COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Final Report: November 14, 2016
Draft Report: August 31, 2016

Daniel R. Losco, Esquire
Losco & Marconi, P.A.
1813 N. Market Street
Wilmington, DE 19899

Ms. Angela D. Kinton
330 Pierce Run
Newark, DE 19702

Re: *Village of Fox Meadow Maintenance Corporation v. Angela D. Kinton*
C.A. No. 10938-MZ
Exceptions to Draft Report on Motion for Summary Judgment
Date Submitted: October 19, 2016

Dear Ms. Kinton and Mr. Losco:

I write in this deed restriction case to address the plaintiff's motion for summary judgment. Because the defendant has complied with the deed restriction, I recommend dismissal due to the absence of any controversy between the parties. I recommend denying the plaintiff's request for fees under 10 *Del. C.* § 348(e) because it is unjustified and unreasonable. I recommend a limited award of expenses pursuant to the deed restrictions.

I. Background[1]

Defendant Angela D. Kinton ("Kinton") purchased a property in the Village of Fox Meadow development in Newark, Delaware, on May 16, 2014. That property was subject to a recorded Declaration of Restrictions, which includes the following:

> AGE RESTRICTIONS
>
> Consistent with the provisions of the [Fair Housing] Act [42 U.S.C. Section 3601 et. seq.], one or more residents of at least eighty percent (80%) of the residences situated on the Property from time to time shall be fifty-five (55) years of age or older and no person who has not attained the age of eighteen (18) years of age shall reside in any residence on e [sic] permanent basis; provided; however, that any person(s) unde [sic] the age of 918) [sic] years of age may reside temporarily in a residence as long as the term of such occupanct [sic] does not exceed (30) days within any single calendar year.[2]

Plaintiff, Village of Fox Meadow Maintenance Corporation ("Fox Meadow"), is the entity responsible for enforcing this deed restriction.

Kinton purchased the property as a family home for herself, her fiancé Daryll Gardner, and a minor child.[3] Kinton alleged that when she inquired about purchasing the property as a family under fifty-five with a minor child, the sales office representative, Patti Orr, told Kinton that as Fox Meadow was over eighty

[1] The facts are drawn from the pleadings and the evidence submitted by the parties. Ct. Ch. R. 56(c).
[2] Compl. Ex. A at Art. 2.
[3] The parties do not dispute that Kinton's minor child was and is younger than eighteen. The record does not contain the minor's birthday; Fox Meadow's April 23, 2015, Complaint alleged he was fourteen, and Kinton's July 6, 2015, Answer alleged he was fifteen.

percent occupied, and twenty percent of Fox Meadow's occupants were permitted to be younger families, Kinton was eligible to purchase the property.[4] Kinton alleged Orr told her Kinton would receive a copy of the deed restrictions, which addressed items like fences, bird baths, and external changes to the homes, when they purchased a home.[5] Kinton alleged she did not receive any deed restrictions upon purchasing the property.[6] Kinton did not specifically dispute that the restrictions were recorded.[7]

The parties engaged in mediation, after which Kinton offered the property for sale for three months, then removed it from the market.[8] On January 26, 2016, Kinton informed this Court via a sworn letter that as of that date, the minor child "no longer reside[d] at the property" and instead was living with his grandmother at a different specific address. Kinton indicated she believed the matter was therefore concluded.

The Court requested Fox Meadow respond as to whether the case was moot, which Fox Meadow did on February 9, 2016. Fox Meadow asserted that the minor child's relocation did not resolve the matter because Fox Meadow had not confirmed the child's nonresidency, because Fox Meadow required an injunction

[4] Ans. ¶ 4.
[5] Ans. ¶ 4.
[6] Ans. ¶ 7.
[7] Ans. ¶ 4.
[8] The parties disagree on the mediation's outcome. The mediator informed the Court the mediation was unsuccessful.

to prevent the child from returning, and because Fox Meadow was entitled to fees. Kinton disputed the fees and reiterated that the child was no longer living at the property in a sworn letter filed February 17, 2016.

Fox Meadow filed a motion for summary judgment on February 18, 2016, in which Fox Meadow again asserted the matter was not moot and that it was entitled to fees. Fox Meadow further asserted that Orr was employed by NVR, Inc., a homebuilder trading as Ryan Homes, which had purchased several lots in Fox Meadow to build homes to sell. Fox Meadow alleged Orr did not work for or represent Fox Meadow, and did not have the authority to waive or modify the deed restrictions.

Kinton, proceeding pro se, filed a sworn response on August 22, 2016, asserting the matter was final because Gardner had signed a thirteen-month lease for an apartment for Gardner and the minor child to live in effective March 8, 2016. Kinton submitted a letter from an apartment complex providing that Gardner held a lease as of that date.[9] Kinton also disputed the request for fees. Fox Meadow replied by letter on August 26, 2016.

II. Dismissal

The deed restriction at issue prohibits minor children from living in a Fox Meadow home. Kinton's minor child no longer lives in a Fox Meadow home.

[9] Resp. Ex. B.

This case must be dismissed due to the absence of any controversy between the parties.

"Mootness arises when controversy between the parties no longer exists such that a court can no longer grant relief in the matter."[10] "A proceeding may become moot in one of two ways: if the legal issue in dispute is no longer amenable to a judicial resolution; or, if a party has been divested of standing."[11] "[A] controversy that has become moot normally will be dismissed."[12]

The Court cannot grant Fox Meadow's requested relief – "[i]ssuing a mandatory injunction compelling the removal of the Child from the Property as a permanent resident so that she complies with the Restrictions" – because Kinton has already so removed the child.[13] Kinton has established, through her sworn submissions and documentation from Gardner's landlord, that the minor child no longer lives at the property. Fox Meadow has introduced no evidence to the contrary or any reason to discredit Kinton's submissions. Kinton has convinced me that the minor child no longer lives at the property; it is irrelevant that Fox

[10] *Mentor Graphics Corp. v. Shapiro*, 818 A.2d 959, 963 (Del. 2003).
[11] *Gen. Motors Corp. v. New Castle County*, 701 A.2d 819, 823 (Del. 1997).
[12] *Glazer v. Pasternak*, 693 A.2d 319, 320 (Del. 1997).
[13] Compl. ¶ 11(a); Mot. ¶ (a).

Meadow cannot independently verify that fact.[14] A controversy between the parties no longer exists, so the action must be dismissed.

Fox Meadow's requested relief of "an Order prohibiting Defendant from resuming the child's residency at the Property at a later date" seeks an advisory opinion that is wholly redundant of the undisputed deed restriction, and therefore does not save this case from dismissal.[15] In order for a controversy to be justiciable, it must be ripe.[16] To determine whether a controversy is ripe, a court must make a practical judgment as to whether the interest in postponing review until the question arises in a more concrete and final form is outweighed by the immediate and practical impact on the party seeking relief.[17] In general, an action is not ripe when it is contingent, meaning that it is dependent on the occurrence of some future event(s) before its factual predicate is complete.[18]

The parties do not dispute that the deed restriction prohibits Kinton's minor child from living at the property, and Kinton has complied. Fox Meadow has not shown any indication Kinton will violate the deed restriction in the future. Based on Kinton's allegation in her July 6, 2015 Answer that the minor child was fifteen

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[14] Fox Meadow's request that this Court permit them to inspect the property to confirm the minor child is no longer a resident is denied because it is similarly irrelevant and because it is offensively intrusive. (Mot. ¶ (d)).
[15] Mot. ¶ 10; Reply p.3.
[16] *K&K Screw Products, LLC v. Emerick Capital Investments, Inc.*, 2011 WL 3505354, at *9 (Del. Ch. Aug. 9, 2011).
[17] *Id.*
[18] *Id.*

at that time, he will be approximately seventeen when Gardner's lease terminates on April 30, 2017. Fox Meadow has made no showing that Kinton is likely to violate the deed restriction during the child's final months as a minor, particularly given all the steps Kinton took to comply with the deed restriction. Fox Meadow's request for a final order of judgment is based not on any present harm, but on the desire for convenient and punitive relief against Kinton should the minor child return.[19] Because a controversy between the parties is contingent upon the minor child's speculative return to the property, a Court order restating the deed restriction would be advisory. The status quo has no immediate or practical negative impact on Fox Meadow. I recommend Fox Meadow's complaint be dismissed.

III. Fees

In order to comply with the deed restriction, Kinton's family has separated and is carrying the cost of two households. But Fox Meadow still requests fees

[19] Fox Meadow's failure to prove any present harm would be fatal to its request for injunctive relief, if I were to reach the merits of its motion for summary judgment. Fox Meadow alleged only that the minor child's presence "jeopardizes the entire age-restricted regime" as permitting his residency might waive the age restriction, and that Kinton's violation harmed property values. Compl. ¶¶ 7, 9. These allegations are belied by the deed restrictions, which provide that "failure by the Maintenance Corporation or any Owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter." Compl. Ex. A at 18. Fox Meadow has submitted no evidence in support of its allegation that the minor child's residency decreased property values. Fox Meadow's request for permanent injunctive relief on summary judgment would fail for lack of proof Fox Meadow would suffer irreparable harm and that the harm to Fox Meadow without the injunction would outweigh the harm to Kinton if the injunction were granted. *See Jackson's Ridge Homeowners Ass'n v. May*, 2007 WL 4179310, at *3 (Del. Ch. Nov. 20, 2007).

and costs pursuant to 10 *Del. C.* § 348(e) and a provision in the deed restrictions. Section 348 contemplates shifting fees to the nonprevailing party "at a trial." There has been no trial to trigger shifting fees. Further, I have discretion to withhold fees where awarding them "would result in an unfair, unreasonable, or harsh outcome." That is certainly the case here.

The parties do not dispute that Kinton's violation of the deed restriction was based on Orr's inaccurate application of that restriction to Kinton's family. I conclude Kinton's violation was accidental and innocent. Fox Meadow has not alleged Kinton's family attempted to evade detection after purchasing the property, or that Kinton's minor child was in any way disruptive to the Fox Meadow community. I find Kinton's family has undertaken extraordinary measures to comply with the deed restriction, including placing the property on the market for three months, temporarily moving the minor child to his grandmother's house, and carrying the cost of two households and separating the family. Kinton has handled this litigation without the assistance of counsel, and with admirable decorum and restraint. To require her to pay fees, in addition to the emotional and financial consequences of her honest mistake, would be unfair, unreasonable, and harsh. Fox Meadow's argument that Kinton's neighbors have been harmed by the expense of this litigation is undercut by Fox Meadow's unnecessary continued

pursuit of this litigation after Kinton indicated the minor child had relocated. I recommend this Court deny Fox Meadow's request for fees under Section 348.

Fox Meadow also requests fees pursuant to Article 10, Section 4 of the deed restrictions.[20] The American Rule against fee-shifting may be modified by contract, such as a deed restriction binding a homeowner and development.[21] A fee-shifting deed restriction may operate independently from the fee-shifting provision of Section 348.[22] In this case, Kinton and Fox Meadow are bound by the following:

> The expense of enforcement by the Maintenance Corporation, including reasonable attorney's fees, shall be chargeable to the Owner of the Lot violating these covenants and restrictions and shall constitute a lien on the Lot, collectible in the same manner as assessments thereunder.[23]

Kinton has provided no basis to conclude that this deed restriction does not apply here, nor can I discern one. Its language is clear and mandatory. Therefore, even as I denied a Section 348 fee award as unfair, unreasonable, and harsh, I must recommend that a final order in this matter charge Kinton with "the expense of enforcement by the Maintenance Corporation, including reasonable attorney's fees." The "expense of enforcement" ended when Kinton relocated the minor child

[20] Fox Meadow requested fees pursuant to this provision in its complaint and motion for summary judgment. Compl. ¶ (c) ; Mot. ¶ (c).
[21] *Jackson's Ridge*, 2007 WL 4179310 at *7.
[22] *See O'Marrow v. Roles*, 2016 WL 39546, at *2 (Del. Ch. June 27, 2016).
[23] Compl. Ex. A at Art. 10, § 4.

to comply with the deed restriction as of January 26, 2016. After the minor child was relocated, Kinton was no longer an Owner "violating" – in the present tense – the deed restriction. Therefore, only those expenses incurred before the minor child's relocation may be charged to Kinton. The plain language of the recorded deed restriction requires me to recommend this Court award Fox Meadow's expenses, including reasonable attorney's fees, that predate the relocation of Kinton's minor child. I did so in a draft report dated August 31, 2016.

IV. Exceptions

On September 12, 2016, Ms. Kinton filed what I deemed to be her opening brief on exception to my draft report under Chancery Rule 144. Fox Meadow filed an answering brief on October 7, 2016, and Ms. Kinton filed a reply on October 19, 2016.

Ms. Kinton asserts the fee award should be limited to fees incurred before June 12, 2015, when she offered to sell her home to resolve the deed violation. [24] Her closing attorney communicated this offer through a letter of that date to Fox Meadow's attorney.[25] Ms. Kinton's offer was conditioned upon resolution of an ongoing dispute with her neighbor and Fox Meadow regarding the fact that the sprinkler system for Ms. Kinton's home, installed before she purchased it,

[24] *See* Exceptions Op. Br. Ex. E.
[25] *Id.*

encroached on her neighbor's property.[26] Ms. Kinton referenced the June 15 letter in her answering brief on summary judgment as evidence of her "attempts at compromise."[27]

Fox Meadow replied to Ms. Kinton's closing attorney on June 17, 2015, requesting additional terms associated with listing the property for sale including a listing agreement, obtaining Fox Meadow's consent to that agreement, and attorneys' fees to date.[28] Fox Meadow also stated in that letter that the sprinkler system was capped at Ms. Kinton's property line on May 18, 2015.[29] Ms. Kinton did not respond to the June 17 letter, and litigation proceeded to mediation on August 18, 2015. In opposing Ms. Kinton's exception, Fox Meadow argues that her June 15 proposal was not a comprehensive settlement and did not resolve the ongoing restriction violation, as the minor child continued to reside in the home through January 26, 2016.

Ms. Kinton explained in her reply on exception that she never received Fox Meadow's June 17 letter due to her father's decline and eventual passing on

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[26] *Id.* Ms. Kinton referenced the sprinkler dispute in her summary judgment response, asserting Fox Meadow's attorney had a conflict of interest in that he also represented the parties requesting Ms. Kinton move her sprinkler system. Summary Judgment Resp. at 3. Ms. Kinton asserted Fox Meadow's attorney was simultaneously arguing that it would be difficult for her to sell her home with the existing sprinkler system encroachment, and demanding that she sell her home. This issue did not inform my recommendations in the draft or final report.
[27] Summary Judgment Resp. at 2, Ex. D.
[28] Exceptions Ans. Br. Ex. B.
[29] *Id.*

August 24, 2015.[30] Ms. Kinton further replied that she was unaware her sprinkler system had been capped in May 2015.[31] She provided additional background on the sprinkler dispute, including her previous efforts to prevent others from modifying her sprinkler system.[32] She requested this Court order the system restored and winterized.

Ms. Kinton's exception is dismissed. The deed restriction compelling the fee award is based on the expense of enforcing another deed restriction against a homeowner violating that restriction.[33] Ms. Kinton was violating the deed restriction until January 26, 2016. I agree with Ms. Kinton's initial characterization of her June 15, 2015 offer to list her home for sale: it was an attempt at compromise that did not abate the violation.[34] Whether Ms. Kinton received Fox Meadow's June 17 counteroffer does not affect my decision, as she was required to comply with the deed restriction regardless of whether and how Fox Meadow responded to her offer of compromise.

Ms. Kinton requested an order compelling restoration and winterization of her sprinkler system for the first time in reply to her exception to my draft report. This tangential request comes too late in this action, and is deemed waived without

[30] Exceptions Reply at 2, Ex. A. Ms. Kinton's response on summary judgment indicated she believed Fox Meadow never responded to her June 15 letter. Summary Judgment Resp. at 2.
[31] Exceptions Reply at 6.
[32] Exceptions Reply at 4-5, Ex. C.
[33] Compl. Ex. A at Art. 10, § 4.
[34] Summary Judgment Resp. at 2.

prejudice to Ms. Kinton's ability to pursue that relief in a separate action should she wish.[35]

V. Conclusion

For the foregoing reasons, I recommend dismissal of Fox Meadow's complaint, as there is no longer a justiciable controversy between the parties. I also recommend denial of Fox Meadow's request for fees under 10 *Del. C.* § 348(e). Over Ms. Kinton's exception, I recommend Fox Meadow's expenses, including reasonable attorney's fees, incurred before the minor child's January 2016 relocation be charged to Ms. Kinton. This is a final report under Chancery Rule 144.

Sincerely,

/s/ Morgan T. Zurn
Master in Chancery

[35] *See Walsh v. William T. Spooner Post 17*, 2013 WL 5568192, at *1 (Del. Ch. Oct. 9, 2013).