COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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MASTER IN CHANCERY

NEW CASTLE COUNTY COURTHOUSE
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Re: *Robert Flanagan v. Joe Amon & Cynthia A. Amon*
C.A. No. 7835-ML

Dear Counsel:

This is a dispute between neighbors in a subdivision regarding whether a structure the respondents built on their property violates deed restrictions governing the subdivision. The parties have filed cross-motions for summary judgment. The undisputed facts show the structure at issue is a playhouse, which was not prohibited by the deed restrictions, and which was approved "by default" by the architectural review committee. I therefore recommend that the Court enter judgment in favor of the respondents. Factual disputes regarding the respondents' counterclaim preclude judgment before trial on that claim.

BACKGROUND

The parties are next-door neighbors in a subdivision known as Ramsey Ridge in Hockessin, Delaware. The petitioner, Robert Flanagan ("Mr. Flanagan"), filed this action against the respondents, Joseph and Cynthia Amon ("Mr. and Mrs. Amon"), after the Amons put a structure on their property that Mr. Flanagan contends is a shed prohibited by the deed restrictions that govern Ramsey Ridge. The parties' dispute is about the nature of the structure and whether it violates the deed restrictions.

Ramsey Ridge is governed by the Amended and Restated Declaration of Restrictions Applicable to Ramsey Ridge (the "Restrictions"), which were adopted by the Ramsey Ridge Service Corporation (the "RRSC") and recorded with the New Castle County Recorder of Deeds in 1992.[1] The RRSC is a maintenance corporation comprised of the owners of the lots in Ramsey Ridge. The RRSC is governed by a board of directors elected annually by the property owners of Ramsey Ridge.

As is typical of residential subdivisions, the Restrictions limit the type of structures property owners in Ramsey Ridge may add to their property. Pertinent to the issues in this case, Section IV(5) of the Restrictions provides:

> TRAILERS, STRUCTURES, ETC.: There shall not be permitted, erected, nor maintained upon LAND, any trailer, manufactured transportable housing unit or mobile home, tent, shack, shed, storage building, barn, stable, cattleyard, hog pen, fowlyard, above ground pool, or other building of any nature or description except a residence, garage and/or ancillary

[1] Resp'ts' Opening Br. in Supp. of Mot. for Summ. J. ("ROB") Ex. 2.

> structure constructed and maintained in accordance with this DECLARATION.[2]

The Restrictions further clarify that the construction of any building, not otherwise prohibited by the Restrictions, must be approved by the Architectural Review Committee (the "ARC").[3] The ARC is a three-member committee elected by the property owners and selected from the members of the RRSC board.[4] The Restrictions give the ARC the authority to grant and deny approvals and consents as required. An owner's request for ARC approval is subject to a 30 day review period. If the ARC does not respond within 30 days after receipt of an approval request, the request is deemed approved by the ARC.[5]

In February 2011, Mr. Amon purchased a shed with the intent of converting it to a playhouse for his grandchildren.[6] In April 2011, after the shed was delivered, Mr. Amon contacted the president of the RRSC to discuss his plans. Although he was advised to submit a request for ARC approval, Mr. Amon did not submit a request for approval before the structure was installed on his property. Mr. Flanagan immediately complained

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[2] *Id.* Ex. 2, at 7 (emphasis in original).
[3] *Id.* Ex. 2, at 5 ("[m]atters which must be submitted to the ARC for review and approval include any and all proposed actions which affect the appearance of any LOT and the exterior appearance of buildings or ancillary structures thereon including, but not limited to, the construction [or] erection … of a building or structure of any kind …").
[4] *Id.* Ex. 2, at 4.
[5] *Id.* Ex. 2, at 4 ("As to each matter submitted to the ARC, the ARC shall have thirty (30) days from the ARC's actual receipt thereof in which to review and act upon the same. Such ARC action may include, without limitation, a partial or total rejection or acceptance of the same or a request for additional information. Failure of the ARC to act within the said 30-day period shall be deemed and forthwith constitute an approval by the ARC.").
[6] *See* Pet'r's Opening Br. in Supp. of Mot. for Summ. J. ("POB") Ex. B; ROB Ex. 5, 44.

about the structure, and about a fence the Amons later added.[7] In response to that complaint, the RRSC board notified the Amons that they were in violation of the Restrictions.[8] Mr. and Mrs. Amon then submitted the required "ARC Change Request Form" seeking approval of the structure and proposed landscaping. The Amons' initial request was rejected by the ARC, but the Amons engaged in additional discussions with the ARC and submitted revised requests. Among the revisions to the Amons' plan were changes to the proposed landscaping and screening.

In January 2012, the Amons met with members of the ARC to discuss changes to the plan, including increasing screening and removing a rose arbor to which the committee objected.[9] The Amons' last Change Request Form was submitted to the ARC on February 20, 2012.[10] The ARC did not respond to that Change Request Form at any point.[11] Two months later, the RRSC board met and discussed, among other things, the Amons' work on their property. The minutes of the meeting reflect that the board concluded that the Amons' structure − which the minutes describe as a shed − violated the Restrictions, but the board voted not to pursue any action against the Amons.[12]

Mr. Flanagan was not satisfied with the RRSC board's decision, and promptly launched a campaign to rally the other property owners in Ramsey Ridge to take action to

[7] The Amons contend this was not a fence, but a "rose arbor." That factual dispute is not material to the issues before me.
[8] POB Ex. E (deposition of Joseph Amon) at 22; Ex. F (letter from RRSC board dated May 5, 2011).
[9] ROB Ex. 9, 10.
[10] *Id.* Ex. 11.
[11] *Id.* Ex. 43.
[12] POB Ex. G.

remedy what Mr. Flanagan viewed as a glaring violation of the Restrictions. To that end, Mr. Flanagan (1) published and distributed to each property owner a "Ramsey Ridge Community Bulletin" (the "Bulletin") detailing Mr. Flanagan's views about the "shed" on the Amons' property, (2) developed a website called stopsheds.com containing largely the same material as the Bulletin (the "Website"), and (3) placed "Save Ramsey Ridge" signs around the neighborhood, which directed people to visit the Website.[13] The substance of Mr. Flanagan's message was that: (1) Mr. Amon[14] placed a "large storage shed" on his property, along with a fence, both of which are visible from the street and from neighbors' yards, (2) Mr. Amon did not seek permission from the ARC before making these additions to his property, (3) the ARC asked Mr. Amon to remove the fence and shed, which Mr. Amon refused to do, and yet (4) the RRSC board had resolved not to enforce the Restrictions against Mr. Amon.[15] Mr. Flanagan argued that Ramsey Ridge "must have consistent enforcement of the [Restrictions] for them to be enforceable," and that, if the neighborhood did not take action, "ALL the deed restrictions are worthless."[16] Mr. Flanagan urged his neighbors to attend the Ramsey Ridge annual meeting in May 2012 − or give their proxy to a like-minded neighbor − and vote to either enforce the Restrictions against the Amons or elect a new board.[17] Although it is unclear what was

[13] ROB Ex. 14, 26, 35.
[14] Mr. Flanagan refers only to Mr. Amon in the bulletin and on the Website. *See* ROB Ex. 14, 26.
[15] *Id.*
[16] *Id.* Ex. 26.
[17] *Id.* Ex. 14, 26 (emphasis in original).

accomplished at the May 2012 annual meeting, it does not appear from the record that any decision was made to pursue an enforcement action against the Amons.

In June 2012, a special RRSC board meeting was held to discuss the issue of the Amons' structure and what action, if any, to take.[18] In a July 2012 e-mail exchange among members of the RRSC board, the chair of the ARC acknowledged that the ARC had failed to respond to the Amons' February 2012 request and that the request therefore had been approved by default.[19] It appears another meeting was held in August 2012. After that meeting, the RRSC board sent a letter to Mr. and Mrs. Amon stating that the board had made a decision not to pursue "legal enforcement" regarding the structure on the Amons' property.[20] In this letter, the board described the structure as an "ancillary structure," rather than a shed.

Mr. Flanagan then filed this action seeking a declaration that the Amons' structure violates the Restrictions and must be removed from their property.[21] The Amons answered the complaint and Mr. Amon also filed a counterclaim against Mr. Flanagan for defamation, alleging that Mr. Flanagan's statements in the Bulletin and the Website were false and damaged Mr. Amon's reputation. The parties engaged in discovery, after which each side filed a motion for summary judgment. Mr. Flanagan argues he is entitled to summary judgment on his claims because the Amons erected a shed on their property and

[18] *Id.* Ex. 36.
[19] *Id.* Ex. 41.
[20] *Id.* Ex. 42.
[21] Section IV(17) of the Restrictions allows either the RRSC or any Ramsey Ridge owners to bring an action to enforce the Restrictions. *Id.* Ex. 2 at 11.

sheds explicitly are prohibited by the Restrictions. Mr. and Mrs. Amon contend the structure in question is a playhouse, not a shed, and the ARC approved the structure by default by not responding within 30 days to the February 2012 request for approval. In support of that contention, the Amons point out that in May 2013, they submitted a request seeking ARC approval for additional landscaping that would provide more screening around the structure. The ARC approved the landscaping and noted in the approval that the "ancillary structure" was approved "by default on a previous ARC request."[22]

Because it bears on my decision in this case, it is important to understand the record, as well as each party's position, regarding the structure that was placed on the Amons' property and how the structure is used. Mr. Flanagan made various statements that he witnessed the Amons storing yard and gardening equipment in and around the structure, but he equivocated during discovery regarding his certainty about what he saw.[23] The Amons, however, argue that the structure is used as a playhouse and submitted pictures of the structure, which includes a slide, swings, and an indoor play area, along with affidavits from a number of neighbors who aver they personally have observed the structure and seen it being used as a playhouse. Mr. Flanagan concedes that he has never sought to examine the structure and in the face of the evidence offered by the Amons, Mr. Flanagan conceded at oral argument that the structure is used as a playhouse. He contends, however, that how the structure is used makes no difference,

[22] ROB Ex. 43.
[23] *Id.* Ex. 12 (Flanagan dep.) at 6-7.

because it was marketed as a shed and the RRSC board identified it as a shed. Therefore, there is no dispute in the record regarding how the structure is used; the only dispute is whether that use makes a difference in light of the language of the Restrictions.

ANALYSIS

The parties each filed a motion for summary judgment. Mr. Flanagan seeks judgment in his favor regarding whether the structure violates the Restrictions, and also contends the Court should enter judgment for him on Mr. Amon's counterclaim for defamation. For their part, Mr. and Mrs. Amon also seek judgment in their favor on Mr. Flanagan's claims regarding the structure, but argue disputed factual issues preclude judgment on the defamation counterclaim.

Summary judgment should be awarded if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[24] When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.[25] A party seeking summary judgment bears the initial burden of showing no genuine issue of material fact exists.[26] If the movant makes such a showing, the burden then shifts to the non-moving party to submit sufficient evidence to show that

[24] *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).
[25] *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).
[26] *Johnson v. Shapiro*, 2002 WL 31438477, at *3 (Del. Ch. Oct. 18, 2002).

a genuine factual issue, material to the outcome of the case, precludes judgment before trial.[27]

It is not the function of a court to weigh evidence in deciding a motion for summary judgment.[28] Here, however, the parties have presented the Court with a record of undisputed facts and have asked the Court to resolve Mr. Flanagan's claims based on that record. Neither party has argued that this is a case in which the Court must assess the credibility of witnesses or resolve issues in the "more highly textured factual setting of a trial."[29] I therefore deem the parties' motions to be a stipulation for decision on the merits of Mr. Flanagan's claims based on the record submitted to the Court.[30]

A. The Amons' structure is an ancillary structure that was approved by the ARC by default.

Restrictive covenants, such as the one at issue in this case, are enforceable under Delaware law, provided the parties' intent is clear and the restrictions are reasonable.[31] Neither party contends the Restrictions are unenforceable or ambiguous, or that the Court should consider extrinsic evidence in interpreting the Restrictions. Deed restrictions are contractual agreements and, as such, ordinary principles of contract law govern the

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[27] *Conway v. Astoria Fin. Corp.*, 837 A.2d 30, 36 (Del. Ch. 2003) (citing *Scureman v. Judge*, 626 A.2d 5, 10 (Del. Ch. 1992), *aff'd*, 628 A.2d 85 (Del. 1993)); *Judah*, 378 A.2d at 632.
[28] *Cont'l Oil Co. v. Pauley Petroleum, Inc.*, 251 A.2d 824, 826 (Del. 1969).
[29] *Schick, Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987).
[30] *See* Ct. Ch. R. 56(h).
[31] *Point Farm Homeowner's Ass'n, Inc. v. Evans*, 1993 WL 257404, at *2-3 (Del. Ch. Jun. 28, 1993); *Chambers v. Centerville Tract No. 2 Maint. Corp.*, 1984 WL 19485, at *2 (Del. Ch. May 31, 1984).

interpretation of the Restrictions.[32] When a contract is clear and unambiguous, the plain meaning of its terms should be given effect.[33]

The essential issue raised by the parties' contentions is: given that the Restrictions prohibit certain structures, such as sheds, while permitting "ancillary structures" approved by the ARC, is a structure prohibited based solely on how it is marketed, or based on considering all factors, including how it is used? In my view, the Restrictions must be read as barring the enumerated structures while permitting non-prohibited structures that are approved by the ARC, and whether a structure is barred must be determined by considering all factors. An objective, reasonable third party would understand the Restrictions to bar structures that were used in prohibited ways, even if the structure was marketed in a non-prohibited way.[34] In contrast, to read the Restrictions as Mr. Flanagan urges – which would prohibit structures based solely on how they are marketed and without giving weight to how they are used – would work an absurd result and allow property owners to circumvent the intent of the deed restrictions.

A couple of examples illustrate the point. The restriction at issue prohibits, among other things, sheds, barns, fowlyards, and any similar building, but permits "ancillary structures," provided they are constructed in accordance with the restrictions, which

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[32] *Goss v. Coffee Run Condominium Council*, 2003 WL 21085388, at *7 (Del. Ch. Apr. 30, 2003); *see also Chambers*, 1984 WL 19845, at *2.

[33] *Osborn v. Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010); *Emerging Europe Growth Fund, L.P. v. Figlus*, 2013 WL 1250836, at *4 (Del. Ch. Mar. 28, 2013).

[34] As with any contract, deed restrictions are construed as would be understood by an objective, reasonable third party. *Osborn*, 991 A.2d at 1159; *Emerging Europe Growth Fund*, 2013 WL 1250836, at *4.

elsewhere require approval by the ARC. If the Court adopted Mr. Flanagan's interpretation of the Restrictions, which considers only how a structure is marketed and not how it is used, a property owner who wished to erect a shed could purchase, for example, a playhouse, have the playhouse approved by the ARC as an "ancillary structure," but use it as a shed. Similarly, an enterprising property owner could seek ARC approval for a generic structure, use lumber to build the structure, and later use it as a barn, or any other prohibited structure, since lumber is not marketed as something prohibited by the Restrictions.

In short, it would be inconsistent with both logic and settled law regarding the interpretation of contracts to read the Restrictions as Mr. Flanagan urges. This is not to say that the ARC or a reviewing court could not consider how a structure was marketed, but simply that marketing should not be given exclusive weight, both so that the Restrictions are not over-inclusive, but also so that they are not under-inclusive.

Applying that interpretation of the Restrictions to the undisputed factual record, I conclude that the structure is a playhouse. Mr. Flanagan's evidence to the contrary consists of (1) how the shed was marketed, and (2) the fact that the RRSC and ARC at times referred to the structure as a shed. Regarding the characterization of the structure by the RRSC and the ARC, those bodies have been inconsistent in their description of the structure, at times referring to it as an ancillary structure, and at times referring to it as a shed. Because of those inconsistencies, I do not give any weight to either characterization. The Court is therefore left to weigh the evidence of how the shed was

marketed against how it was converted and is used. It is undisputed in the record that the structure was altered by the Amons to turn it into a playhouse and has been used since that time as a playhouse. Numerous affidavits confirm that fact, along with pictures and receipts submitted by the Amons.[35] Although his averments at the beginning of this case indicated he was disputing how the structure was used, Mr. Flanagan retreated from that position during his deposition and at oral argument counsel conceded that Mr. Flanagan was not disputing that the structure is used as a playhouse. Mr. Flanagan also did not take the opportunity during discovery to inspect the structure, effectively conceding that he does not dispute how it is used. Because how the structure was marketed cannot be given exclusive weight over how it appears and is used, and because Mr. Flanagan offers no disputed facts that would require the Court to hear evidence at trial, I conclude the structure is a playhouse and therefore is an "ancillary structure" that could be approved by the ARC.

Given that conclusion, the ARC was free to approve the Amons' "ancillary structure" in its discretion. The ARC approved the structure by default when the committee failed to respond to the February 2012 approval request within 30 days. Any factual question regarding that default was removed by the ARC's later acknowledgement of the approval.[36] Because the playhouse is not prohibited by the Restrictions and was approved by the ARC, Mr. Flanagan's claims for declaratory

[35] *See* ROB Ex. 18, 20, 25, 27- 31, 44.
[36] *Id.* Ex. 43.

judgment and a permanent injunction fail, and judgment should be entered in favor of Mr. and Mrs. Amon.[37]

B. Disputed factual issues preclude summary judgment on the defamation counterclaim.

Mr. Flanagan also moved for summary judgment on the defamation counterclaim asserted by Mr. Amon. In the counterclaim, Mr. Amon contends that the statements Mr. Flanagan made in the Bulletin and on the Website constitute written defamation, particularly the statements that the structure was a shed that violated the Restrictions, that Mr. Amon did not seek ARC approval before putting the structure on the property, and that Mr. Amon refused to remove the structure after the RRSC board asked him to do so. The Amons have not moved for summary judgment on that claim. Mr. Flanagan argues that the counterclaim is baseless because (1) the allegedly defamatory statements were true, (2) irrespective of the truth of the statements, Mr. Amon cannot establish harm to his reputation, and (3) the statements are protected by absolute privilege.[38] In my view, factual disputes in the record preclude summary judgment.

First, although Mr. Flanagan is correct that a claim for defamation may be defeated upon a showing that the statements at issue were true,[39] there are factual disputes regarding the truth of Mr. Flanagan's statements. To begin, I have concluded the structure is an "ancillary structure," rather than a shed. In addition, although Mr.

[37] Having reached this conclusion, I do not address the Amons' defense of unclean hands.
[38] Mr. Flanagan initially argued that Mr. Amon was required by law to prove special damages, but withdrew that argument during the hearing on the pending motions.
[39] *Holmes v. The News Journal Co.*, 2015 WL 1893150, at *2 (Apr. 20, 2015).

Flanagan stands by his statement that the RRSC board asked Mr. Amon to remove the structure, the record evidence he cites does not support the truth of that statement.[40] Mr. Amon does concede he placed the structure on his property before seeking ARC approval,[41] but the truth of the other statements remains in question.

Second, although it will be Mr. Amon's burden at trial to prove that the statements harmed his reputation, that factual question cannot be resolved on the present record. A defamatory statement is one "which tends to injure the reputation in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him."[42] I am skeptical that Mr. Amon can prove that Mr. Flanagan's statements met this standard, but – drawing all inferences in favor of Mr. Amon – I cannot conclude as a matter of law that Mr. Amon will be unable to meet that burden. Similarly, Mr. Amon will need to establish at trial the damages that he suffered as a result of the defamation. Counsel was unable to articulate during argument what those damages might be, other than a passing reference to punitive damages, which this Court cannot award absent express statutory authority.[43] I do not understand how pursuing this claim makes economic sense for Mr. Amon, but that cost-benefit disconnect is not a basis for entering judgment for Mr. Flanagan.

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[40] *See* POB at 16, 17.
[41] POB Ex. E at 22; Ex. F.
[42] *Images Hair Solutions Medical Center v. Fox News Network, LLC*, 2013 WL 6917138, at * 3 (Del. Super. Dec. 20, 2013) (quoting *Spence v. Funk*, 396 A.2d 967, 969 (Del. 1978)).
[43] *Adams v. Calvarese Farms Maintenance Corp., Inc.*, 2010 WL 3944961, at *21, n.204 (Del. Ch. Sept. 17, 2010).

Finally, Mr. Flanagan contends that his remarks are protected by absolute privilege. The "absolute litigation privilege" shields from claims of defamation the "statements of judges, parties, witnesses and attorneys offered in the course of judicial proceedings so long as the party claiming the privilege shows that the statements [were] issued as part of a judicial proceeding and were relevant to a matter at issue in the case."[44] The policy justifications underlying the privilege are to (1) encourage citizens to resolve their differences through litigation, and (2) allow courts to use their "alternative enforcement mechanisms" to address statements that might be considered defamation outside the litigation context.[45] I do not read the privilege as extending to statements a homeowner makes in the context of a dispute before a homeowners' association, at least where, as here, I cannot conclude there was an imminent threat of litigation.[46] Mr. Flanagan has not cited any case extending the privilege that far or explained how extending the privilege in that manner would further the policy goals articulated by the Delaware Supreme Court.

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[44] *Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, 22 A.3d 710, 716 (Del. 2011).
[45] *Id.*
[46] In *Paige Capital Management, LLC*, this Court assumed for the sake of its analysis that the privilege could extend to "communications made in advance of anticipated litigation" for the purpose of allowing "a party to contemplated litigation to 'preview' its claims to the other side in order to initiate frank settlement talks without having to temper the boldness of its assertions for fear of a defamation or other related tort suit." 22 A.3d at 717. This Court noted, however, that there were valid arguments for not extending the privilege so far, and that the extension of the privilege to pre-litigation statements was not a settled question in Delaware. Assuming, as did the *Paige Capital Management* court, that the privilege could extend to pre-litigation statements made for purposes of "frank settlement talks," Mr. Flanagan's statements on the Website and in the Bulletin do not fit that limited extension of the privilege. The statements at issue were not made for the purpose of settlement, nor has Mr. Flanagan argued as much.

Accordingly, I do not believe the defamation claim can be resolved on the record before me. If Mr. Amon elects to pursue this claim, it will require a trial.

CONCLUSION

For the foregoing reasons, I recommend that the Court enter judgment in favor of Mr. and Mrs. Amon on the claims in the complaint, and I recommend that the Court deny Mr. Flanagan's motion for summary judgment on the counterclaim for defamation. This is my final report and exceptions may be taken in accordance with Rule 144.

Sincerely,

/s/ *Abigail M. LeGrow*
Master in Chancery