NOT DESIGNATED FOR PUBLICATION

LAKE TERRACE PROPERTY OWNERS' ASSOCIATION, INC.	*	**NO. 2003-CA-1535**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
CYNTHIA ANN PITMAN RODRIGUEZ	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-10534, DIVISION "C-6"
Honorable Roland L. Belsome, Judge
* * * * * *
Judge David S. Gorbaty
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(Court composed of Judge Patricia Rivet Murray, Judge Dennis R. Bagneris Sr., Judge David S. Gorbaty)

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JUDGMENT OF DECEMBER 11, 2001, VACATED IN PART; INJUNCTION OF DECEMBER 18, 2001, VACATED; AND, JUDGMENT OF APRIL 24, 2003, VACATED; REMANDED

Defendant/Appellant, Cynthia Ann Pitman Rodriguez (Rodriguez), appeals a December 11, 2001 judgment of the trial court which denied her motion for summary judgment, and which issued a permanent injunction in favor of plaintiff/appellee, Lake Terrace Property Owners' Association (the Association), ordering the removal and dismantling of Rodriguez's carport addition and enjoining her from making any additions to the existing carport in violation of the Lake Terrace Subdivision Building Restrictions (the Building Restrictions). In addition, Rodriguez appeals an April 24, 2003 judgment that granted the Association's motion for summary judgment and permanent injunction and declared moot, and thus denied, her motion for new trial of the December 11, 2001 judgment.

FACTS AND PROCEDURAL HISTORY:

The Association filed a Petition for Injunctive Relief against Rodriguez on June 26, 2001, alleging that she was in violation of Sections II

and V of the Association's duly recorded Building Restrictions as a result of additions made to the existing carport at her Frankfort Street residence in New Orleans, Louisiana. According to the petition, Rodriguez applied for a building permit through the City Of New Orleans' Department of Safety and Permits, representing that general repairs were being undertaken to replace the existing carport's flat roof that had suffered water damage. The petition alleged that rather than merely replacing the flat roof, Rodriguez constructed an addition to her carport, which extended 2.9 feet into the six-foot side yard boundary of the property, without prior permission or approval of the Orleans Parish Levee Board. In its prayer for relief, the Association requested that: (1) a mandatory injunction be issued directing Rodriguez to dismantle and remove the carport addition, (2) that a prohibitory injunction be issued enjoining Rodriguez from constructing an addition to her carport, and (3) that it be awarded attorney's fees and all costs of the proceedings.

Rodriguez responded with an answer, exceptions and a reconventional demand, asserting therein that the Association's claim had prescribed and that the Association had engaged in a pattern of willful, continuous, harassing and discriminatory tortious actions against her, amounting to an invasion of her right to privacy and to malicious prosecution and entitling her to damages.

In September 2001, Rodriguez filed a motion for summary judgment asserting that she was entitled to judgment dismissing the Association's lawsuit against her with prejudice due to the Association's selective, and thus discriminatory, enforcement of its building restrictions. She claimed that since its inception in 1956, the Association had only filed three lawsuits, other than the present lawsuit against her, seeking to enforce its building restrictions. In particular, she alleged that a developer, Gerald Schroeder, who had violated Section V on the building restrictions in the construction of two new houses, was allowed to pay a fine rather than having to tear down the two houses. Attached as an exhibit to her motion was a list of 57 homes in Lake Terrace, which, according to Rodriguez, were in violation of the Association's building restrictions concerning side yards and/or carports without resulting lawsuits against the homeowners. Rodriguez submitted photographs of those 57 homes, allegedly depicting the aforementioned violations, along with affidavits of her husband and brother wherein they stated that they had taken the photographs. In addition, Rodriguez supplied the trial court with a May 18, 1995 letter from the President of the Lake Terrace Property Owners' Association to the residents of Lake Terrace subdivision wherein he stated that the Association now had an active Building Restrictions Committee, and that the Association intended to

enforce the restrictions in order to preserve the unique character and beauty of the neighborhood. The motion was set for contradictory hearing on November 9, 2001.

The Association filed an opposition to Rodriguez's motion for summary judgment on November 8, 2001. Therein, it alleged that Rodriguez's motion should be denied because it was totally devoid of proper evidentiary support and because it was based upon the fatally flawed premise that 57 homes in the Lake Terrace subdivision exhibited violations of the Lake Terrace Building Restrictions. In support of its opposition to Rodriguez's motion for summary judgment, the Association submitted an affidavit of Charles Ruello, a licensed Louisiana architect, a member of the Association's Board of Directors, and the chairman of the Association's Building Restriction Committee. Therein he stated that he was thoroughly familiar with Lake Terrace's building restrictions. He stated that he became aware of Rodriguez's potential violations of those restrictions through an anonymous telephone call, and that he had investigated the situation and determined that the addition to Rodriguez's carport had been done without first obtaining a permit from the Orleans Levee District and in violation of Section V of the building restrictions. Mr. Ruello then stated that he had investigated each and every one of the 57 alleged building restriction

violations claimed by Rodriguez in her motion for summary judgment, and that, in fact, the photographs depicted only 7 possible violations. He opined that Rodriguez was perhaps confused about the difference between a side yard and a rear yard, and attached drawings illustrating those concepts, as dictated by the building restrictions, on both an interior and a corner lot. He disputed Rodriguez's claim that the Association had randomly, selectively or discriminatorily enforced the building restrictions, and gave several examples of recent actions, including lawsuits, taken by the Association in response to its discovery of violations of those restrictions. In addition, Mr. Ruello attached a copy of the city permit applied for by Rodriguez's husband that represented that the project being undertaken was one of general repairs consisting of the removal/repair of the flat roof on the existing carport. He further stated that he had contacted the Orleans Levee District and had been told that Rodriguez had not sought or obtained a permit for constructing an addition to her carport.

The hearing on Rodriguez's motion took place on November 9, 2001, as scheduled, with the matter being taken under advisement. A week later, the Association filed a motion for summary judgment and request for the issuance of permanent injunctions. The matter was set for contradictory hearing on January 11, 2002.

Meanwhile, on December 11, 2001, the trial court rendered judgment denying Rodriguez's motion for summary judgment and ordering that an injunction be issued to Rodriguez ordering that her carport addition be dismantled and removed, and enjoining her from making any additions to the existing carport in violation of the Lake Terrace Subdivision Building Restrictions. In its written reasons for judgment, the trial judge noted that when Rodriguez purchased her home in 1990, the purchase was made subject to the Building Restrictions that had been recorded in the Orleans Parish Conveyance Office in 1953. The judge noted that the building permit application filed by Rodriguez's husband sought a permit for general repairs to the carport, including replacing its roof. The judge found, however, that the repairs and construction to the carport were performed in contravention of the Building Restrictions in that, first, Rodriguez was required to receive approval from the Orleans Parish Levee Board for any changes, and, second, the repairs and construction brought the carport within 2.9 feet of the sideline boundary, despite the prohibition of any construction within 6 feet of the sideline boundary. The judge further found that although Rodriguez contended that the entire plan of the Building Restrictions had been abandoned, she failed to establish that the restrictions had been so disregarded or unenforced that the original plan for the neighborhood had

been undermined. In addition, the judge found that Rodriguez failed to establish that the particular restriction [i.e., the side yard restriction] had been substantially violated. The trial court signed an injunction on December 18, 2001 enjoining Rodriguez, or anyone acting on her behalf, from making any additions to her existing carport in violation of the Lake Terrace Subdivision Building Restrictions.

Rodriguez timely filed a motion for new trial of the December 11, 2001 judgment. Shortly thereafter, the Association filed an *ex parte* motion and order to reset its previously filed motion for summary judgment and for the issuance of permanent injunctions. The motions were set for hearing on February 8, 2002.

Rodriguez filed an opposition to the Association's motion for summary judgment on February 4, 2002. She argued that the Association's motion should be denied because the Association had made a judicial admission, in its brief in opposition to her motion for summary judgment, that there were genuine issues of material fact regarding the 57 building restriction violations alleged by Rodriguez which demanded a denial of her motion. In addition, Rodriguez argued that some members of the Association's Board of Director's and/or its Building Restrictions Committee were in the practice of providing professional services to

residents of Lake Terrace in conjunction with the building or renovating of their homes, and that none of those residents-turned-clients have been sued even when violations of the building restrictions resulted. Moreover, Rodriguez claimed that her attempts at deposing Mr. Ruello and other current and former members of the Association's Board of Director's had been thwarted.

Rodriguez filed a memorandum in support of her motion for new trial on February 5, 2001, asking the trial court to reconsider its finding that the Association had not discriminatorily and selectively enforced its building restrictions against her.

Although the hearing on the parties' competing motions took place, as scheduled, on February 8, 2002, with the trial judge issuing his rulings from the bench, no written judgment was rendered until April 24, 2003. In that judgment, the Association's motion for summary judgment and issuance of permanent injunction was granted and Rodriguez's motion for new trial was denied as moot.

Rodriguez filed a motion for devolutive appeal on June 19, 2003. She simultaneously filed a second, separate motion for appeal seeking to have her appeal set with preference due to the fact that the repair/renovation to her carport remained only partially complete, exposing her home to the elements

since May 2001. The trial judge signed both motions for appeal on June 20, 2003.

ASSIGNMENTS OF ERROR:

Rodriguez assigns three errors in this appeal. First, she asserts that the trial court committed legal error in issuing a permanent injunction against her when the only matter before the court was her motion for summary judgment. Further, she claims that the trial court erred in issuing a permanent injunction without a trial or evidentiary hearing on the merits of the issuance of the injunction. Second, Rodriguez claims that the trial court erred in finding that she failed to offer sufficient evidence that the Association had selectively, and thus on a discriminatory basis, enforced section V of its building restrictions. Finally, Rodriguez submits that the trial court erred in finding that the building restrictions had not been waived, either in whole or in part.

The Association counters that the trial court did not err in issuing a permanent injunction. It points out that it was Rodriguez who filed a motion for summary judgment seeking to have the matter adjudicated by a summary proceeding rather than by a full evidentiary hearing. Nevertheless, the Association asserts that both parties were given ample opportunity to submit evidence, and in fact, both parties did submit evidence at several hearings

before the trial court issued a permanent injunction. Moreover, the Association submits that the trial court properly held that Rodriguez failed to meet her burden of proving that the building restrictions had been waived, in whole or in part, or that it had selectively, and thus discriminatorily, enforced section V of its building restrictions.

DISCUSSION:

"Building restrictions are charges imposed by the owner of an immovable in pursuance of a general plan governing building standards, specified uses, and improvements." La. Civ. Code art. 775.

"Building restrictions may be enforced by mandatory and prohibitory injunctions without regard to the limitations of Article 3601 of the Code of Civil Procedure." La. Civ. Code art. 779. Nevertheless, there is a technical distinction between a hearing on the preliminary injunction and a hearing on the merits of a permanent injunction. There are different delays and pleadings, and different types of evidence are admissible (affidavits in the preliminary injunction). Technically, there is a different burden of proof, the preliminary injunction just requiring a prima facie showing, the permanent injunction by the preponderance of the evidence. *Louisiana State Bd. of Medical Examiners v. Banker*, 100 So.2d 920, 922 (La.App. 1 Cir. 1958) (citations omitted).

"Building restrictions terminate by abandonment of the whole plan or by a general abandonment of a particular restriction. When the entire plan is abandoned the affected area is freed of all restrictions; when a particular restriction is abandoned, the affected area is freed of that restriction only." La. Civ. Code art. 782.

In determining whether certain building restrictions have been waived, there are three aspects for the court to consider: (1) the number of violations, (2) their character, and (3) the adverse reaction of property owners to the violations. The proponent of the waiver(s) must establish, by a preponderance of the evidence, the existence of all three considerations in their favor. *Mouille v. Henry*, 321 So.2d 377 (La.App. 3 Cir. 1975) (citing *Fisher v. Smith*, 190 So.2d 105 (La.App. 4 Cir. 1966).

"Doubt as to the existence, validity, or extent of building restrictions is resolved in favor of the unrestricted use of the immovable." La. Civ. Code art 783.

Whether a general waiver or relinquishment of building restriction has occurred by common consent or by universal acquiescence, due to multiple violations without protest or objection, depends on the facts of each case. *Edwards v. Wiseman*, 3 So.2d 661 (La. 1941). (See, for example, *Lakeshore Property Owners Ass'n, Inc. v. Delatte*, 579 So.2d 1039 (La.App. 4 Cir.

1991), where this Court held that although the property owner's association had stipulated to six violations of a certain building restriction, the homeowner failed to show timely knowledge of and lack of protest to the violations by the association such as to meet his burden of proof regarding abandonment of the restriction; further, even if the homeowner had proven voluntary acquiescence by the association to the violations, 7 violations of a single restriction in relation to 267 lots would not establish a general waiver of that restriction.) (Compare *Ritter v. Fabacher*, 517 So.2d 914 (La.App. 3 Cir. 1987), where the subdivision property owners were found to have abandoned general restrictions on temporary structures, including restriction prohibiting use of trailers as residences, through their acquiescence to violations of general restriction by over 25% of homes in subdivision.)

Appellate courts review summary judgments *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, 99-2257 (La. 2/29/00), 755 So.2d 226, 230.

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions. The procedure is favored and shall be construed to accomplish these ends. La. Code Civ. Proc. art. 966 A(2). After adequate discovery or after a case has been set for trial,

summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. Code Civ. Proc. arts. 966 B and C.

According to La. Code Civ. Proc. art 966 C(2):

> The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

Even though summary judgment procedure is now favored, it is not a substitute for trial and is often inappropriate for judicial determination of subjective facts such as motive, intent, good faith or knowledge. *Oaks v. Dupuy*, 32,070, p.2 (La.App. 2 Cir. 8/18/99), 740 So.2d 263, 265 (citations omitted); *Smith v. Our Lady of the Lake Hosp., Inc.* 93-2512, p.28 (La.1994), 639 So.2d 730, 751 (citations omitted).

Initially, we note that Rodriguez does not dispute, on appeal, that she violated Sections II or V of the building restrictions in the renovation of her

carport. Accordingly, we assume for purposes of this appeal that those violations did occur, as alleged by the Association in its petition.

In her first assignment of error, Rodriguez asserts that the trial court committed legal error in issuing a permanent injunction against her when the only matter before the court was her motion for summary judgment. She claims that the trial court additionally erred in issuing either of the permanent injunctions against her in the absence of a full evidentiary hearing or trial on the merits regarding the issuance of the injunction.

The Association counters that it was Rodriguez who chose to have the matter adjudicated by a summary proceeding rather than by a full evidentiary hearing and that both parties were given ample opportunity to submit evidence to the trial court before each of its two rulings.

We find that the trial court erred in issuing a permanent injunction to Rodriguez following the November 9, 2001, hearing at which the only matter technically before the court was her motion for summary judgment. If the Association had sought any affirmative relief on its behalf, it could have sought to have the hearing on Rodriguez's motion for summary judgment continued to a later date so that the trial court could have ruled on its motion for summary judgment and for issuance of the permanent injunction at the same time. It did not do so. Accordingly, the portion of the

December 11, 2001 judgment rendering judgment in favor of the Association and issuing an injunction to Rodriguez is vacated, as is the separate injunction signed by the trial court on December 18, 2001.

The more difficult issue to be decided, however, is whether the trial court properly granted the Association's motion for summary judgment and issuance of the permanent injunction following the February 8, 2002 hearing on that motion, as well as on Rodriguez's new trial motion.

It was Rodriguez who chose to have this matter tried by summary judgment. Nevertheless, we must conclude that the trial court erred in rendering judgment on the merits in a summary fashion, and without a full evidentiary hearing or trial on the merits, once the critical issues involved in the resolution of this matter became known: (1) whether the Association was aware of any other possible violations of the building restrictions and had chosen, for whatever reason, to ignore those violations, thus resulting in waiver of those restrictions; and (2) whether the Association gave favorable treatment to those homeowners who had professional consultations with its members prior to building or renovating their homes, regardless of whether violations ultimately resulted, as opposed to their filing this suit against Rodriguez for similar violations. The resolution of those issues turns on the knowledge, intent, and motives of the Association in its treatment of

defendant and of other residents in Lake Terrace. Interestingly enough, the trial court made the following comment, on the record, during the February 8, 2002, hearing: " [I] [j]ust hope that the Lake Terrace homeowners' association acts with parity towards all homeowners in that community, because that's my real concern, is that someone gets singled out because they may be on the wrong side of the administration out there."

While we do not dispute the trial court's finding, that on the evidence presented, Rodriguez failed to meet her burden of proof regarding her assertion that the building restrictions had been abandoned, or substantially violated and unenforced, we must conclude that the trial court erred in attempting to resolve those issues by summary judgment. Rodriguez should have been given the opportunity to conduct discovery relative to those issues of subjective facts and to present any evidence thereof at a full evidentiary hearing or trial on the merits. *Oaks, supra* at 32,070, p.2, 740 So.2d at 265; *Smith, supra* at 93-2512, p.28, 639 So.2d at 751.

Accordingly, we reverse the April 24, 2003 judgment of the trial court and remand this matter for a full evidentiary hearing or trial on the merits, following the passage of a reasonable amount of time in which the parties are allowed to undertake discovery.

Based on our above ruling, we need not address Rodriguez's two

remaining assignments of error.

CONCLUSION:

For the foregoing reasons, the portion of the December 11, 2001 judgment rendering judgment in favor of the Association and issuing an injunction to Rodriguez is vacated, as is the separate injunction signed by the trial court on December 18, 2001. In addition, the entire April 24, 2003 judgment is vacated, and this matter is remanded to the trial court for a full evidentiary hearing or trial on the merits, following the passage of a reasonable amount of time for the taking of discovery.

JUDGMENT OF DECEMBER 11, 2001, VACATED IN PART; INJUNCTION OF DECEMBER 18, 2001, VACATED; AND, JUDGMENT OF APRIL 24, 2003, VACATED; REMANDED