Piekunka v Straubing
2018 NY Slip Op 32708(U)
October 24, 2018
Supreme Court, Wayne County
Docket Number: 77237
Judge: John B. Nesbitt

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

THOMAS E. PIEKUNKA, JOHN A. HINSMAN, JR.
and **GLENDA L. HINSMAN**

Plaintiffs

-vs-

Index No. 77237

C. ROBERT STRAUBING
and **CORINNE V. STRAUBING,**

Defendants.

APPEARANCES: Lacy Katzen LLP
(Michael J. Wegman, Esq.)
Attorneys for Plaintiffs

John L. Bulger, Esq.
Attorney for Defendants

MEMORANDUM - DECISION

John B. Nesbitt, J.

The Appellate Division remanded this case for one purpose. Having modified on appeal the order of Supreme Court (Kehoe, J.) so to determine "that the construction on defendants' property violates restrictive covenants in the deeds to the parties' properties," the Appellate Division nevertheless found "issues of fact with regard to the extent of the violation and the appropriate remedy therefor" (*Piekunka v Straubing*, 149 AD3d 1483 [4th Dept 2017]). Regarding the appropriate remedy, the Court noted that "the enforcement of the restrictive covenants implicates the equitable powers of the court," specifically citing *Meadow Run Dev. Corp. v Atlantic Ref. & Mktg. Corp.* (155 AD2d 752, 754 [3d Dept 1989]), which reads in pertinent part:

> Although restrictive covenants generally are enforceable against subsequent purchasers with notice *(see, Gordon v Incorporated Vil. of Lawrence*, 84 AD2d 558, 559 [2nd Dept 1981], *aff'd* 56 NY2d 1003 [1982]), they will not be enforced in inequitable circumstances, such as where there is a change of character of the surrounding area which obviates the purposes of the restrictions *(see, Evangelical Lutheran Church v Sahlem*, 254 NY 161, 167 [1930]), where the party seeking enforcement is guilty of laches (*see, Goodfarb v Freedman*, 76 AD2d 565, 570-573

[2nd Dept 1980]), or where enforcement would result in a detriment disproportionate to any benefit (*see, Evangelical Lutheran Church v Sahlem, supra*).

The Court twice cited the seminal opinion of Chief Judge Cardozo in *Evangelical Lutheran Church*, which explains and guides the remedial powers of the court in this area of law. It is worth quoting at length:

> By the settled doctrine of equity, restrictive covenants in respect of land will be enforced by preventive remedies while the violation is still in prospect, unless the attitude of the complaining owner in standing on his covenant is unconscionable or oppressive. Relief is not withheld because the money damage is unsubstantial or even none at all. (*Trustees of Columbia College v Lynch*, 70 NY 440, 453 [1877]; *Trustees of Columbia College v Thacher*, 87 NY 311, 316 [1882]; *Rowland v Miller*, 139 NY 93, 103 [1893]; *Forstmann v Joray Holding Co., Inc*, 244 NY 22, 31 [1926]; *Star Brewery Co. v Primas*, 163 Ill. 652 [1896]; *Lord Manners v Johnson*, LR 1 Ch Div. 673). 'If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of covenant affords sufficient ground for the Court to interfere by injunction.' (*Tipping v Eckersley*, 2K & J 264, 270, *quoted in Trustees of Columbia College v Thacher*, *supra*). 'The parties had the right to determine for themselves in what way and for what purposes their lands should be occupied irrespective of pecuniary gain or loss, or the effect on the market value of the lots.' (*Trustees of Columbia College v Lynch, supra*). Inequity there may be in standing on the letter of a covenant when the neighborhood has so altered that the ends to be attained by the restriction have been frustrated by the years. (*Trustees of Columbia College v Thacher, supra*; *McClure v Leaycraft*, 183 NY 36 [1905]; *Batchelor* v *Hinkle*, 210 NY 243 [1914]; Inequity there may be in a demand for a mandatory injunction that will tear a completed building down, when the builder has acted in good faith, the covenant is presently to expire, and the havoc wrought by demolition will be disproportionate, in a degree shocking to the conscience, to any corresponding benefit. (*Forstmann v Joray Holding Co., Inc., supra*). Few formulas are so absolute as not to bend before the blast of extraordinary circumstances. In the award of equitable remedies there is often an element of discretion, but never a discretion that is absolute or arbitrary. In equity, as at law, there are signposts for the traveler. 'Discretion ... must be regulated upon grounds that will make it judicial.' (*Haberman v Baker*, 128 NY 253, 256 [1891], *quoting White v Damon*, 7 Ves Jun. 30, 35; *Rosenberg* v *Haggerty*, 189 NY 481 [1907]; *McClure v Leaycraft, supra*; *cf* Clark, Covenants & Interests Running with Land, p. 164).

Turning to the facts of this case, we start with the declaration of the Appellate Division that "the construction on defendants' property violates restrictive covenants in the deeds to the parties' properties." It was left to this Court to determine the "extent of the violation." Accordingly, the issue

here is the extent to which the construction complained of constitutes the type of structure prohibited by the restrictive covenants. That part of the restrictive covenants applicable here states:

> No building shall be erected on any portion of said lot except between 30 and 90 feet parallel lines above mentioned except boat and bath houses which shall have an elevation not to exceed (6) feet above the established high water mark of Sodus Bay.

The parallel lines "above mentioned" are (1) a line "90 (ninety) feet southerly distant from and parallel to the southern curb of the roadway as designated on [the subdivision map]" and (2) " a line parallel to said southern curb of the roadway, and 30 (thirty) feet southerly therefrom."

The construction complained of is the erection of the so-called privacy walls on the east and west sides of defendants' deck located in the restricted building area, as well as the roof covering the deck or portions thereof, including a fireplace. How much of this construction, if any, constitutes a building? The Court finds, based upon the trial record, and its inspection of the premises with counsel, that the privacy walls adjacent the deck and the roof over the deck create a building or, perhaps more accurately, an expansion of the existing dwelling so to create an expanded building that violates the restrictive covenant. The Court is very mindful of the relevant canons of construction, having labored in this vineyard before (*see Sodus Bay Heights Golf Club v Andrews*, 2002 WL 237037 [Sup Ct, Wayne Co 2002][Nesbitt, J.]; *Agnostinelli v Fox*, 2006 WL 4682088 [Sup Ct, Wayne Co. 2006][Nesbitt, J.]). First, restrictive "covenants 'are strictly construed against those seeking to enforce them,' in light of public policy favoring 'free and unencumbered use of real property'"(*Witter v Taggart*, 78 NY2d 234, 237 [1991]).Thus, "where the language used in a restrictive covenant is equally susceptible of two interpretations, the less restrictive interpretation must be adopted" (*Ludwig v Chautauqua Shores improvement Assoc.*, 5 AD3d 1119,1120 [4th Dept 2004]). Second, in assessing the viability of suggested interpretations, courts must ascertain and give effect to the intention of the parties as gleaned from the language employed, surrounding circumstances, and the object to be achieved (*Jennings Beach Association, Inc v Kaiser*, 145 Ad2d 607 [2nd Dept 1988]). As long ago stated, "[t]he primary rule of interpretation of such [restrictive] covenants is to gather the intention of the parties from their words, by reading, not simply a single clause of the agreement, but the entire context, and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met" (*Kitching v Brown*, 180 NY 414, 426 [1905]).

It is clear from the language used and extant circumstances in this case that the intent and design of the building restriction was to preserve the residents' view of Sodus Bay. Certainly, the language of the restrictions suggest this. The southerly permitted building line is referenced as a "porch line." A common, if not dominant, purpose of a porch on waterfront property is to provide a semi-protected location for viewing the adjoining body of water and adjacent shoreline. Moreover, the restrictions expressly allow boat and bathhouses in the restricted building area as long as such structures are not more than six feet above the established high water mark. These textual clues clearly indicate the drafter's intent to preserve relatively open space outside of the permitted building area (*see generally, Schuman v Schechtler*, 215 AD2d 291, 293). Indeed, without some type of restriction, the lots could develop into a row of horizontal silos extending from the road edge to the shoreline. The only conceivable purpose of the building restrictions was to preserve for each lot something of a panoramic view of Sodus Bay. The construction undertaken by defendants has all the indicia of a building and has the same effect upon their neighbors' views of the bay.

Having concluded that the defendants' construction violates the restrictive covenant against building south of the porch line, the issue remains whether removal of the offending improvements is appropriate. The Court holds that it is. The circumstances here are analogous to those presented to Judge Strobridge in *Jones v Fowler* (Index No. 35340 [Sup Ct, Wayne Co 1993], aff'd 201 AD2d 878 [4th Dept 1994], lv to app den 83 NY2d 760 [1994]). Like here, the parties were adjoining landowners subject to the same set of restrictive covenants, with one claiming that the other violated the same by certain construction along or near the shoreline. The properties involved were part of the residential subdivision known as Shaker Heights Subdivision at Hunter's Point adjoining Sodus Bay. Having found that the construction violated the restrictive covenants, Judge Strobridge addressed the issue of remedy:

> Both counsel agree that for the plaintiffs to be able to enforce the restrictions, they must first establish that their premises and the premises owned by the defendants are part of a general scheme or plan of development, and, second, that at the time the defendants purchased the property they had notice, actual or constructive, of the common scheme or plan (*see, Korn v Campbell*, 192 NY 490 [1908]; Malley v Hanna, 101 AD2d 1019 [4th Dept 1984, *aff'd* 65 NY2d 289 [1985]; *Graham v Beermunder*, 93 AD2d 254 [2d Dept 1983]). Notwithstanding the defendants' argument against such a determination, the court finds that the plaintiffs have established by clear and convincing evidence both of these factors (*Greek Peak, Inc.*

v Grodner, 75 NY2d 981 [1990]; *Huggins v Castle Estates, Inc.*, 36 NY2d 427 [1975]).

From the evidence adduced at trial as well as the Court's inspection of the premises with counsel, the several properties east and west of the defendants' uniformly adhere to the bayside setback established in this subdivision nearly a hundred years ago, as did the defendants' until the construction giving rise to this litigation. Notwithstanding the quality and attractiveness of defendants' construction, for this Court not to enforce the restriction would perforce mean that it would not enforce the restriction for future building by other affected property owners into the area where buildings are not permitted. That, of course, would render the restriction a dead letter and defeat the original development plan to which all affected property owners have conformed to and ostensibly relied upon.

Accordingly, the Court orders that the so-called privacy walls adjoining defendants' deck and roof covering said deck be removed within a reasonable time following service of the judgment to be issued in accordance herewith.

Dated: October 24, 2018
Lyons, New York

JOHN B. NESBITT
Acting Supreme Court Justice