Gorman v Despart
2017 NY Slip Op 32929(U)
May 25, 2017
Supreme Court, Albany County
Docket Number: 6237-14
Judge: Christina L. Ryba
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

PAUL A. GORMAN (a/k/a ANOTHONY GORMAN) and DENISE GORMAN,

Plaintiffs,

-against-

THOMAS W. DESPART,

Defendant.

DECISION/ORDER

Index No. 6237-14
RJI No. 01-15-117334

APPEARANCES:

Gleason, Dunn, Walsh & O'Shea
For Plaintiffs
40 Beaver Street
Albany, NY 12207

The Baynes Law Firm PLLC.
For Defendant
14340 Route 9W
PO Box 160
Ravena, NY 12143

RYBA J.,

Plaintiffs and defendant are the present owners of adjoining parcels of property located in the Hamlet of Loudonville, Albany County. The parties trace the ownership of their properties back to a common grantor, the Estate of Marjorie Rockwell, which divided an approximately 43-acre parcel of land into three separate lots as reflected in a subdivision plan filed with the Albany County Clerk on April 3, 1998. By three separate deeds dated June 1, 1998, the Estate transferred each of the three parcels, designated respectively as Parcels A, B and C, to The Audubon Society of the State of New York Inc. The deed to Parcel A, which consisted of a house situated on a 10-acre lot, contained the following restrictive covenant:

> The party of the second part may remodel the house, but may not demolish it for a period of 10 years from the date of this deed. The property must be

> used to further the mission of the Audubon Society of New York State Inc., and the property can only be sold in one parcel for use as a single family dwelling. All of these restrictions shall run with the land.

The deed to the 26-acres of undeveloped land designated as Parcel B contained a different restrictive covenant, which provided as follows:

> The land shall be forever wild and shall be used as a research, education and management area for urban wildlife conservation and water resource protection. No new permanent structures greater than 100 square feet shall be constructed on the premises, excluding necessary and accessory use structures to carry out research and education projects and programs for urban wildlife management and water resources conservation efforts. The property must be used to further the mission of The Audubon Society of New York State Inc. These restrictions shall run with the land.

Finally, the deed and subsequently issued corrected deed to Parcel C, a seven-acre parcel, contained the following restrictive covenant: "The property must be used to further the mission of the Audubon Society of New York State Inc. until said property is sold by the Audubon Society of the State of New York Inc. If sold, the property can only be subdivided into two (2) lots. These restrictions shall run with the land."

The Audubon Society thereafter transferred Parcel A to plaintiffs by deed dated March 2, 2001. Subsequently, The Audubon Society issued a corrected deed which reiterated the restrictive covenant set forth in the original deed, but expressly removed the restriction that the property be "used to further the mission of the Audubon Society of the State of New York Inc."[1] In 2002, The Audubon Society transferred Parcel C to J.S. Standish Company, which is not a party to this action. The Audubon Society retained Parcel B until April 2013, when it transferred the parcel to defendant

---

[1]The corrected deed further reserved to the Audubon Society an easement of ingress and egress over Parcel A to benefit its retained land.

by deed that imposed the original "forever wild" restrictive covenant as well as the requirement that the property be used to further the mission of The Audubon Society. The deed to defendant further provided that the restrictions "shall run with the land."

Alleging that defendant has engaged in activities on his property that are prohibited by the "forever wild" restrictive covenant, including the removal of trees and other vegetation, plaintiffs commenced this action seeking to enforce the restrictive covenant. In addition to declaratory and injunctive relief relating to the restrictive covenant, plaintiffs assert causes of action sounding in nuisance, prima facie tort, trespass, and a claim to a portion of defendant's property through adverse possession. Thereafter, plaintiffs and defendant simultaneously filed separate orders to show cause seeking to preliminarily enjoin one another other from engaging in certain activities with respect to defendant's property pending resolution of the action. On June 4, 2015, the Court (Platkin, J.) executed the orders to show cause which each contained a temporary restraining order enjoining the parties from "taking any action which would alter the status quo between the parties' pending determination of their respective applications for preliminary injunctions. By decision and order dated July 29, 2015, the Court (Zwack, J.) held the parties' respective applications for preliminary injunctions in abeyance pending a hearing and directed that the temporary restraining orders preserving the status quo remain in effect. By letter orders dated October 16, 2015 and December 4, 2016, the decision and order was modified to clarify the types of activities that were prohibited under the temporary restraining orders.

Plaintiffs thereafter moved for an order holding defendant in contempt for allegedly disturbing the "status quo" in violation of the Court's orders, while defendant cross-moved for an order renewing and vacating the temporary restraining orders. By decision and order dated April

18, 2017, this Court denied the motion and the cross motion. During a subsequent appearance before the Court, the parties withdrew their respective applications for preliminary injunctions and stipulated to certain language governing the parties' conduct with respect to defendant's property during the pendency of this action. Plaintiffs now move for an order pursuant to CPLR 3212 granting partial summary judgment enforcing the restrictive covenant against defendant and dismissing defendant's affirmative defense that plaintiffs lack standing to seek such enforcement. Defendant cross-moves for partial summary judgment pursuant to CPLR 3212 dismissing plaintiffs' causes of action relating to the enforcement of the restrictive covenant and for an order pursuant to CPLR 3211 dismissing plaintiffs' adverse possession claim for failure to state a cause of action. Both the motion and the cross motion are opposed.

Plaintiffs contend that the original conveyance of Parcels A, B and C to the Audubon Society was part of the Estate's comprehensive plan to create an ecological preserve on Parcel B, now owned by defendant, and that plaintiffs are entitled to enforce the "forever wild" restrictive covenant contained in defendant's deed because plaintiffs' parcel was included within this comprehensive plan. Defendant counters that plaintiffs lack standing to enforce the restrictive covenant because the covenant was personal to the Audubon Society and, in any event, it was not part of a comprehensive plan for development or otherwise created for plaintiffs' benefit so as to create a right of enforcement.

The issue of whether plaintiffs are entitled to enforce the "forever wild" restrictive covenant requires an analysis of the nature of the covenant. It is well established that the law favors free and unencumbered use of real property, and therefore any covenant purporting to restrain landowners from making otherwise lawful uses of their property will be strictly construed against the party

seeking enforcement (see, Witter v Taggart, 78 NY2d 234, 237 [1991]; Dever v DeVito, 84 AD3d 1539, 1542 [2011], lv dismissed 18 NY3d 864 [2012], lv denied 21 NY3d 861 [2013]). It is equally well established that a neighboring landowner is not entitled to enforce a restrictive covenant contained in his neighbor's deed unless the covenant was intended for the neighboring landowner's benefit (see, Witter v Taggart, 78 NY2d at 237 [1991]; Haldeman v Teicholz, 197 AD2d 223, 226 [1994]). Whether a covenant is personal only to the grantee or runs with the land so that it may be enforced by a stranger to the deed depends upon (1) whether the grantor and grantee intended that the covenant run with the land (2) whether the covenant touches and concerns the land, and (3) whether there is privity of estate between the party seeking enforcement and the party burdened by the covenant (see, Neponsit Prop. Owners' Ass'n . Emigrant Indus. Sav. Bank, 278 NY 248, 255 [1938]; Korn v Campbell, 192 NY 490 [1908]). Finally, courts will enforce restrictive covenants only "where the party seeking enforcement establishes their application by clear and convincing evidence" (Dever v DeVito, 84 AD3d at 1542 [2011]; VanSchaick v Trustees of Union Coll., 285 AD2d 859, 860 [2001], lv denied 97 NY2d 607; Korenman v Zaydelman, 237 AD2d 711, 711 [1997]).

Here, there is no dispute that the "forever wild" restrictive covenant touches and concerns the land and that plaintiffs and defendant are in privity of estate because they share a common grantor. As to whether the covenant runs with the land, in ascertaining the parties' intent the Court must turn to the language of the deed which specifically recites that the "forever wild" restriction "shall run with the land" (see, Harrison v Westview Partners LLC, 79 AD3d 1198 [2010]; Brody v St. Onge, 167 AD2d 671, 672-673 [1990]). However, although this deed recital is evidence that the parties intended the covenant run with the land, countervailing evidence exists. The absence of

language that the covenant is binding on the parties' "heirs successors and assigns", the presence of language in the covenant expressing the intent that the property was to be used for the benefit of The Audubon Society, and the fact that The Audubon Society retained no lands that were benefitted by the covenant all point to the conclusion that the covenant was personal to the Audubon Society and did not run with the land (see, 328 Owners Corp. v 330 West 86 Oaks Corp., 8 NY3d 372 [2007]; Niagara Mohawk Power Corp. v Allied Health Care Prods., 137 AD3d 1539, 1542 [2016], lv dismissed 28 NY3d 956 [2016]; Harrison v Westview Partners LLC, 79 AD3d 1198 [2010]).

However, a finding that the restrictive covenant runs with the land would not end the Court's inquiry. Assuming without deciding that the restrictive covenant runs with the land and is otherwise enforceable, the Court must still determine whether plaintiffs are included among the class of persons entitled to seek that enforcement. As a nonparties to the deed imposing the restrictive covenant, plaintiffs' standing to enforce the covenant "is dependent upon a showing of 'the clear intent to establish the restriction for the benefit of the party suing or his grantor'" (Thomas v June, 194 AD2d 842, 845 [1993], quoting The Equitable Life Assur. Socy. of U.S. v Brennan, 148 NY 661, 672 [1896]; see, Bristol v Woodward, 251 NY 275, 284 [1929]).

In determining who can enforce a restrictive covenant that runs with the land, courts have generally recognized three classes of covenants (see, Korn v Campbell, 192 NY 490 [1908]). The first class of covenants are those uniform restrictions imposed by a common grantor as part of a common plan or scheme for the uniform improvement or development of the parcels conveyed, which are enforceable by any grantee included within the common plan. The second class of covenants are those created by the grantor for the benefit and protection of contiguous or neighboring lands retained by the grantor, which may be enforced by the grantor and his assigns without the need

to establish the existence of a common plan for improvement or development (see, Malley v Hanna, 65 NY2d 289 [1985]). The third class of covenants relates to mutual covenants between owners of adjoining lands, which produce corresponding benefits and are enforceable by each landowner (see, Haldeman v Teicholz, 197 AD2d at 224–25 [1994]). Some jurisdictions also recognize a fourth class of restrictive covenants which are enforceable by neighboring landowners who are expressly mentioned in the deed as the intended third-beneficiary of a restrictive covenant (see, Nature Conservatory v Congel, 253 AD2d 248, 251 [1999]).

Here, it is undisputed that the "forever wild" restrictive covenant does not fall into the latter three classes of covenants. Clearly, the restrictive covenant here was not created by the grantor for the benefit and protection of neighboring lands retained by the grantor, as language of the deed clearly identifies that the Estate created the restriction for the benefit of the Audubon Society, which has since sold all of its adjoining property thus eliminating any dominant estate. Nor does the restrictive covenant constitute a mutual covenant between the owners of two adjoining properties. Moreover, although the existence of the "forever wild" restriction on defendant's land may have influenced plaintiffs' decision to purchase the neighboring property, plaintiff was not expressly identified in any deed as an intended beneficiary of the restrictive covenant.

The dispute herein centers upon whether the restrictive covenant is encompassed within the first class of covenants imposed by a common grantor as part of a common plan for the development of real property. In support of their argument that they may enforce the covenant under this category, plaintiff contends that the "forever wild" restrictive covenant was created by the Estate as part of a plan to establish an ecological preserve on defendant's 26-acre parcel, as evidenced by the subdivision plan filed in the Albany County Clerk's office and a conceptual plan created by the

Audubon Society entitled "Marjorie Doyle Rockwell Ecological Preserve".

A common plan or scheme of development will be found to exist where a common grantor divides its land and imposes substantially similar restrictive covenants on all of the parcels conveyed, with the intent that the restrictions are enforceable by any grantee included in the common plan (see, Huggins v Castle Estates, 36 NY2d 427, 432 [1975]). "Such covenants are entered into by the grantees for their mutual protection and benefit, and the consideration therefor lies in the fact that the diminution in the value of a lot burdened with restrictions is partly or wholly offset by the enhancement in its value due to similar restrictions upon all the other lots in the same tract" (Korn v Campbell, 192 NY at 495 [1908]). The existence of a common plan of uniform development must be demonstrated by plaintiffs through "clear and definite proof" (Huggins v Castle Estates, 36 NY2d at 432 [1975]; Thomas v June, 194 AD2d at 846 [1993]).

Plaintiffs have failed to present clear and definite proof of the existence of a common plan for uniform development of the parcels. The mere filing of a subdivision plan does not constitute the adoption of common or general plan of development creating equitable rights and limitations on use of commercial parcel on behalf of owners of residential lots within development (see, Thomas v June, 194 AD2d at 846 [1993]). Notably, no declarations of covenants or restrictions on use are documented on the subdivision plan, nor is there any proof that a separate document setting forth the restrictive covenant was filed along with the plan (see, id. at 846). Moreover, the fact that defendant's parcel was the only lot in the subdivision subject to the "forever wild" restriction tends to refute any inference that the covenant was imposed "with the design to carry out a general scheme for the improvement or development" of the original parcel, with the intent to create property rights attaching to all parcels within the subdivision (Emerald Green Prop. Owners Ass'n, Inc. v Jada

Developers, LLC, 63 AD3d 1396, 1397–98 [2009]; Thomas v June, 194 AD2d 842 [1993]; Westmoreland Assn. v West Cutter Estates, 174 AD2d 144, 151 [1992]). Finally, the document entitled "Marjorie Doyle Rockwell Ecological Preserve" does not establish that the restrictive covenant was imposed by the Estate as part of a common plan for development of the property inasmuch as the evidence establishes that the document was neither created by the Estate nor was it in existence at the time the original parcel was subdivided. To the contrary, the proof demonstrates that "Marjorie Doyle Rockwell Ecological Preserve" is an internal document created by the Audubon Society a full six years after the restrictive covenant was imposed.

Strictly construing the restrictive covenant in favor of defendant, as the Court must do, plaintiffs have failed to establish by clear and definite proof that a general plan of development existed or that the restrictive covenant was otherwise established for their benefit. Accordingly, plaintiffs lack standing to enforce the "forever wild" restrictive covenant set forth in defendant's deed. Plaintiffs' motion for partial summary judgment enforcing the restrictive covenant is therefore denied, and defendant's cross motion for partial summary judgment dismissing the second and third causes of action for enforcement of the covenant is granted. Under these circumstances, the Court need not address defendant's alternative argument for dismissal of these causes of action.

To the extent that plaintiffs contend that he should nonetheless be permitted to enforce the "forever wild" restriction in defendant's deed under principles of equity and fairness, the Court finds this argument to be somewhat disingenuous inasmuch as plaintiffs themselves have admitted to violating the restrictive covenant. Plaintiffs readily admit to disrupting the "forever wild" characteristics of a 200-foot deep portion of defendant's property by altering the natural vegetation, creating and maintaining a lawn, and installing a subsurface drainage system on the property, all of

which form the basis for plaintiffs claim that they acquired title to this portion of defendant's property through adverse possession. Notably, defendant has moved to dismiss the adverse possession cause of action and, curiously, plaintiffs have not opposed dismissal. Therefore, plaintiffs' first cause of action seeking a declaration that they acquired title to this portion of land through adverse possession is also dismissed.

For the foregoing reasons, it is

ORDERED that plaintiffs' motion is denied, without costs, and it is further

ORDERED that defendant's cross motion is granted, without costs, and the first, second and third causes of action in the complaint are dismissed.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the defendant. The original papers are being transferred to the Albany County Clerk. **The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.**

SO ORDERED.

ENTER.

Dated: May 25, 2017

HON. CHRISTINA L. RYBA
Supreme Court Justice