA appraiser. Within thirty (30) days from the making of such offer, the **members** may accept such offer

See Id. at Page 449 (emphasis added).

The use of the plural possessive is additional evidence that the purchase right is afforded to the member group. The Special Covenant continues with the clear intent that the purchase right is vested in the group as a whole by stating:

If **they** reject, this Article shall then cease, determine and be without further legal efficacy whatever. If said **members** shall timely accept said offer, they shall simultaneously pay to the selling owner a good faith binder in the amount of Five Percent (5%) of the sales price and the sale and purchase shall close within the next fifteen (15) days.

See Id. at Page 450 (emphasis added).

To afford one member the right to purchase if a majority rejects the right, as argued by Plaintiffs, would render this clause meaningless. The Special Covenant concludes on the purchase right as follows:

Within twenty (20) days from the date of initial notice hereunder, the said **members** shall notify the record owner of such facilities in writing of the

names and addresses of three (3) individuals who have been designated and appointed by such **members** as their agent and attorney in fact to represent them and act on their behalf and in their place and stead with regard to all rights and obligations hereunder. The selling owner may deal solely and exclusively with a **majority** of such representatives and may rely totally upon their authority and the validity of their appointment without inquiry with relation thereto.

See Id. at page 450 (emphasis added).

It follows that all members are bound by the three representatives' decision to reject the purchase right. Thus, Palmetto had full authority to close the Narrows in January 2016, and the purchase right contained in Special Covenant has terminated as to the Narrows.

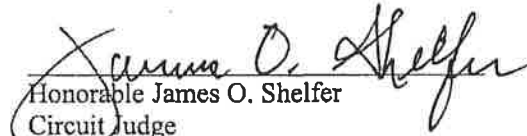
5. Even if the KCC members had exercised the purchase right, said election would not have affected the mortgage held by United National Bank. Covenants must be strictly construed. Since the Special Covenant does not reference the purchase right usurping the lien of a mortgage, Plaintiffs' claim on this issue must fail.

6. Pursuant to Rule 9.130 (f), Florida Rules of Appellate Procedure, this judgement shall not constitute a final decree until Plaintiffs' appeal of this Court's order denying the class certification motion is ruled upon by the First District Court of Appeal.

7. This Court reserves jurisdiction to tax costs against Plaintiffs in favor of Defendants. Defendants may not file a motion seeking same until this judgement becomes final pursuant to the above cited appellate rule.

For the foregoing reason Plaintiffs shall recover nothing herein and shall go hence without day.

ORDERED and adjudged at Tallahassee, Leon County, Florida, on this 17th day of February, 2017.


Honorable James O. Shelfer
Circuit Judge

Conformed Copies To:
All counsel of record.



FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D16-4799

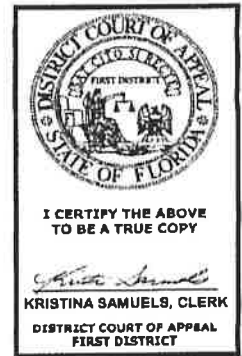
JORGE PIEKAREWICZ and J. D.
RAYBURN,

Appellants,

v.

KILLEARN HOMES ASSOCIATION,
INC., UNITED NATIONAL BANK,
and PALMETTO CLUB
PROPERTIES LIMITED
PARTNERSHIP,

Appellees.



On appeal from the Circuit Court for Leon County.
James O. Shelfer, Judge.

January 31, 2018

PER CURIAM.

AFFIRMED.

ROBERTS, MAKAR, and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Mark G. Lawson and James C. Dinkins, Mark G. Lawson, P.A., Tallahassee, for Appellants.

Daniel E. Manausa, Manausa Law Firm, P.A., Tallahassee, for Appellees.



MANDATE

from

FIRST DISTRICT COURT OF APPEAL

STATE OF FLORIDA

This case having been brought to the Court, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that further proceedings, if required, be had in accordance with the opinion of this Court, and with the rules of procedure, and laws of the State of Florida.

WITNESS the Honorable Bradford L. Thomas, Chief Judge, of the District Court of Appeal of Florida, First District, and the seal of said Court at Tallahassee, Florida, on this day.

February 21, 2018


Jorge Piekarewicz and J. D. Rayburn v.
Killearn Homes Assoc., Inc., Palmetto etc. et al.

DCA Case No.: 16-4799
Lower Tribunal Case No.: 2014-CA-002865

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LEON COUNTY, FLORIDA

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KRISTINA SAMUELS, CLERK
District Court of Appeal of Florida, First District



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Mandate and opinion to: Hon. Gwen Marshall, Clerk
cc: (without attached opinion)

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