Superior Court of Connecticut, Judicial District of Litchfield.

David L. WILLIAMS et al.
v.
Jeanne M. ALMQUIST et al.

**No. LLICV065000595S**
Not Reported in A.2d, 2007 WL 3380299

Oct. 30, 2007.

MARANO, J.
***1** Before the court is the plaintiffs' request for a declaratory judgment that a restriction in their deed be declared void and unenforceable. After considering the testimony, the documents submitted, and the parties' arguments, this court grants the plaintiffs' request and declares the restriction void and unenforceable.

*FACTS*

On May 8, 2006, the plaintiffs, David and Kelly Williams, filed a complaint for declaratory judgment against the following defendants: Jeanne M. Almquist, Wyatt A. Stewart, III, Renee B. Stewart, Corinne B. Green, Samuel D.B. Millar, Jr., Carol M. Forstmann, Christopher B. Combs, Jay D. Combs, and Cindy B. Kolosky.[FN1]The plaintiffs asked the court to declare the restriction in their deed void and unenforceable and asked for the quieting of their title so that it may be free and clear of the restriction.

> FN1. A default was entered against Carol Forstmann on June 29, 2006, and she is no longer a party to this action. Samuel Millar, Cindy Kolosky and Jay Combs were not in contact with the defendants' attorney at the time of trial, and Jay Combs specifically said he was not going to participate in the action. The defendants' attorney moved to withdraw as counsel for these three defendants at trial, but the motion was denied.

On July 25, 2007, the parties presented the following testimony and evidence at trial. Attorney Robert Bonynge bought a 150-acre tract of land at Lake Waramaug in 1898. Although some of the original tract was sold in the 1930s, and some of the heirs owned certain parcels outright, the 105-acre tract that was eventually sold to Lee and Cynthia Vance (the Vances) was held jointly by numerous Bonynge heirs, who are the defendants in this case, as late as March 2001. Prior to their purchase of the 105-acre tract, the Vances had purchased the Lake View Inn from Chris Combs and his branch of the Bonynge family. In March 2001, the Vances made an offer to purchase the 105-acre tract, and presented a detailed outline of their sale proposal. The proposal marked the beginning of negotiations that would culminate in the sale of the property on February 25, 2002. The negotiations were a difficult and emotional process and many people wanted to back out of the sale at various times. The primary concern of the defendants was

conserving the natural condition of the property and curtailing extensive development. To that end, the Vances agreed to give some of the land and a conservation easement to the Weantinoge Heritage Land Trust (Weantinoge), which they did by quitclaim deed December 21, 2005. In furtherance of their conservation goals, the defendants also placed the following restriction on 8.9 acres of the property: "There shall be no construction or placing of any residential or commercial buildings upon this property provided that non-residential structures of less than 400 square feet may be constructed for recreational or other non-residential purposes and further provided that the property may be used for passive activities such as the installation of septic and water installations, the construction of tennis courts, swimming pools and the construction of facilities for other recreational uses."

The plaintiffs purchased a small .55-acre tract of land adjacent to the 8.9-acre tract from Michael Kaplan in January and February 2005. Shortly thereafter, the plaintiffs decided to purchase part of the 8.9-acre tract of land from the Vances. This 6.158-acre tract was still subject to the restriction agreed upon in February 2002. With full knowledge of the restriction, the plaintiffs purchased the tract and included the restriction in the deed that was recorded on April 26, 2005. On May 3, 2006, the plaintiffs entered into an agreement with the Vances in which the Vances waived their right to enforce the restriction.

***2** After trial, the plaintiffs and the defendants filed post-trial briefs on September 11 and 12, 2007, respectively. Both parties filed reply briefs on September 18, 2007.

*DISCUSSION*

"The purpose of a declaratory judgment action ... is to secure an adjudication of rights where there is a substantial question in dispute or a substantial uncertainty of legal relations between the parties."(Internal quotation marks omitted.) *Interlude, Inc. v. Skurat,* 253 Conn. 531, 536, 754 A.2d 153 (2000)."The rules of practice define the scope of declaratory judgment actions as follows: 'The judicial authority will, in cases not herein excepted, render declaratory judgments as to the existence or nonexistence (1) of any right, power, privilege or immunity; or (2) of any fact upon which the existence or nonexistence of such right, power, privilege or immunity does or may depend, whether such right, power, privilege or immunity now exists or will arise in the future.'Practice Book § 17-54."*ACMAT Corp. v. Greater New York Mutual Insurance Co.,* 88 Conn.App. 471, 476, 869 A.2d 1254,cert. denied, 274 Conn. 903, 876 A.2d 11 (2005).

In their post-trial brief, the plaintiffs assert that the Supreme Court has only recognized three types of restrictive covenants: (1) mutual covenants in deeds exchanged by adjoining landowners; (2) uniform covenants in deeds executed by owners selling property in lots under a general development plan; and (3) covenants exacted by grantors from grantees for the benefit of retained property. The plaintiff argues that the restriction is unenforceable as a matter of law because there is no evidence that it falls into any of these categories.

In their post-trial brief, the defendants argue that a restrictive covenant may be enforceable even if it does not fall within the three generally accepted categories because a court has the equitable power to enforce a restriction if it can glean from the language of the deed and the surrounding

circumstances that the parties intended the covenant to run with the land. The defendants argue that the court should find that the restriction is enforceable in this present case because there is ample evidence that the defendants and the Vances intended the restriction to run with the land, and the plaintiffs purchased the property with knowledge of the restriction.

In reply to the defendants' post-trial brief, the plaintiffs argue that a restriction will not run with the land simply because the parties intend it to do so. The plaintiffs argue that the restriction is unenforceable because, with only one exception that does not apply to this case, the courts have only found restrictive covenants enforceable if they have fallen within the three categories.

In their reply brief, the defendants reiterate their argument that the court has the equitable power to declare a restriction enforceable if the parties intended that it run with the land. The defendants argue that evidence from the deed and the surrounding circumstances proves such an intent existed in this case, and, as such, the restriction is enforceable.

***3** "Restrictive covenants generally fall into one of three categories: (1) mutual covenants in deeds exchanged by adjoining landowners; (2) uniform covenants contained in deeds executed by the owner of property who is dividing his property into building lots under a general development scheme; and (3) covenants exacted by a grantor from his grantee presumptively or actually for his benefit and protection of his adjoining land which he retains."*DaSilva v.. Barone,* 83 Conn.App. 365, 371-72, 849 A.2d 902,cert. denied, 271 Conn. 908, 859 A.2d 560 (2004); see also *Stamford v. Vuono,* 108 Conn. 359, 364-65, 143 A. 245 (1928).

In the present case, the restrictive covenant does not fall under the first category because it originally arose from the sale of the defendants' land to the Vances, not from an exchange of covenants between adjoining landowners.

The restrictive covenant also does not fall under the second category. In discussing this category, the Appellate Court has explained, "[w]hen, under a general developmental scheme, the owner of property divides it into building lots to be sold by deeds containing substantially uniform restrictions, any grantee may enforce the restrictions against any other grantee."*DaSilva v. Barone, supra,* 83 Conn.App. at 373. "The doctrine of the enforce ability of uniform restrictive covenants is of equitable origin. The equity springs from the presumption that each purchaser has paid a premium for the property in reliance upon the uniform development plan being carried out. While that purchaser is bound by and observes the covenant, it would be inequitable to allow any other landowner, who is also subject to the same restriction, to violate it."*Contegni v. Payne,* 18 Conn.App. 47, 52, 557 A.2d 122,cert. denied, 211 Conn. 806, 559 A.2d 1140 (1989)."The factors that help to establish the existence of an intent by a grantor to develop a common plan are: (1) a common grantor sells or expresses an intent to put an entire tract on the market subject to the plan; (2) a map of the entire tract exists at the time of the sale of one of the parcels; (3) actual development according to the plan has occurred; and (4) substantial uniformity exists in the restrictions imposed in the deeds executed by the grantor ... The factors that help to negate the presence of a developmental scheme are: (1) the grantor retains unrestricted adjoining land; (2) there is no plot of the entire tract with notice on it of the restrictions; and (3) the common grantor did not impose similar restrictions on other lots."(Citation omitted.) *DaSilva v. Barone,*

*supra,* 83 Conn.App. at 372.

The evidence suggests that a common plan or scheme did not exist in the present case. First, the defendants did not sell, or show any intent to sell, the property into separate lots subject to a common plan, but rather sold the entire 105-acre tract to the Vances. Second, though a map of the sale in question exists, it does not reveal any plans for dividing the property into separate lots for sale, but rather shows the entire tract being sold to the Vances. Third, there is no evidence that a plan for multi-plot development was carried out by any party. Fourth, a uniform restriction was not placed on the property. Only 8.9 acres of the 105-acre tract was subject to the restriction in question. The rest of the property was granted outright to the Vances with minimal restriction or subject to the agreement to transfer the property to Weantinoge. Also, there is no evidence that the defendants sold other property subject to similar restrictions. As to the factors that suggest no plan or scheme, the first two factors do not apply because the defendants did not retain any adjoining property or divide the 105-acre tract into separate lots that could take notice of each other. As to the third factor, the defendants did not impose similar restrictions on other lots because there were no other lots.

***4** Besides these commonly considered factors, the sale does not fulfill the equity purposes of recognizing covenants under the second category. As stated earlier, the purpose of giving grantees enforcement rights under a common plan or scheme is to ensure that the value of their purchase would not be affected by the actions of subsequent grantees. *Contegni v. Payne, supra,* 18 Conn App. at 52. In the present case, the Vances have no such concern because the defendants have no other tracts to sell. Indeed, the Vances waived their right to enforce the restriction. The restriction does not fall under the second category of recognized restrictive covenants.

The restrictive covenant does not fall under the third category either. As to this category, "[w]here the owner of two adjacent parcels conveys one with a restrictive covenant and retains the other, whether the grantor's successor in title can enforce, or release, the covenant depends on whether [the covenant] was made for the benefit of the land retained by the grantor in the deed containing the covenant, and the answer to that question is to be sought in the intention of the parties to the covenant expressed therein, read in light of the circumstances attending the transaction and the object of the grant ... If the covenant is for the benefit of the retained land it runs with the land and may be enforced by the successor in title to the retained land against the successor in title to the conveyed land, on the principle which prevents one with notice of the just rights of others from defeating those rights."(Citation omitted; internal quotation marks omitted .) *Contegni v. Payne, supra,* 18 Conn.App. at 61. "[T]he question of intent ... [is] determined pursuant to the broader principle that a right to enforce a restriction of this kind will not be inferred to be personal when it can fairly be construed to be appurtenant to the land, and that it will generally be construed to have been intended for the benefit of the land, since in most cases it could obviously have no other purpose, the benefit to the grantor being usually a benefit to him as owner of the land, and that, if the *adjoining land retained by the grantor is manifestly benefitted by the restriction,* it will be presumed that it was so intended."(Emphasis in original; internal quotation marks omitted .) *Grady v. Schmitz,* 16 Conn.App. 292, 297-98, 547 A.2d 563,cert. denied, 209 Conn. 822, 551 A.2d 755 (1988).

Three defendants, Jeanne Almquist, Renne Stewart and Corrine Green, all retained property near the 105-acre tract, but did not own property directly adjoining or overlooking the restricted tract. As such, there is no presumption that the restriction was meant to benefit their land. The deed does not indicate that the restriction was meant to benefit the defendants' property in the Lake Waramaug area; the deed does not indicate that the restriction was meant to benefit anyone at all. Chris Combs testified that the restrictions were meant to be part of the conservation plan, but he did not suggest that the conservation plan was meant to benefit any of the defendants' property. Besides Combs, no other defendant testified at trial. With no mention of beneficiaries in the deed and no testimony regarding the intent of the retaining landowners the restriction can not fall under the third category.

***5** Having determined that the restriction does not fall under the three tradition categories of restrictive covenants, the next question is whether the court should look beyond these three categories in its analysis.[FN2]"[T]he trial court may, in determining the rights of the parties, properly consider equitable principles in rendering its judgment ... This conclusion ... is ... in accord with our position favoring liberal construction of the declaratory judgment statute in order to effectuate its sound social purpose."(Citations omitted; internal quotation marks omitted.) *Middlebury v. Steinmann,* 189 Conn. 710, 715-16, 458 A .2d 393 (1983). Although it is rare for the courts to consider restrictive covenants outside the three categories, it is not entirely unheard of. Trial courts have considered this issue on at least two separate occasions, and although neither decision is controlling, their reasoning is worth considering to fully effectuate the purpose of this declaratory action.

> FN2. The parties do not raise the issue of whether the restriction could be considered some other type of property interest.

In *Cannavaro v. Washington Community Housing,* Superior Court, judicial district of Litchfield, Docket No. CV 03 0091521 (May 23, 2005, Pickard, J.) (39 Conn. L. Rptr. 413), the original grantor conveyed property to the plaintiff subject to a restriction that benefitted a third party. The court held that although the restriction did not fall under one of the three traditional categories, it was still enforceable because the restriction benefitted a discernable third party. *Id.,* at 416.The court relied on the decision in *Bolan v. Avalon Farms Property Owners Assn., Inc.,* 250 Conn. 135, 144-45, 735 A.2d 798 (1999), in which the court held "that the unity of title doctrine should be abandoned and that the intent of the deed creating an easement should be effectuated even if no unity of title exists between the servient estate and the dominant estate the easement is intended to serve."[FN3]

> FN3."The unity of title doctrine provides that [n]o right of way appurtenant can be created without a dominant as well as a servient estate ... The dominate estate enjoys the benefit of the way, and the servient estate bears the burden. The way can become legally attached to the dominant estate only if the same person has unity of title to both the way and the dominant estate ... The doctrine is based on the common-law notion that, because a stranger to the deed has no interest in the property conveyed, he has no interest to be expected from the grant, and none from which a reservation could be carved."(Citation

> omitted; internal quotation marks omitted.) *Bolan v. Avalon Farms Property Owners Assn., Inc., supra,* 250 Conn. at 143.

The *Bolan* decision pertains to easements and not restrictive covenants.*Bolan v. Avalon Farms Property Owners Assn., Inc., supra,* 250 Conn. at 144-45. Although the *Cannavaro* court saw no distinction between the two property interests; *Cannavaro v. Washington Community Housing, supra,* at 39 Conn. L. Rptr. 415; when the Appellate Court has had the opportunity to review the categories of restrictive covenants, it has not mentioned the *Bolan* decision. See *DaSilva v. Barone, supra,* 83 Conn.App. at 371-72. Even if the reasoning in *Bolan* extends to restrictive covenants, it would not apply to the restriction in this case because the defendants have not presented any evidence that the restriction on the 8.9-acre tract was created for the benefit of other identifiable property owners near Lake Waramaug.[FN4]Thus, the restriction would not be enforceable under the reasoning of the *Cannavaro* decision.

> FN4. In their post-trial brief, the defendants argue that "[t]he Bonynge heirs considered [the restriction] to be a benefit to those who continued to reside at the lake."(Defendants' Post-Trial Brief 12). This argument is not supported by the deed or the trial testimony, which suggests the defendants' only concern was conservation and curtailing development. The testimony also does not suggest that the defendant's interest in conservation was motivated by a desire to benefit those residing around the lake.

The case most directly on point is *DeTullio v. Chebrak Bikur Cholim, Inc.,* Superior Court, judicial district of Fairfield, Docket No. CV 96 0334892 (April 7, 1999, Skolnick, J.) (24 Conn. L. Rptr. 338), where the defendant, in selling its synagogue, put a restriction in the deed in order to limit use of the structure to non-religious purposes. The restriction was intended to assuage the concerns of some of the wealthier donors of the new synagogue who did not want another religious organization using the old property because they had a particular emotional attachment to it. *Id.,* at 339.Although the restriction did not fall under the three traditional categories, the court considered whether it would nevertheless be enforceable on the basis of the following reasonableness analysis, "[t]he test of the validity of [a] covenant is the reasonableness of the restraint imposed ... To meet this test successfully, the restraint must be limited in its operation with respect to time and place and afford no more that a fair and just protection to the interests of the party in whose favor it is to operate, without unduly interfering with the public interest."(Internal quotation marks omitted.) *Id.*"Covenants restricting the transfer of property are usually sustained as being reasonable even though they may prevent competition and even though they involve no transfer of good will ... Such restrictions on the use of real property are considered less likely to affect the public interest adversely than a restraint on the activities of individuals ... Notwithstanding, there is still the obligation imposed by public policy, and that forbids unreasonable restraint."(Internal quotation marks omitted.) *Id .;* see also *Lampson Lumber Co. v. Caporale,* 140 Conn. 679, 683-84, 102 A.2d 875 (1954). In *DeTullio* the court found that the restriction was unreasonable because it limited the use of a traditionally religious structure to non-religious purposes, was unlikely to fulfill its stated purpose and was severely limiting the marketability of the property. *DeTuillo v. Chebrah Bikur Cholim, Inc., supra,* 24 Conn. L. Rptr. at 339-40.

***6** The restriction in this case is not reasonable because it has no clear beneficiary and limits the marketability of the property. As previously stated, it is unclear who exactly was meant to benefit from the restriction. From the testimony at trial, the defendants were obviously concerned with conservation of the 105-acre tract, but they do not indicate who, if anyone, was to benefit from this conservation. The possible beneficiaries are the defendants, the defendants who retained property in the Lake Waramaug area, the other residents in the Lake Waramaug area, the Vances, or simply nature itself. Without a discernable beneficiary, it is difficult to determine who can enforce the restriction and for how long. Any one of the previously mentioned parties (except nature) could possibly enforce the restriction at any given time, and this does not even begin to consider the possible rights of their respective successors in interest. The plaintiffs would have no idea who could possibly make such a claim and whether it would be legitimate or not.

With such uncertainty, the restriction cannot fulfill its fundamental purpose of limiting development. If a violation of the restriction were to occur, it would be impossible for any of the previously mentioned parties to know who should enforce it. It is also impossible to know which of the previously mentioned parties would even be willing to enforce it. For example, the Vances have waived their rights to enforce it and many of the defendants have not participated in this action. Without a clearly defined beneficiary, termination date and enforcement method, it is unknown how the defendants expected the restriction to fulfill their conservation goals; as currently constituted, it cannot.

The restriction also unreasonably limits the marketability of the property. Although restrictions are often disfavored by the law and limited in their implication, *DaSilva v. Barone, supra,* 83 Conn.App. at 372, restrictive covenants arose in equity as a means to protect the value of property.*Contegni v. Payne, supra,* 18 Conn.App. at 52. In the present matter, no identifiable property is being protected by the restriction. The plaintiffs bought the property because they thought the restriction was unenforceable. If the restriction is found enforceable, the property could only be developed for recreational purposes and would be far less valuable. Devaluing property without a clear beneficiary is not reasonable.

For the foregoing reasons, the court finds that the restriction in the plaintiffs' deed is not reasonable and is therefore not enforceable under the reasonableness test used in *DeTullio.*

Accordingly, the court grants the plaintiffs' request for a declaratory judgment because the restrictive covenant does not comport with the three traditional categories of restrictive covenants, does not benefit a discernable third party, and is unreasonable under the circumstances.

So ordered.