

M E M O R A N D U M

SUPREME COURT: QUEENS COUNTY
IA PART: 16

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KEW FOREST NEIGHBORHOOD
ASSOCIATION, INC., et al.

INDEX NO. 26289/99

BY: SCHMIDT, J.

- against -

DATED: MAY 16, 2000

RITA LIEBERMAN, et al.

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In this declaratory judgment action plaintiffs seek to enjoin defendants from proceeding with any further construction on property located at 77-16 Kew Forest Lane, Forest Hills, New York (hereinafter "77-16") and to require the construction site be secured to permit safe passage by pedestrians and vehicles. By separate notice of motion defendants move to dismiss the complaint based upon plaintiffs' lack of capacity to sue, failure to include a necessary party, and failure to state a cause of action against defendant Joseph Lieberman.

Defendants Rita Lieberman and Albert Mushibayev purchased the subject property by deed dated November 10, 1998. The property included a single family home that was demolished in May 1999. Defendants, thereafter, began construction of a seven story building to be comprised of 15 residential units and medical offices on the ground floor. Plaintiffs seek to enjoin construction of the proposed building on the basis of restrictive covenants imposed by a common grantor in all deeds in the subject neighborhood.

This court will initially address that branch of defendants' cross motion which is premised on the contention that both plaintiffs lack the capacity to maintain this action. Plaintiff Tina Chan and her husband own a home directly across the street from 77-16 and the Kew Forest Neighborhood Association, Inc. (hereinafter "Association") is a not-for-profit corporation formed for the purpose of maintaining the residential character of the Kew Forest neighborhood. There are 27 members in the Association. The subject area is defined as, Queens Boulevard to the North, Union Turnpike to the East, Austin Street to the South and 76th Drive to the West (hereinafter the "Neighborhood"). Sixty-six parcels in this area, sixty-five of which are now single family homes, were commonly owned by Kew Gardens Corp., and conveyed with the following restrictive covenant that states in pertinent part:

[N]either the party of the second part, nor its successors or assigns, will erect on said premises or permit to be erected thereon, without the written consent of the party of the first part, any sign, or any fence, wall or similar structure or any building intended for the occupation of more than one family or household, or any building nearer than twenty feet, or any barn, stable or other outhouse nearer than forty feet to the line of any street, road or park laid out, or which may be laid out upon the property embraced in said map ... and further, that the present covenants on the part of the party of the second part, shall run with the land intended to be affected hereby, and may be enforced by action, injunction or otherwise.

This covenant appears in the 1922 indenture between Kew Gardens Corporation and E. Edward Day for the 77-16 parcel . A subsequent

recorded document dated July 2, 1924 between Kew Gardens Corporation and E. Edward Day indicates that a private dwelling had been placed on the property with an open porch or piazza in violation of the 20 foot setback. Upon application of E. Edward Day the grantor consented to the location of this structure, but limited this consent to "the original structure and not to any extensions thereof or other building hereafter planned for erection on said premises." The document further provided that "E. Edward Day, by accepting and recording this consent covenants and agrees that neither he nor his heirs or assigns will violate any of the covenants in said former deed and that the present consent shall apply only to the present open porch or piazza located as aforesaid and not to any future building or buildings erected upon said premises."

It is defendants' position that the Association is not a proper party to enforce the restrictive covenant. In Matter of Douglaston Civic Assn. v Galvin (36 NY2d 1), which involved the review of a public zoning ordinance, the court found a representative association would have standing to assert the rights of its individual members. Granting standing to the organization allows the expense of challenging zoning changes to be spread over a number of property owners placing them in economic parity with the developer. In evaluating whether a particular group should have standing, the court considered several factors: 1) the capacity of the organization to assume an adversary position, 2) the size and composition of the organization as reflecting a

position fairly representative of the community or the interests it seeks to protect, 3) the adverse effect the matter sought to be reviewed would have on the represented group and 4) whether membership in the organization is open to all residents and property owners in the relevant neighborhood. In Westmoreland Assn. v West Cutter Estates, Ltd., (174 AD2d 144), the court applied these factors and granted a representative organization standing to enforce restrictive covenants which run with the land. The area subject to restrictions in Westmoreland contained 320 building lots and all residents or property owners in the development were automatically members of the representative association. The factors concerning the size and composition of the organization were not in issue.

Here, the papers do not state how many parcels the 27 members of the Association actually represent. Defendants also assert that the Association does not, in fact, represent the community's interests, in that 23 additional parcels composed of apartment buildings, condominiums, a school and other commercial property fall within the bounds of the defined Neighborhood and that these owners and residents have not been offered membership in the Association. In light of the record presented, it cannot be determined whether the Association complies with the factors enumerated above.

Accordingly, that branch of the dismissal motion pertaining to the Association's standing to pursue this action is denied without prejudice to defendants pursuing disclosure and

asserting an affirmative defense based on this issue. It is noted that a financial inquiry into an organization's resources was not a factor utilized in Douglaston and defendants are precluded from seeking disclosure on this issue.

Restrictive covenants which are part of a general plan or scheme of development for the benefit of all parcels may be enforced by an individual owner against any other owner that has at least constructive notice of the covenant. (Vogeler v Alwyn Improvement Corp., 247 NY 131; Landsberg v Rosenwasser, 124 App Div 559). Thus, an individual owner does not lack legal capacity or standing to pursue enforcement within the meaning of CPLR 3211(a)(3). The issue of whether it was the intention of the grantor to create a general plan of uniform development is, however, a question of fact which must be established by "clear and definite proof" (Huggins v Castle Estates, 36 NY2d 427, 432; Westmoreland Assoc. v West Cutter Estates, supra) and, therefore, cannot be resolved in this procedural context.

Inasmuch as Tina Chan and her husband, Hing Wah Lai, own their home as tenants by the entirety, she is directed to join him as a plaintiff in this action and amend the caption and complaint accordingly.

That branch of the motion which seeks dismissal against Joseph Lieberman is granted. The papers are devoid of any information which indicate he has a possessory interest in 77-16 warranting his inclusion in this action.

With respect to plaintiffs' motion for a preliminary injunction, movants must establish the likelihood of success on the merits, irreparable injury and the balancing of equities in their favor. (Aetna Ins. Co. v Capasso, 75 NY2d 860, 862; W.T. Grant Co. v Srogi, 52 NY2d 496.) As stated previously, a homeowner or properly constituted Association may seek enforcement of a restrictive covenant on the basis of a common plan or scheme of development. (Westmoreland Assoc. v West Cutter Estates, Ltd., *supra*; Irish v Besten, 158 AD2d 867; Graham v Beermunder, 93 AD2d 254.) While a final determination rests upon factual evidence not before the court, an analysis of relevant factors including, the substance of the restrictions, the language employed and defendants' constructive notice of the restrictions by virtue of their presence in the chain of title (*see*, Booth v Knipe, 225 NY 390; Huggins v Castle Estates, *supra*; Ryzuk v Timber Ridge Homes at the Woods, 179 AD2d 751; Graham v Beermunder, *supra*), indicate that, plaintiffs have a likelihood of success. (*Cf.*, Turner v Williams, 264 AD2d 443.) In the absence of injunctive relief in this situation, a later judgment in plaintiffs' favor may be rendered ineffectual. (*See*, Board of Mgrs. of 235 22nd St. Condominium v Lavy Corp., 233 AD2d 158.) Thus, the equities lie in favor of preserving the status quo pending a resolution of this matter. (Abed v Zach Assocs., 124 AD2d 531; Blake v Biscardi, 52 AD2d 834.)

Accordingly, defendants Rita Lieberman, Albert Mushibayev, their agents and employees are enjoined from proceeding

with any construction of the proposed structure located at 77-16 Kew Forest Lane and are directed to secure the construction site for safe passage of pedestrians and vehicles. The foregoing relief is conditioned upon plaintiffs filing an undertaking pursuant to CPLR 6312, which amount is to be fixed in the order to be entered hereon. Upon settlement of the order, the parties may submit proof and recommendations as to the amount of the undertaking.

Settle one order.

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J.S.C.