DILLINGHAM *v.* KAHN.

4-3323

Opinion delivered February 5, 1934.

1. VENDOR AND PURCHASER—RESTRICTED AREA—BREACH OF COVENANT.—A covenant in a contract of sale of a lot within a restricted area that no residence in such area should be erected the "actual *bona fide* cost" of which, "exclusive of any outbuildings" should be less than $10,000 was broken where the vendor built homes within such area which cost less than that sum, and the words "actual *bona fide* cost" did not include the vendor's supervision of construction nor the cost of any outbuildings.

2. VENDOR AND PURCHASER—LACHES.—A purchaser was not barred by delay from rescinding a purchase of a lot because of the vendor's breach of a covenant not to build houses costing less than $10,000, where the purchaser did not know of the violation until he filed a cross-complaint to the vendor's foreclosure suit.
3. VENDOR AND PURCHASER—ESTOPPEL.—A purchaser's letters to the vendor requesting additional time for payment of purchase money *held* not to preclude the purchaser from rescinding the purchase on discovering that the vendor had violated a covenant as to the cost of buildings erected within a restricted area, where the letters were written at a time when the purchaser did not know of the violation.
4. VENDOR AND PURCHASER—RIGHT OF PURCHASER TO RESCIND.—A purchaser could rescind a purchase contract on the vendor's breach of a restrictive covenant, since covenants for payment and restrictions were concurrent and dependent.

Appeal from Pulaski Chancery Court; *Frank H. Dodge,* Chancellor; reversed.

STATEMENT BY THE COURT.

On January 5, 1926, appellant purchased from appellee plot 23, Prospect Terrace, an exclusive and restricted residential addition to the city of Little Rock. A warranty deed was duly executed and delivered by appellee, the granting clause of which is as follows:

"That I, Sidney L. Kahn, as trustee, for and in consideration of the sum of four thousand dollars ($4,000), paid and to be paid to me by R. N. Dillingham, as follows, to-wit: Two hundred fifty dollars ($250), cash in hand, receipt of which is hereby acknowledged, and the balance of thirty-seven hundred fifty dollars ($3,750), evidenced by the one note of even date herewith, payable in monthly installments of thirty-five dollars ($35) each, beginning on or before February 5, 1926, do hereby grant, bargain, sell and convey unto the said R. N. Dillingham, and unto his heirs and assigns forever (subject to all the conditions, limitations, restrictions and reservations contained and mentioned in the plat and bill of assurance of Prospect Terrace hereinafter referred to) the following described real property and premises lying and being situated in the county of Pulaski and State of Arkansas, to-wit:

"Plot number twenty-three (23) of Prospect Terrace, in the city of Little Rock, Pulaski County, Arkan-

sas, according to the plat and bill of assurance of said Prospect Terrace dated May 24, 1923, and filed in the office of the recorder of Pulaski County, Arkansas, and duly recorded in record book 168, page 22, which said plat and bill of assurance are made a part of this deed."

The bill of assurance referred to in the granting clause of the deed contained a covenant to the following effect: "No residence shall be erected on plots 1 to 39, inclusive * * *, the actual *bona fide* cost of which, exclusive of any outbuildings, shall be less than $10,000," etc. We deem it unnecessary to set out other provisions of the bill of assurance because not directly involved on this appeal.

On August 5, 1932, this suit was instituted by appellee against appellant to foreclose the vendor's lien reserved in the deed. The complaint alleged that appellant had failed and refused to pay fourteen monthly payments aggregating $490, and has further failed to pay taxes in the sum of $48.52; that appellants now elect to declare all the indebtedness due and payable aggregating a total sum of $1,558.52. Appellant answered appellee's complaint and alleged affirmatively, and, by way of cross-complaint, that appellee agreed, at the time of the purchase, to maintain parks in Prospect Terrace; that, by the bill of assurance, appellee covenanted and agreed that no house would be built, within the area, for a cost of less than $10,000. Appellant further alleged certain representations made by appellee's agent which induced his purchase, but we deem them not of sufficient importance to here set out. The prayer was for rescission of the contract of purchase and a return of the purchase money paid.

On July 17, 1933, the cause came on for trial and decree, and the court heard testimony then and there presented to the following effect: Sidney L. Kahn identified the deed to appellant and said it conveyed the property subject to the plat and bill of assurance. Appellant's note was identified, and witness stated that there was $2,366.28 due thereon; that witness was the trustee for himself and all of the heirs; that he gave appellant a copy

of the plat and bill of assurance prior to the purchase; that all restrictions were for the benefit of future owners in the addition. That, by the bill of assurance, under certain lots, which includes the lot in this controversy, buildings were restricted to cost not less than $10,000; that all houses constructed in the addition by witness cost over $10,000; that witness had nothing to do with the building of the Dr. Calcote house; that witness considers improvements, under the bill of assurance, to include a house, garage and landscaping and everything; that witness did not have his books or records as to what the house cost on plot 26.

E. J. Bodman, a witness for appellee, testified, as far as he knew, Mr. Kahn has not violated the bill of assurance by the erection of houses costing less than $10,000; that witness did not handle the building of houses.

Oscar W. McCaskill, a witness for appellee, testified that he did not know that any of the restrictions and conditions of the bill of assurance had been violated.

Appellant testified, in his own behalf, that it was represented to him at the time of purchase that no building would be allowed in the district which cost less than $10,000; that, had it not been for the restrictions in the district, plot 23 would not have been worth more than $1,000, but that under the restrictions he considered it worth $4,000; that the restrictions, in regard to buildings, had been violated by Mr. Kahn; that on lot 22, which is adjacent to witness' lot, Dr. Calcote built a house that cost only $8,250; that, on lots two doors from plot 23, Mr. Kahn built a house that didn't come up to the restrictions; that witness called Mr. Kahn's attention to the Calcote house; that witness first learned about the violation of restrictions just recently; that on plot 26, which was constructed by Mr. Kahn himself, cost only $7,750; that witness has paid Mr. Kahn in principal, interest and taxes $2,993; that witness knew the cost of the building on plot 26 because he saw the contract between Mr. Kahn and Mr. Bracy, the building contractor; that witness did not know of the violations of the restrictions until just recently; that without the restrictions provided for in the

bill of assurance, plot 23 is not worth more than $750 or $1,000; that witness saw ten or fifteen contracts between Mr. Kahn and Mr. Bracy, the building contractor, and the $10,000 restriction had been violated in every one of them.

S. M. Pearson, a witness on behalf of appellant, testified that he was general superintendent of Mr. E. D. Bracy, a building contractor in Little Rock in 1926 and subsequent years; that witness made up the records from which the ledger and books were kept; witness identified the contract for the building on plot 26 between Mr. Bracy and appellee; that the price specified was $7,750, and that is the amount appellee paid for the building; that the actual cost of the building to Mr. Bracy was $7,750.91; that certain extras were added to the contract price, making a total cost of $7,966, which was the exact sum paid by Mr. Kahn to Mr. Bracy for the construction of the building on plot 26; that witness assisted in building ten or fifteen other houses in this district; that the restrictions as to the cost of building were violated by Mr. Kahn in each and every instance; witness identified a building permit granted by the city of Little Rock for the building on plot 26. The approximate cost of the building was given as $8,000, and the actual cost was about $300 less than that; that the Bracy books are now in possession of witness, and some of them are in the Rector building.

M. O. Branton, a witness on behalf of appellant, testified that he bid on the contract for the Calcote house, and his bid was $8,750, but that Dr. Calcote advised him he didn't want to spend over $8,000; that Dr. Calcote afterwards advised witness that he had beaten his price, and witness did not get the job.

Sidney L. Kahn, being recalled, testified that appellant had not at any time made any objections to the noncompliance with their agreement in regard to plot 23 in Prospect Terrace or to anything connected therewith; that appellant had never said a word to witness about the Calcote house, and that witness did not know what the Calcote house had cost; that witness knew for a fact

that the house on plot 26 cost in excess of $10,000; that this included charges for supervision, inspection and architect; that witness had served in all the buildings constructed as supervisor; that it took about ninety days to four months for Mr. Bracy to construct a house, and that witness was there 50 per cent. of every day; that witness had searched for his books in reference to these contracts, but could not find them; that witness would not say that $7,966.96 was the total cost of the house on plot 26; that he would have to look at his books to determine this. Witness further testified that he charged from 25 per cent. to 30 per cent. of the contract price for handling the supervision of construction; that witness was paid 25 per cent. to 30 per cent. to inspect and supervise the construction of buildings by his brother and father.

The above is a concise statement of the testimony for the respective parties on the decisive issue in this case. The chancellor found in favor of appellee, and this appeal is prosecuted therefrom.

Fred A. Isgrig, for appellant.

Louis M. Cohn and *Trieber & Lasley,* for appellee.

JOHNSON, C. J., (after stating the facts). The foregoing statement of facts demonstrates that appellee violated the terms and conditions of his bill of assurance, which was made a part and parcel of the deed from appellee to appellant conveying plot 23 in Prospect Terrace. The evidence on this point is too plain and certain to be ignored. In very plain language the bill of assurance provides: "No residences shall be erected on plot 1 to 39, inclusive * * *, the actual *bona fide* cost of which, exclusive of any outbuildings, shall be less than $10,000." This language conveys what it means and means exactly what it says. "Exclusive of any outbuildings" means that no building other than the residence can or should be considered, and "the actual *bona fide* cost" does not include 25 per cent. or 30 per cent. of the contract price for supervision of construction.

The undisputed evidence shows that appellee, almost before the ink had dried on his bill of assurance and deed to appellant, contracted with one Bracy, a contractor and

builder in Little Rock, for the construction of a dwelling house on plot 26, which lot lies within the restricted area of the bill of assurance, at a contract cost price of $7,750. This is a palpable violation of the bill of assurance. Appellee undertakes to justify this construction contract by contending that he personally supervised the construction of the building, and that his services in so doing were worth 25 per cent. to 30 per cent. of the contract price of construction. If the bill of assurance may now receive the interpretation contended for by appellee, it would become absolutely worthless. If supervision costs can be invoked in this manner, then it may likewise be extended to 50, 60, 75 per cent. or any greater percentage of construction cost, and thereby nullify the clear intention of the parties as evidenced by their contract.

Appellee contends that a rescission should not now be directed because of appellant's long delay in demanding it. It is true the deed was executed in 1926, and no demand was made for rescission until the cross-complaint was filed, but appellant could not possibly complain of something which he did not know. Appellant had the right to assume that appellee would live up to his contract in good faith until otherwise advised; he testified most positively that he knew nothing of the violation of the building restrictions until just prior to the filing of his cross-complaint. This testimony was entirely reasonable and consistent. Certainly, appellee's contractor, Mr. Bracy, would not advise appellant of the violations of the building restriction so long as he was in the employ and good graces of appellee; certainly appellee would not be expected to advise appellant of his own infidelities. No other sources of information were open to appellant, and we think his testimony is entitled to full credence in this regard. Thus, when so considered, appellant's cross-complaint seeking rescission was brought within a reasonable time. In *Snyder* v. *Bridewell*, 167 Ark. 8, 267 S. W. 561, we stated the rule as follows: "An offer to rescind a contract must be made within a reasonable time after having had an opportunity to discover the grounds therefor."

We think appellant asserted his right of rescission within a reasonable time after the facts came to his knowledge.

Neither can we agree that appellant's letters to appellee requesting additional time for payment preclude his asserted rights under his cross-complaint. These letters were written at a time when appellant was not advised of appellee's violation of the covenants in the bill of assurance, and, when thus considered, do not preclude his right of rescission.

Since the restrictions contained in the bill of assurance, in reference to the cost of dwellings constructed within the restricted area, are a material part of the consideration; and, since the usual basis of the covenants for payments and restrictions are concurrent and dependent, the purchaser is entitled to rescind upon breach of such covenant. *Smith* v. *Home Seekers' Realty Co.*, 97 Fla. 236, 122 So. 708, 67 L. R. A. 809; *Laser* v. *Forbes*, 105 Ark. 166, 150 S. W. 691.

For the reasons assigned, the case is reversed, and the cause remanded to the Pulaski Chancery Court, with directions to ascertain the total amount paid by appellant to appellee on the purchase price, exclusive of interest and taxes paid by appellant, and render a decree therefor, after restoring the fee simple title in appellee.

It is so ordered.

SMITH and MCHANEY, JJ., dissent.