

MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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FOREST HILLS VAN COURT ASSOCIATION, INC.,

Plaintiff,

-against-

TAMARA RUBINOFF and MICHAEL RUBINOFF,
Defendants.

Index No.: 14651/05

Motion Dated:
July 31, 2007

Cal. No.: 13

M#: 4

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This motion by the plaintiff for summary judgment and other relief is decided as follows:

Plaintiff corporation is responsible for the enforcement of certain restrictive covenants applicable to land designated as the Vanderveer Tract and Forest Hills Court in Forest Hills, New York. These restrictive covenants were originally recorded in the Queens County Register's Office on July 26, 1923 and subsequently renewed in 1989. Defendants own a home located at 69-05 Juno Street, in Forest Hills, which is within the subject area.

Article 6 of the restrictive covenant at issue provides that "[n]o building, fence or other structure shall be erected nor maintained, nor any change or alteration made thereto unless the plans and specifications therefor showing the nature, kind, shape, height, color scheme and location of such structure and

the grading plans of the plot to be built upon shall have been submitted to, approved in writing by a committee of the Gardens Corporation and a copy thereof, as finally approved, lodged permanently with the Gardens Corporation."

Plaintiff alleges that beginning in October or November 2004, defendants commenced work on the exterior portion of their house without the consent of the plaintiff as required. According to the plaintiff, defendants have constructed an exterior to the subject premises which is out of character with the homes in the surrounding area. Specifically, plaintiff objects to the color of the house, the quoins on the corners of the house, medallions between the upper and lower windows, a canopy over the front door and columns in the front of the house. Plaintiff also asserts that defendants have refused to comply with the restrictive covenant even though they are in violation of the covenant. Plaintiff contends that because of their actions, defendants are attempting to destroy the character of the neighborhood.

In support of its motion for summary judgment, plaintiff asserts that defendants are bound by the restrictive covenant regardless of whether they had actual knowledge of the restrictions contained therein. According to the plaintiff, a restrictive covenant is binding upon a grantee where there is constructive notice of such restriction. Plaintiff further

maintains that the restrictive covenants herein run with the land and are for the benefit of all homeowners in the locale.

In opposition to the motion, defendants contend that plaintiff failed to comply with discovery and, thus, defendants are unable to determine whether triable issues of fact exist.

"Restrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy . . ." (Forest Hills Gardens Corp. v Velonskis, 309 AD2d 732, 733 [2003].) Where restrictive covenants are created with the design to carry out a general scheme applicable to an entire tract, the covenant is enforceable against any party upon the theory that there is a mutuality of covenant and consideration, provided that the common grantor intended a common scheme or plan and that the defendant had notice thereof. (Malley v Hanna, 101 AD2d 1019, 1020 [1984].) In the case at bar, the defendants had constructive notice of the restrictive covenant at issue. (see Zunno v Kiernan, 170 AD2d 795, 796 [1991]; Meadow Run Dev. Corp. v Atlantic Refining and Marketing Corp., 155 AD2d 752, 754 [1989].) The title report here referred to the restrictive covenant and, as noted above, the covenant was recorded in the Register's Office of Queens County.

_____ Defendants have failed to raise a triable issue of fact. Indeed, the affirmation of defendants' counsel does not

constitute admissible evidence and is insufficient to raise a triable issue of fact. (Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) Further, defendants' contention that discovery is not complete is not a basis to deny the motion. The court notes that the note of issue herein was filed on November 27, 2006, and it does not appear that defendants ever timely moved to vacate the note of issue. (22 NYCRR § 202.21[e].) Thus, defendants cannot, at this juncture, oppose the motion on the ground that discovery is not complete.

The branch of the motion for an award of legal fees is, however, denied. It is well settled that attorney's fees are considered an incident of litigation and, unless authorized by statute, court rule, or written agreement of the parties, are not recoverable. (see Hooper Assoc., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989]; Matter of A.G. Ship Maintenance Corp. v Lezak, 69 NY2d 1, 5 [1986]; Maliner-Colvin v 85-10 34th Ave. Apt. Corp., 284 AD2d 434, 434 [2001].) There is no statute or agreement herein providing for the recovery of the movant's attorney's fees. Contrary to the movant's assertion, there is nothing in the by-laws, annexed to the moving papers, which addresses the issue of legal fees.

Accordingly, this motion by plaintiff for summary judgment is granted to the extent that defendants are directed to comply with the restrictive covenant herein.

The branch of the motion by plaintiff for an award of legal fees is denied.

Settle Order.

Dated: November 2, 2007

AUGUSTUS C. AGATE, J.S.C.