VENETIAN ISLES CIVIC ASSOCIATION AND KENNETH COWIE	*	**NO. 2006-CA-1644**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
DORIS BURCH, WIFE OF AND WOODY BURCH	*	**STATE OF LOUISIANA**

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2006-7802, DIVISION "F"
Honorable Louis A. DiRosa, Judge Pro Tempore
* * * * * *
CHARLES R. JONES
JUDGE
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, and Judge Max N. Tobias Jr.)

MURRAY, J, CONCURS WITH REASONS

Glenn C. McGovern
THE LAW OFFICES OF GLENN C. McGOVERN
826 Focis Street, Suite 102
P. O. Box 516
Metairie, LA 700040516

COUNSEL FOR PLAINTIFF/APPELLANT

Gerald J. Calogero
CALOGERO LAW FIRM, P.L.L.C.
825 Baronne Street
New Orleans, LA 70113

COUNSEL FOR DEFENDANT/APPELLEE

REVERSED IN PART;
REMANDED

The Appellants, Venetian Isles Civic and Improvement Association (*hereinafter*, "VICIA") and Kenneth Cowie, appeal an adverse judgment of the district court, denying their preliminary injunction and dismissing their permanent injunction, with prejudice. We reverse in part and remand in part.

This lawsuit arises out of the construction of a dock by the Appellees, Doris and Woods "Woody" Burch (*hereinafter*, "the Burches"), which exceeded eight (8) feet past the bulkhead of adjoining property owned by the Appellant, Kenneth Cowie.

The VICIA Subdivision was built in 1965 to 1970's by New Orleans East Inc., a development company. "Section 1" of the subdivision consists of a series of 191 lots. These lots are mostly on man-made canals, per the actual title restrictions. The subdivision also has specified rules on maintenance, docking, and the use of the canals so that they can be freely navigated by all residents. Most of these lots are located on canals and have concrete bulkheads.

About 40 years ago, a neighborhood restriction prohibited the building of docks which extended more than eight (8) feet from the bulkhead and mooring of more than twelve (12) feet from the dock. The purpose of this restriction was to prevent a dock and vessel, combined, from extending more than twenty (20) feet from the bulkhead into the adjoining canal. A number of the lots in the subdivision allow boathouses and other structures to extend over the canals per the VICIA building restrictions, but most lot owners are not allowed to construct structures extending into the canals beyond eight (8) feet of the center bulkhead.

The Burches own one of the 191 lots in the Venetian Isles subdivision. Mrs. Burch is a member of the VICIA Board of Directors which enforces the restriction in "Section 1" of the subdivision. The lots in Section 1 of the subdivision are located on the water and there are title restrictions in effect for those lots, including the 8 foot bulkhead rule.

The Burches submitted a request to the Venetian Isles Architectural Control Committee to construct a walkway that extended over eight (8) feet into the canal area. The construction plans were rejected by the Architectural Committee since the proposed structure exceeded the length allowed, per the building restriction. As a result, Mr. Burch cancelled his plans for construction.

However, following Hurricane Katrina, Mr. Cowie alleges that the Burches illegally placed pilings attached to a walkway, extending 20-23 feet past the concrete bulkhead. He asserts that this was in clear violation of the building restriction.

The Burches assert that the primary dock on their property measures eight (8) feet from the bulkhead. Since their property is located near a dead end, and does not experience a great deal of boat traffic, they insist that following Hurricane Katrina, they merely built two small "finger-like" constructions at the bow and stern of their boat. They contend that these added portions of the dock measure approximately twenty (20) feet from the bulkhead. They also maintain that the addition of this section does not impede the flow of boat traffic in the canal.

Although the Burches acknowledge that they are aware of the building restriction, which prohibits the construction of docks more than twenty (20) feet from the bulkhead, they assert that the combined length of their dock does not violate the building restriction.

Mr. Cowie filed a petition for injunction and a separate temporary restraining order in the Civil District Court for the Parish of Orleans on August 21, 2006. The lawsuit sought to have the Burches remove the dock they constructed. In particular, Mr. Cowie asserted that the 40-year old

building restriction prohibited the construction of any docks exceeding eight (8) feet from the bulkhead, and twelve (12) feet from the dock.

On the same date, the district court issued the temporary restraining order and set a preliminary injunction hearing to be heard using live testimony for August 28, 2006. However, after the matter was assigned to an *ad hoc* judge, the parties were notified via telephone that the applications would be heard upon affidavits. The hearing scheduled for August 28, 2006, was subsequently continued by the district court.

Nevertheless, on October 20, 2006, the district court denied Mr. Cowie's petition for preliminary injunction and dismissed the petition with prejudice. Because the petition for preliminary injunction was dismissed, due to the district court's finding that the building restriction had been abandoned, the petition for a permanent injunction was never decided by the district court. This appeal followed.

Mr. Cowie sets forth three (3) assignments of error on appeal:

1. the district court manifestly erred when it did not issue a written order as per La. C.C.P. art 3609 for testimony by affidavits to be substituted instead of live testimony;

2. the district court manifestly erred when it denied the preliminary injunction based on affidavits of defendants that pointed to only six (6) alleged title restriction violations out of 191 homes in the Subdivision; and

3. the district court manifestly erred when it totally disregarded the affidavits of witnesses who lived in Section 1 of Venetian

> Isles for over twenty (20) years and served as Architectural Committee members and officers, and yet accepted the affidavits of persons who neither lived in Section 1 of the subdivision, nor had lived there for but a few years and cited violations outside of Section 1 where the Association had no duty to enforce its restrictions.

DISCUSSION

"[A]n appellate court may not set aside a trier of fact's findings in the absence of manifest error. Further, where there is a conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed on review, even though the appellate court may feel that its own evaluations and inferences are as reasonable." *Rosell v. ESCO,* 558 So.2d 1360, 1363 (La.App. 4 Cir., 1990) *citing Arceneaux v. Dominque,* 365 So.2d 1330, 1333 (La.1978); *Canter v. Koehring,* 283 So.2d 716, 724 (La.1973).

In his first assignment of error, Mr. Cowie argues that the district court erred in not issuing a written order pursuant to La. C.C.P. art. 3609 for testimony by affidavits to be substituted for live testimony.

La. C.C.P. art. 3609, titled *Proof at hearing; affidavits,* during the injunction proceedings, provides in pertinent part:

> The court may hear an application for a preliminary injunction or for the dissolution or modification of a temporary restraining order or a preliminary injunction upon the verified pleadings or supporting affidavits, or may take proof as in

> ordinary cases. If the application is to be heard upon affidavits, the court shall so order in writing, and a copy of the order shall be served upon the defendant at the time the notice of hearing is served….

Mr. Cowie argues that the district court erred in not issuing a written order pursuant to La. C.C.P. art. 3609 during the injunction proceedings. However, the matter was not addressed, nor was any objection raised at the district court in an effort to preserve such an objection on appeal. Thus, Mr. Cowie's failure to address this matter at the district court bars him from raising the matter in this Court, for the first time, on appeal. This Court stated in *Board of Directors of the Industrial Board of the City of New Orleans v. Taxpayers, Property Owners, Citizens of the City of New Orleans*, 2003-0827, p. 4, (La.App. 4 Cir. 5/29/03), 848 So.2d 733, 737, that:

> [T]his court is a court of record, which must limit its review to the evidence in the record before it. *Ventura v. Rubio*, 2000-0682, pp. 3-4 (La.App. 4 Cir. 3/16/01), 785 So.2d 880, 885. Pursuant to La. C.C.P. art. 2164, an appellate court must render a decision upon the record on appeal. The record on this appeal is that which is sent by the trial court to the appellate court and includes the pleadings, court minutes, transcript, judgments and other rulings, unless otherwise designated. La. C.C.P. arts. 2127 and 2128. An appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence. *Augustus v. St. Mary Parish School Board*, 95-2498, p. 16 (La.App. 1 Cir. 6/28/96), 676 So.2d 1144, 1156.

Hence, Mr. Cowie's first assignment of error is not properly before us on appeal and shall not be addressed by this Court.

In his second and third assignments of error, Mr. Cowie argues that the district court erred in denying the petition for preliminary injunction based on the affidavits submitted by the Burches which alleged that six (6) violations of the building restrictions had occurred in the 191 homes in the subdivision. He also asserts that the district court erred when it disregarded the affidavits of witnesses who lived in Section 1 of Venetian Isles for over twenty (20) years and served as Architectural Committee members and officers, but accepted the affidavits of persons who did not live in Section 1of the subdivision.

Mr. Cowie maintains that similar violations of the same restriction show that VICIA had enforced the subject restriction, therefore, he argues that the district court erroneously found that the building restrictions were abandoned due to non-enforcement based on the number of violations allowed, when compared to the total lots in the subdivision.

The Burches argue that Mr. Cowie and VICIA have been aware of various restriction violations over the years. They assert that during these prior violations by other residents of the subdivision, VICIA and Mr. Cowie did not seek to enforce those building restrictions. Additionally, the Burches

contend that members of VICIA's Board of Directors testified that they abandoned the building restriction at issue. Finally, the Burches also claim that they have produced documentation proving that the restriction was abandoned.

The pertinent provision, Article V, of the Venetian Isles Civic Association Title Restrictions of Section 1, reads:

> V. Any portion of any lot forming a water channel, being that area covered by water, is hereby restricted solely for the existence, construction, repair and maintenance of the said channel and boat docks as herein provided for the benefit of all owners of said lots in this subdivision and the same shall never be filled in. The first eight (8') feet of said channel area measured from the centerline of the bulkhead outward, shall be reserved for the construction of boat docks or other mooring facilities. The next twelve (12') feet channel area shall be used for mooring purposes. In order to insure the free and uninterrupted movement of boat traffic within all of the channels, the remaining area shall be set aside as a "freeway" area and no boat, dock, or other obstruction shall be placed therein and no boats or other vessels shall be moored, anchored, or docked therein."

In *Lakeshore Property Owners Ass'n, Inc. v. Delatte*, 579 So.2d 1039 (La.App. 4 Cir.1991), a property owners' association filed a petition for mandatory and injunctive relief against a landowner, Mr. Delatte, on the ground that his proposed garage violated building restrictions. The district court issued the injunction, and Mr. Delatte appealed. On appeal, this Court

reversed and remanded the matter to the district court where the injunction was issued once again. On a second appeal to this Court, we held that abandonment of the building restrictions had not been established. This Court concluded,

> Abandonment of the entire restrictive plan is ordinarily predicated on a great number of violations of all or most restrictions**.** LSA-C.C. art. 782, Comment (b). **Abandonment of a particular restriction is predicated on a sufficient number of violations of that restriction in relation to the number of lots affected by it**. *Id.; Marquess v. Bamburg,* 188 So.2d 721 (La.App. 2d Cir.1966); *Guyton v. Yancey,* 240 La. 794, 125 So.2d 365 (1960).
>
> Whether a general waiver or relinquishment of a restriction has occurred by common consent or universal acquiescence depends upon the facts of each case. *Edwards v. Wiseman, supra.* Where violations are general or have been universal without protest, so as to substantially defeat the object of the general scheme or purpose of the building restrictions, the restriction is considered waived or relinquished and cannot subsequently be enforced. *See Id.; Antis v. Miller,* 524 So.2d 71 (La.App. 3d Cir.1988); *Marquess v. Bamburg, supra; Robinson v. Donnell,* 374 So.2d 691 (La.App. 1st Cir.1979), *writ den.,* 375 So.2d 958 (La.1979); *Cook v. Hoover,* 428 So.2d 836 (La.App. 5th Cir.1983).
>
> Whether acquiescence to violations is sufficient to cause abandonment of a restriction depends upon the character, materiality, and number of the violations and their proximity to the objecting residents. *Guyton v. Yancey, supra; Gwatney v. Miller,* 371 So.2d 1355 (La.App. 3d Cir.1979);

> *Ritter v. Fabacher,* 517 So.2d 914 (La.App. 3d Cir.1987); *East Parker Properties, Inc. v. Pelican Realty Co.,* 335 So.2d 466 (La.App. 1st Cir.1976), *writ den.,* 338 So.2d 699 (La.1976). When frequent and substantial violations of a restriction pass without objection, the restriction is regarded as abandoned if the property owner against whom abandonment is asserted knew, should have known or had a duty to know of the alleged violation. *East Parker Properties, Inc. v. Pelican Realty Co., supra. See also Lakeshore Property Owners Ass'n v. Delatte, supra.* Insubstantial, technical or infrequent violations of a restriction, which are not subversive to the general plan or scheme, weigh little towards establishing an abandonment. *Id.; Guyton v. Yancey, supra; Marquess v. Bamburg, supra; Cook v. Hoover, supra; Gwatney v. Miller, supra; Antis v. Miller, supra.*

Id., 579 So.2d at 1043. (*Emphasis ours*)

Therefore, based upon our review of the record, we find that Mr. Cowie's second and third assignments of error are without merit. While we may have found differently, given the contradicting affidavits in the record, we cannot say that the district court erred in denying the petition for preliminary injunction, we cannot say that the factual determination by the district court was error nor clearly wrong.

Finally, we conclude that the district court erred in dismissing Mr. Cowie's request for a permanent injunction, with prejudice. With respect to this issue alone, this matter is remanded for further proceedings consistent with this Court's opinion.

DECREE

Accordingly, we reverse the judgment of the district court, and remand this matter as to the district court's dismissal, with prejudice, of Mr. Cowie's Petition for Injunction. In all other respects, the judgment of the district court is affirmed.

REVERSED IN PART; REMANDED