J-A28007-21
J-A28008-21

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

TIMOTHY M. BROUSE Appellant v. JAMES E. BROUSE, DANIEL G. BROUSE AND CHRISTOPHER J.P. BROUSE	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 842 MDA 2021

APPEAL OF DANIEL G. BROUSE AND CHRISTOPHER J.P. BROUSE

Appeal from the Order Entered June 3, 2021
In the Court of Common Pleas of Schuylkill County Civil Division at
No(s): S-150-2020

TIMOTHY M. BROUSE APPELLANT v. JAMES E. BROUSE, DANIEL G. BROUSE AND CHRISTOPHER P. BROUSE	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 663 MDA 2021

Appeal from the Order Entered April 21, 2021
In the Court of Common Pleas of Schuylkill County Civil Division at
No(s): S-150-2020

BEFORE: LAZARUS, J., NICHOLS, J., and STEVENS, P.J.E.*

MEMORANDUM BY LAZARUS, J.: **FILED: JUNE 29, 2022**

These are related appeals that we have consolidated, *sua sponte*, for purposes of disposition. At docket number 663 MDA 2021, Timothy Brouse ("Servient Landowner") appeals from the order of the Court of Common Pleas of Schuylkill County, granting the motion for judgment on the pleadings filed by Daniel G. Brouse and Christopher P. Brouse (collectively, "Dominant Landowners") in a declaratory judgment action brought by Servient Landowner. At docket number 842 MDA 2021, Dominant Landowners appeal the trial court's order denying their motion for counsel fees pursuant to 42 Pa.C.S.A. § 2503(9). Upon our careful review, we are constrained to reverse the order granting judgment on the pleadings in the declaratory judgment action and remand for further proceedings. We affirm the order denying counsel fees.

The trial court set forth the factual history as follows:

> On or about January 24, 2020, [Servient Landowner] filed a complaint in equity seeking declaratory judgment and [a] permanent injunction against [Dominant Landowners]. In the complaint, [Servient Landowner] allege[d] that his father, James E. Brouse,[1] as Grantor, conveyed the property situated at 637 Wynonah Drive, South Manheim Township, Schuylkill County, Pennsylvania (hereinafter the "637 Lot") to [Servient Landowner] as Grantee. [Servient Landowner] further alleges that he received a copy of the deed to this property (hereinafter the "2017 [] Deed") by mail in December of 2017. According to [Servient Landowner], he was not afforded an opportunity to review,

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* Former Justice specially assigned to the Superior Court.

[1] Grantor, James E. Brouse, was named in the complaint, but died on February 9, 2020, after the complaint was filed, but before service was effected.

> inspect, or otherwise verify the contents of the 2017 637 Deed prior to its execution. Additionally, [Servient Landowner] alleges that the deed contained a restrictive covenant (hereinafter the "Building Restriction") that prohibits him from building upon or otherwise disturbing the natural state of the 637 Lot unless the owners of the property situated at 638 Wynonah Drive [] (hereinafter the "638 Lot") deed over the right, power, and privilege to build on the 637 Lot to [Servient Landowner]. According to [Servient Landowner], [Dominant Landowners] are the title owners of the 638 Lot, and they own the property as joint tenants with rights of survivorship. [Servient Landowner] alleges that he is unable to use or profit from the property because of the restrictive covenant. Additionally, he argues that the property's title has been rendered unmarketable, such that he is unable to sell the property on the open market. [Servient Landowner] further alleges that the property is a part of the Lake Wynonah Subdivision, and[,] as such, it is subject to additional restrictive covenants and conditions that only allow the property to be used for residential purposes. According to [Servient Landowner], he has and will continue to incur thousands of dollars in expenses for the care and maintenance of the property.

Trial Court Opinion, 4/21/21, at 1-2 (unnecessary capitalization omitted).

Following the close of pleadings, on January 12, 2021, Dominant Landowners filed a motion for judgment on the pleadings, in which they alleged that: (1) the facts as averred in the complaint and reply to second amended new matter fail to state a case as a matter of law; (2) the restrictive covenant contained in the deed is clear, unambiguous, valid, enforceable, and consistent with public policy; (3) the Grantor's intention is clearly and unambiguously expressed in the deed itself; (4) Servient Landowner failed to assert any facts which would render the restrictive covenant unenforceable; and (5) the action is barred by the doctrine of laches. ***See*** Motion for Judgment on the Pleadings, 1/12/21. Servient Landowner filed a response on February 4, 2021, and both parties submitted memoranda of law. On April

21, 2021, the trial court issued an opinion and order, granting Dominant Landowners' motion and dismissing Servient Landowner's complaint with prejudice. Servient Landowner filed a timely notice of appeal, followed by a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal.

On May 10, 2021, Dominant Landowners filed a motion for award of attorneys' fees pursuant to 42 Pa.C.S.A. 2503(9), in which they asserted that, because the trial court found that Servient Landowner had failed to allege facts which would warrant relief, "there was no basis in fact or law for any of the counts and the conduct in commencing the action was arbitrary as that word is used in [s]ection 2503(9)." Motion for Award of Attorney Fees, 5/10/21, at ¶ 6. Servient Landowner filed a response and, on June 3, 2021, the court denied the motion, concluding that Servient Landowner "had a reasonable basis in fact" in commencing the action, and therefore the suit was not "arbitrary." Trial Court Opinion, ***supra*** at 9. Dominant Landowners filed a timely notice of appeal, followed by a court-ordered Rule 1925(b) statement.

We first address the claims raised by Servient Landowner in his appeal, which are as follows:

> 1. Whether the trial court erred in finding that the Building Restriction does not violate public policy?
>
> 2. Whether the trial court erred in finding that the Building Restriction is not an unreasonable restraint on alienation?
>
> 3. Whether the trial court erred in finding changed neighborhood conditions be a prerequisite for the discharge of a restrictive covenant?

> 4. Whether the trial court erred in determining that the [2017 Deed] was accepted by [Servient Landowner] where he did not have an opportunity to review or consent to the terms of the deed or the Building Restriction prior to its recording?

Brief of Appellant (663 MDA 2021), at 5 (unnecessary capitalization omitted).

We begin by noting our standard and scope of review in matters involving the grant or denial of judgment on the pleadings:

> [A]ppellate review of a trial court's decision to grant or deny judgment on the pleadings is limited to determining whether the trial court committed an error of law or whether there were facts presented which warrant a jury trial. In conducting this review, we look only to the pleadings and any documents properly attached thereto. Judgment on the pleadings is proper only where the pleadings evidence that there are no material facts in dispute such that a trial by jury would be unnecessary.
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> In passing on a challenge to the sustaining of a motion for judgment on the pleadings, our standard of review is limited. We must accept as true all well pleaded statements of fact of the party against whom the motion is granted and consider against him only those facts that he specifically admits. We will affirm the grant of such a motion only when the moving party's right to succeed is certain and the case is so free from doubt that the trial would clearly be a fruitless exercise.

Bowman v. Sunoco, Inc., 986 A.2d 883, 886 (Pa. Super. 2009), quoting ***John T. Gallaher Timber Transfer v. Hamilton***, 932 A.2d 963, 967 (Pa. Super. 2007).

We address Servient Landowner's first three claims together. Servient Landowner argues that the building restriction contained in the deed to 637 Wynonah violates public policy because it is an unreasonable restraint on alienation. Specifically, Servient Landowner asserts that, because the restriction bars him from building on the property, "[s]o long as the

[restriction] is enforced, [he] is forced to incur expenses, such as annual property taxes, HOA fees, and other costs and expenses . . . with no use or benefit which he can use to pay" for them. Brief of Appellant (663 MDA 2021), at 18-19. Moreover, the property is also subject to deed restrictions imposed by the Lake Wynonah Property Owners Association, which require, *inter alia*, that the property be used "exclusively for residential purposes except those lots that may be designated, subject to rezoning (if any), and zoned as business or commercial areas[.]" ***Id.*** at 11-12. Because he cannot build a residence on a property that must be used exclusively for residential purposes, Servient Landowner asserts the restriction "amounts to an unreasonable restraint on [his] right to alienate the property, and is void as against public policy." ***Id.*** at 19.

In support of his claim, Servient Landowner relies on ***Lauderbaugh v. Williams***, 186 A.2d 39 (Pa. 1962), and asserts that "[r]estrictive covenants which indirectly restrain free alienation may be unenforceable where such restraints are unreasonable, perpetual in nature, and devoid of standards by which the restraints can be terminated." Brief of Appellant (663 MDA 2021), at 16. In ***Lauderbaugh***, our Supreme Court was called upon to determine the validity of a deed restriction requiring future purchasers to be members of the Lake Watawga Association ("Association"). The Court observed that there were no objective standards for admission set out in the Association's bylaws and that, thus, it was "possible that three members by whim, caprice[,] or for any reason, good or bad, or for no reason, could deny membership to any

prospective alienee[.]" ***Id.*** at 41. As such, the Court concluded that the restriction unreasonably limited the free alienation of land bordering Lake Watawga, as control over the membership was in the hands of individuals other than the potential grantor. ***Id.*** The court also noted that "the restriction is not limited in time and purports to be a perpetual one, a fact which militates strongly against its enforcement." ***Id.***

Similar to the restriction in ***Lauderbaugh***, Servient Landowner asserts that the restriction in his deed

> effectively allows the owners of the neighboring 638 Wynonah property to control the alienability [of] the 637 Wynonah property. . . . The right to lawfully use, develop, or profit from the 637 Wynonah property lies exclusively with the owners of . . . 638 Wynonah . . ., and those who wish to acquire the building rights to be able to use and develop the 637 Wynonah property are left entirely to the discretion of the owners of the . . . 638 Wynonah property.

Brief of Appellant (663 MDA 2021), at 17-18. Servient Landowner argues that "there are no standards for how the 638 Wynonah owners may determine *whether* to release the building rights, *to whom*, or for *what price*," and that the restraint is perpetual in nature. ***Id.*** at 18 (emphasis in original).

Servient Landowner further asserts that the restriction is unenforceable, as it renders the property unfit or unprofitable for use and development. Servient Landowner argues that the trial court erred in finding that changed conditions, acquiescence, or abandonment are "prerequisites to the court's exercise of its equity powers" to void a restriction. ***Id.*** at 20. Rather, Servient Landowner argues that "[e]quity may not enforce a deed restriction where it

bars the 'only reasonable use available.'" ***Id.***, quoting ***Schulman v. Serrill***, 246 A.2d 643, 648 (Pa. 1968). He asserts that, "[w]here strict enforcement of a deed restriction is possible 'only by sacrificing use and development' of the land, such strict enforcement is 'unjust and inequitable and a court of equity will not lend its aid for such purpose.'" ***Id.***, quoting ***Ellis v. Dubin***, 16 Pa.D.&C.2d 779, 785-86 (Pa. Ct. Cm. Pl., Phila Co. 1959). Accordingly, Servient Landowner asserts that the trial court erred in granting judgment on the pleadings, and requests that we remand for further proceedings.

Preliminarily, we agree with Servient Landowner that the trial court's focus on changed conditions was in error as applied to the facts of this case. While the cases relied upon by the trial court all involve changes in the nature of the surrounding neighborhood, the principles of equity are "necessarily general in character, and they require discrimination, therefore, in their application to the facts of each case." ***Katzman***, ***supra*** at 87. "[D]eed restrictions are not favored by the law[, because] they represent an interference with the owner's free and full enjoyment of his property." ***Shulman***, ***supra*** at 646. As such, "the law appropriately construes them most strictly against the grantor." ***Id.***

In this case, Servient Landowner argues that he owns a property—intended for residential use—that he can neither build a residence upon nor sell, and which is a financial drain for which he receives no benefit in return. Just as equity will enforce a building restriction in the face of changed conditions "if its enforcement remains of substantial value to the dominant

tenement," it will decline to enforce a restriction "if the enforcement of the restriction would make the land unfit or unprofitable for use and development, **or result in a far greater hardship to the servient [tenement] than a benefit to the dominant tenement**." ***Id.*** (emphasis added). "It is not inequitable to enforce a deed restriction merely because it bars the highest and best use, **so long as this is not the only reasonable use available**." ***Schulman v. Serrill***, 246 A.2d 643, 648 (Pa. 1968), citing ***Katzman***, ***supra*** (emphasis added).

The trial court's narrow focus on the need for "changed conditions" was a misapplication of the law. Consequently, we are constrained to conclude that the court's grant of judgment on the pleadings was improper. As noted above, in passing on the propriety of the court's grant of judgment on the pleadings, we must accept as true all well-pleaded statements of fact of the Servient Landowner and consider against him only those facts that he specifically admits. ***Bowman***, ***supra***. Servient Landowner averred the following in his complaint:

- The deed to 637 Wynonah contains a restrictive covenant prohibiting Servient Landowner from constructing any improvements on the property without the permission of the owners, or subsequent owner(s), of 638 Wynonah, ***see*** Complaint, 1/24/20, at ¶¶ 23-29;
- Dominant Landowners intend to enforce the building restriction, ***see id***. at ¶ 29;
- The 637 Wynonah property is subject to certain restrictive covenants and conditions as part of the Lake Wynonah Subdivision, ***see id.*** at ¶ 30;

- Lake Wynonah Subdivision restrictions prevent Servient Landowner from using the 637 Wynonah property for anything other than "residential purposes," ***see id.*** at ¶ 31;
- Servient Landowner has been unsuccessful in selling 637 Wynonah on the open market due to the building restriction and Lake Wynonah deed restrictions, ***see id.*** at ¶¶ 42-44;
- A certified appraiser has opined that, if the building restriction is deemed enforceable, "the value of the subject property would be so greatly impacted to the point where [it is] possible the property would never be able to be transferred/sold," ***id.*** at ¶ 46, Exhibit D;
- Without the building restriction, the certified appraiser valued 637 Wynonah at $105,000, ***see id.*** at ¶ 51;
- Servient Landowner has incurred annual costs of over $3,000 for taxes, HOA dues, water fees, and property maintenance, while simultaneously being unable to benefit from, use, or profit from the property, ***see id.*** at ¶¶ 53-56.

These facts, **if proven at trial**, could: (1) establish a hardship to Servient Landowner greater than the benefit to the Dominant Landowners, ***Katzman***, ***supra***; (2) demonstrate that the restriction bars the only reasonable use available for the property, ***Schulman***, ***supra***; and (3) show that the restriction imposes a *de facto* perpetual restraint on alienation, subject entirely to the whim of Dominant Landowners. ***See Lauderbaugh***, ***supra*** (voiding restriction where right to alienate property subject to whim or caprice of others based on "any reason, good or bad, or for no reason"). Accordingly, it is not apparent from the record that Dominant Landowners' "right to succeed is **certain** and the case is **so free from doubt** that trial would clearly be a fruitless exercise." ***Bowman***, ***supra*** at 886 (emphasis

added). Thus, we vacate the order granting judgment on the pleadings in the case at docket number 663 MDA 2021, and remand for further proceedings.[2]

We briefly discuss Servient Landowner's final claim. This Court has repeatedly held that failure to develop an argument with citation to, and analysis of, relevant authority waives that issue on review. ***In re Estate of Schumacher***, 133 A.3d 45, 51 (Pa. Super. 2016). Here, aside from generally reciting the legal standards for delivery of a deed, Servient Landowner cites no authority to support his specific claim—that that he did not legally accept the deed because he did not have an opportunity to review or consent to its terms prior to its recording. Accordingly, we find the claim to be waived. ***See id.***; ***see also*** Pa.R.A.P. 2119(a) (stating argument shall be divided into as many sections as there are questions presented, followed by discussion with citation to relevant legal authority).

Because we vacate the trial court's order granting judgment on the pleadings, we need not address in detail the issues raised in Dominant Landowners' appeal of the order denying counsel fees at 842 MDA 2021. This

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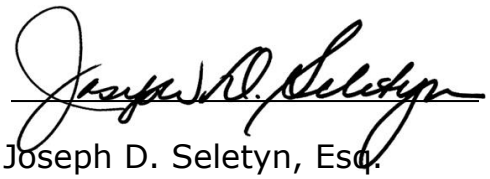
[2] We note for the record that Dominant Landowners raised in its second amended new matter the defense of laches, which "bars relief when the complaining party is guilty of want of due diligence in failing to promptly institute the action to the prejudice of another." ***Fulton v. Fulton***, 106 A.3d 127, 131 (Pa. Super. 2014) (citation omitted). Evidence of prejudice may include, *inter alia*, establishing that a witness has died or become unavailable. ***Id.*** Here, the trial court declined to rule on the issue of laches because it concluded that Servient Landowner "failed to allege facts that make out a case as a matter of law." Trial Court Opinion, ***supra*** at 10. As such, the issue is not currently before us. However, on remand, the trial court may wish to address this claim in light of the February 2020 death of the grantor, more than two years after the deed was executed.

Court having found merit to Servient Landowner's claims on appeal, it is axiomatic that his conduct in commencing the action in the trial court cannot be deemed "arbitrary, vexatious, or in bad faith." 42 Pa.C.S.A. § 2503(9). Accordingly, we affirm the trial court's order denying counsel fees to Dominant Landowners.

Order at 663 MDA 2021 vacated. Case remanded for further proceedings consistent with this memorandum. Jurisdiction relinquished.

Order at 842 MDA 2021 affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/29/2022