

**IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT  
IN AND FOR BAY COUNTY, FLORIDA  
CIVIL DIVISION**

SANTA MONICA BEACH PROPERTY OWNERS  
ASSOCIATION, INCORPORATED, JOE BAILEY,  
LEW JAMES, CINDY DOOD, JANET DICK-GRACE,  
ADRIAN HOLMAN, JOYCE HOSKINS, JOHN HUNTER,  
MARK JAMISON, BARBARA RAMLOW, GARY SALTER,  
STEVE SANDERS AND BOB WHITSON;

Plaintiff,

Case No.: 16000740CA

v.

DAVID ACORD and wife, VIRGINIA ACORD and  
WILLIAM C. ALFORD

Defendants.

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**ORDER OF DISMISSAL WITH PREJUDICE**

**THIS MATTER** was called on September 19, 2016 for a hearing on Defendants DAVID ACORD, VIRGINIA ACORD and WILLIAM C. ALFORD's Motion to Dismiss Plaintiff's Complaint. Counsel for Plaintiffs and the Defendants were present at the hearing. The Court, having been fully advised in the premises by argument of counsel, finds that:

A. Plaintiff's Complaint is framed as an action for declaratory relief pursuant to Chapter 86, Florida Statutes. The Complaint contains allegations which, taken as true for the purposes of the Motion to Dismiss, allege certain restrictive covenants ("Covenants") which encumber parcels of real property owned by the Defendants, which properties are located within the Santa Monica Beach subdivision. The Covenants state that properties within Santa Monica Beach "shall be used only as residential purposes" and prohibit any building on such properties from being used "for business or manufacturing purposes." The Complaint also alleges, in relevant part:

*8. The Defendants' properties are currently being offered and advertised for rent as a transient public lodging establishment on the internet.*

*9. Pursuant to the provisions of Fla.Stat. 59.013(4)(a)1[sic], a transient public lodging establishment includes a dwelling that is rented three times a year or more for periods of less than thirty days and pursuant to Fla. Stat. 509.241 must obtain a license from the Florida Division of Hotels and Restaurants.*

*10. In addition to being licensed, the Defendants are required to collect state sales tax and local bed tax and remit the sums collected to the appropriate authorities.*

*11. Attached hereto as Exhibit "D" is information obtained relating to the Defendants, David Acord and wife, Virginia Acord, having obtained a license to operate their property located within the Santa Monica Beach subdivision as a transient public lodging establishment.*

B. The foregoing consist of the only allegations of ultimate material fact contained in the Complaint with regard to the uses being conducted on Defendants' properties. The Complaint goes on to request a declaration that these uses are contrary to the aforementioned Covenants, and to request that Defendants be prohibited from continuing to operate transient public lodging establishments in the Santa Monica Beach subdivision.

C. Defendants, in their Motion to Dismiss and at the hearing on this matter, have contended that the allegations set forth above fail to state a cause of action, in that the Plaintiffs have not alleged that the subject properties are being rented for any purpose other than residential use by residential tenants. For the reasons discussed below, the Court agrees, and finds that the Complaint contains no allegations of any non-residential use of real property, and therefore it should be dismissed.

D. The allegations of the Complaint, taken as true, establish that the subject properties are being rented and/or advertised for rent on what would commonly be called a "short-term" basis. The allegations also establish that, as short-term rentals, the properties are subject to licensing pursuant to Chapter 509, Florida Statutes. This includes the collection and remission of sales tax and a local bed tax to the appropriate authorities. Although not specifically stated in the Complaint, it can be inferred that the Defendants are alleged to rent their properties for pecuniary gain. Finally, Exhibit "D" to the Complaint establishes that the owners of one of the properties, David Acord and Virginia Acord, have established the fictitious name "Acord Rental" for their property. No corresponding exhibit is presented with respect to Defendant William Alford.

E. Although no controlling or persuasive authority from Florida courts was presented on this point, several foreign jurisdictions have evaluated whether a short-term rental of property is inherently "business" or "commercial" in nature, and answered the question in the negative. "[R]esidential use, without more, has been consistently interpreted as meaning that the use of the property is for living purposes, or a dwelling, or a place of abode,' and that '[t]he transitory or temporary nature of such use does not defeat the residential status.'" *Slaby v. Mt. River Estates Residential Ass'n*, 100 So. 3d 569, 578 (Ala. Civ App. 2012)(citing *Lowden v. Bosley*, 395 Md. 58, 68 (2006)). See also *Mullin v. Silvercreek Condominium Owner's Ass'n*, 195 S.W.3d 484 (Mo. Ct. App. 2006); *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 829-830 (2003). In other words, property is used for residential purposes when those occupying it do so for ordinary living purposes. The critical inquiry is not the duration of the tenancy, but the character of the actual use of the property by those residing thereon.

F. With regard to rental of the properties for pecuniary gain, it has been held, and this court agrees, that “receiving rental income, or making a profit” from a home does not necessarily mean that the home is being used for non-residential purposes. *Moss v. Inverness Highlands South and West Civic Ass’n*, 521 So. 2d 359 (Fla. 5<sup>th</sup> DCA 1988). *See also Slaby*, 100 So. 3d at 580. As noted by the Fifth District Court of Appeals in *Moss*, “if paying for the right to reside is a violation of the deed restriction, then each resident in the subdivision is violating, or has violated, the restriction,” since it is reasonable to assume that nearly all residents have paid a purchase or rental price for their properties. *Moss*, 521 So. 3d at 359.

G. Likewise, the fact that the properties may be subject to a regulatory scheme or that tax remittances must be made to applicable authorities does not render the use of those properties a “business” use. As noted by counsel for the Defendants, regulations by all levels of government are prevalent on both residential and commercial property, and nothing inherent in the terminology of Ch. 509 regarding transient public lodging establishments indicates that such establishments must be considered “business” or “commercial” in nature. Neither financial benefit to the property owner nor remittance of tax “transforms the nature of the use of the property from residential to commercial.” *Slaby*, 100 So. 3d at 580. The registration by Defendants David and Virginia Acord of a fictitious name for rental operations on their property also does not affect the nature of the actual use which is undertaken on the property, and therefore does not support an allegation that the Covenants have been violated.

H. This is not to say that the Plaintiffs could not have alleged uses of the subject properties, which uses would violate the Covenants’ restriction on business use. In *Robins v. Walter*, 670 So. 2d 971 (Fla. 1st DCA 1995), the First District Court of Appeal held that the operation of a bed and breakfast inn was a commercial use prohibited under the applicable covenants.<sup>1</sup> In holding that the bed and breakfast was a “facility servicing temporary or transient guests from the general public,” the First District noted facts such as complimentary breakfast service, use of a manager to “control the guests,” advertising signs located on the property advertising it as a “Bed and Breakfast Inn,” and five bedrooms each with a separate entrance to the outside of the structure. None of these indicia of commercial use, or any similar allegations, are contained in the Complaint in the instant case.

I. Finally, the Court also notes the generally recognized principle that restrictive covenants should be strictly construed in favor of the free and unrestricted use of real property, and therefore an ambiguous covenant must be construed in favor of the landowner. *See e.g. Bendo v. Silver Woods Cmty. Ass’n*, 159 So. 3d 179, 180 (Fla. 5<sup>th</sup> DCA 2015); *Moss*, 521 So. 3d at 359. The covenants at issue are silent on the issue of

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<sup>1</sup> The covenants at issue in *Robins* specifically provided that “the renting of the premises in whole or in part shall not be construed to be a business or commercial operation.” It is clear, therefore, that the holding of *Robins* is predicated on the business and commercial nature of other uses of the property, rather than the short-term rental being inherently prohibited as a business or commercial use. The Covenants at issue in the instant case are silent on this issue.

short-term property rental, and controlling precedent dictates that this ambiguity be resolved in favor of the Defendants, as the property owners.

J. The Court would customarily grant the Plaintiffs an opportunity to amend the Complaint in a situation such as this. However, at the hearing on this matter Counsel for the Plaintiffs indicated that he could not amend the Complaint to allege additional uses of the subject properties which would support the Plaintiffs' claim of prohibited use. Based on this fact and the non-objection of counsel for all parties, the Court will dismiss the Complaint with prejudice.

It is therefore **ORDERED AND ADJUDGED** as follows:

1. Defendants' Motion to Dismiss is granted.
2. Plaintiffs, SANTA MONICA BEACH PROPERTY OWNERS ASSOCIATION, INCORPORATED, JOE BAILEY, LEW JAMES, CINDY DOOD, JANET DICK-GRACE, ADRIAN HOLMAN, JOYCE HOSKINS, JOHN HUNTER, MARK JAMISON, BARBARA RAMLOW, GARY SALTER, STEVE SANDERS AND BOB WHITSON's claims against Defendants, DAVID ACORD, VIRGINIA ACORD and WILLIAM C. ALFORD, are hereby dismissed with prejudice.
3. The Court reserves jurisdiction for consideration of further motions and orders that are proper.

**DONE and ORDERED** in chambers in Panama City, Bay County, Florida on the

29 day of September, 2016.



**MICHAEL C. OVERSTREET**  
**CIRCUIT JUDGE**

**CERTIFICATE OF CLERK**

**I HEREBY CERTIFY** that a correct copy of the foregoing was sent this 29 day of Sept., 2016 to the following:

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BY:   
Deputy Clerk J.A.