

Agostinelli v Fox

2006 NY Slip Op 30175(U)

May 26, 2006

Supreme Court, Wayne County

Docket Number: 0058704/2006

Judge: John B. Nesbitt

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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

DEBRA AGOSTINELLI, JAMES AGOSTINELLI
DWIGHT CRITCELL, KAREN CRITCHELL, TAB
ORBAKER, KAREN ORBAKER, JOHN KOSKA,
NICOLE KOSKA, JOHN SCHULTES, LIZ LATTIMORE,
KIRK OCKE, MARYJO OCKE, ADEEB SABA, RENEE
SABA, REX REISSNER, CATHY REISSNER,
GAUGER & SWINGLY, INC., JOHN SYLVESTER,
STEPHANIE SYLVESTER, STANLEY EDWARDS,
DAWN EDWARDS, PHIL SUDOR, and JAMIE SUDOR

ORIGINAL

Index No. 58704

Plaintiffs,

-vs-

ALTON J. FOX and NANCY FOX,

Defendants.

APPEARANCES: DAVIDSON, FINK, COOK, KELLY & GALBRAITH, LLP
 (Fernando Santiago, Esq. and Teresa M. Pare, Esq., of counsel)
 Attorneys for the Plaintiffs

 EVANS & FOX, LLP
 (Richard J. Evans, Esq., and Jaret P. Hirt, Esq., of counsel)
 Attorneys for Defendants

MEMORANDUM - DECISION

John B. Nesbitt, J.

Did defendants' construction of a detached garage adjacent their home violate the restrictive covenants to which their property was subject? For the following reasons, the Court holds that it did, albeit finding injunctive relief warranted on a more limited basis than demanded by the plaintiffs. Plaintiff's motion for a preliminary injunction is denied as moot, and defendant's cross-motion for summary judgment is denied.

I. GENESIS OF THE CONTROVERSY

The controversy before the Court involves the operative effect of certain covenants regulating development and use of a residential subdivision in the Town of Ontario known as

Creekwood Estates .¹ The history and circumstances of the property at issue merits recitation, its relevance to become apparent. The property ownership of all the parties to this action devolves from a tract of land once known as the Adler Farm located on the south side of Lake Road and east side of Furnace Road, which was conveyed to Arthur J. Heinicke, Jr., by deed of Max A. Adler, dated January 27, 1964, and recorded in the Wayne County Clerk's Office in Liber 524 of Deeds at page 573. In the years ensuing, Mr. Heinike pursued subdivision development of some of the land for residential purposes, the project becoming known as the Heinicke Subdivision, consisting initially of Section I and a Section II added later. Each section was subdivided into individual lots intended for home construction.² Section I consisted of four lots, three along Furnace Road and one along Lake Road. During Mr. Heinike's ownership of the subdivision tract, the four lots in Section I were sold and homes constructed on the lots.

Mr. Heineke did not undertake subdivision or sale of what became known as Section II. As suggested by the title history, Mr. Heineke was a fruit grower doing business as Lake View

¹ Bear Creek runs through this development, coming from the south through the area known as Furnaceville and emptying into Bear Creek Harbor on Lake Ontario. A hundred years ago, Furnaceville was a large commercial operation with a blast furnace manufacturing pig iron. Before that, the iron ore was hauled by horses to piers at the harbor, and shipped by steam vessel to the blast furnace at Charlotte. In the late 1800's, across Lake Road from what is now Creekwood Estates subdivision, one would have found a scale house, where the ore was weighed before shipping, as well as a dry goods store. *See generally, History of the Town of Ontario, 1807 - 1957*, at p. 56 - 60.

² Exhibit A to the Affirmation of Richard J. Evans, Esq., dated March 15, 2006, consists of a copy of a letter dated February 27, 2006 to Mr. Evans from Michael P. Gorman of Monroe-Gorman Title Agency, LLC, which alludes to a Section III of the Heinicke Subdivision. This letter states in its penultimate paragraph:

Regarding your inquiry of any recorded restrictions for Section III of the Heinicke Subdivision, once again I could find no restrictions recorded in the Wayne County Clerk's Office. I also could not find any filed map in the Wayne County Clerk's Office for a Section III of the Heinicke Subdivision.

There is no further reference to a Section III in any of the papers or exhibits submitted to the Court, except a notation on the Kreiling survey of the Fox property last dated December 22, 2005, which sketches Lots 20 and 21 of a Section III lying east of the Fox property. Absent an approved and/or filed subdivision map for a Section III, or discussion of a Section III by the parties, the Court assumes that either that there is no Section III or that any Section III is irrelevant to the present matter.

Knolls Orchards and ran into financial difficulties, which resulted in bankruptcy proceedings. By order of the federal bankruptcy court dated September 19, 1985, Mr Heinicke was authorized to sell the remainder of the Adler Farm property to James E. Hollingsworth. This consisted of approximately 30 acres. The transfer is reflected in deed recorded October 31, 1985, in the Wayne County Clerk's Office in Liber 796 of Deeds at page 171. It was out of this conveyance that Section II of the Heinike Subdivision was created.

Although the Heinike name is attached to Section II, it appears that Mr. Heinike had no involvement in its creation or, at least, present configuration. The map of Section II referenced in the relevant deeds is that prepared by R. Ronald Kreiling, PE, LS, PC, dated May 14, 1987, Job No. 87-2216-2 filed in the Wayne County Clerk's Office on April 9, 1991, file no. 19, 496. This map was prepared well after Mr. Heinike had conveyed the property to Mr. Hollingsworth in October of 1985 pursuant to order of the Bankruptcy Court. And it was from this map that descriptions were drawn for the surface water drainage and sanitary sewer easements granted to the Town of Ontario and recorded in March of 1991, presumably as a condition of subdivision approval. The map depicts a subdivision of 15 lots adjoining a road (apparently constructed by the developer) intersecting Lake Road, proceeding southerly to a cull-de-sac. During this time frame, Section II and the road apparently acquired the stately moniker of Creekwood Estates, by which they are now known.

The first conveyance out of Section II (Creekwood Estates) of the Heinike subdivision occurred by deed of James E. Hollingsworth recorded August 19, 1991, in the Wayne County Clerk's Office in Liber 860 of Deeds at page 533, devising Lot 19 to Bernice D. VerSluis. On the same day, one minute before the deed to Lot 19 went on record, Mr. Hollingsworth recorded a duly executed Declaration of Restrictions, enumerating fifteen restrictive covenants, reciting their purpose, scope, and applicability to be "[f]or the common benefit of all owners in the Heinike Subdivision Section II, in particular, those parcels on Creekwood Estates shown as lots numbered 5 through 19 on the filed subdivision map." These restrictions remain in full force and effect today, and their operative effect creates the pivotal issues in this litigation.

The first and second restrictions provide that no use other than one and only one single family dwelling is permitted on a lot, and that no further subdivision is permitted. The third

restriction provides a minimum square footage requirement for the dwellings, and the fifth restriction states the type of exterior materials that must be used on the dwellings. The seventh, eighth, ninth, and tenth restrictions prohibit most outside installations and uses often seen as detracting from the aesthetics of upscale residential developments; for example, storage of trailers, recreational vehicles, boats and snowmobiles, installation of freestanding transmitting or receiving devices, garbage storage except on collection days, and burning of waste material. The two restrictions implied in the present controversy are those enumerated four and six, which read as follows:

4. On each lot at the time of construction of the residence there will be constructed a garage containing not less than 390 square feet.

* * * *

6. There shall not be placed on a lot any accessory structures, including but not limited to utility sheds, barns and above-ground pools. This shall not preclude in-ground swimming pools but these will be located behind the back wall of the dwelling and suitably screened from adjacent lots and road view by natural screening or planting.

Do these restrictions prohibit either multiple garages or garages detached from the dwelling structure as claimed by plaintiffs? These are the issues before the court, in this apparent first judicial intervention into the enforcement of these particular restrictive covenants. Since the filing of the restrictive covenants in 1991 and contemporaneous first conveyance of a Section II lot, all of the lots have now been sold, resulting in a development of approximately a dozen or so fine homes. The garage issue arose after the defendants, Alton J. and Nancy Fox (the Foxes) came into the picture. The Foxes purchased lots 18 and 19 in Creekwood Estates from Peter S. and Bonnie M. Polfleits by deed recorded June 21, 2005, and recorded in the Wayne County Clerk's Office as Document No. R.9058938.³ The total purchase price was \$323,000. Lot 18 consisted of 1.624 acres improved by a single family residence, and adjoining Lot 19 consisted of .8 acres of unimproved land bordering the south side of lake road. The address of these properties is 7698 Creekwood Estates.

³ Polfleit acquired Lot 18 by deed of Hollingsworth recorded September 21, 2001, in the Wayne County Clerk's Office in Liber 1000 of Deeds at page 271, and acquired Lot 19 by deed of Hollingsworth recorded December 19, 2003, as Document R9037123. Apparently, Hollingsworth reacquired at some point Lot 19, which he had been conveyed to Bernice VerSluis in 1991.

At the time the Foxes acquired 7698 Creekwood Estates, all the lots improved in Section II were done so by single family dwelling with one attached garage.⁴ This was the case with the home purchased by the Foxes. This, however, presented a problem. As Mr. Fox explains in his March 14, 2006, affidavit, “[our house came only with a relatively small two-car garage. The garage is too small to properly park our three vehicles inside, one being an SUV, and the others being a GMC pickup truck and a Passat” (Fox Aff. ¶12). In addition, given the 2.4 acres acquired by the Foxes, they require property maintenance equipment, and “use a John Deere gator to maintain our two lots” (Id. at ¶10). Thus, “in order to have enough space to park our vehicles and to properly keep inside and out of sight the equipment, gear, and property maintenance items ..., we determined that it was necessary to build an additional garage” (Id. at ¶13).

In November, 2005, the Foxes contacted Gerber Homes, Inc., a general construction company, to help design and construct additional garage space. Mr. Bruce Gerber visited the property and noted two factors that, in his opinion, limited the Foxes’ options. First, construction of another garage attached to the existing built-in garage would be difficult, if not impossible,

⁴ The Court’s usage of the terms “attached” and “detached” in describing the relation between a garage and the residence it serves merits definition in light of the parties’s repeated use of the terms. An attached garage, in ordinary usage, is one that is built into and part of the same structure that houses the residence, with a common wall between the garage and living quarters. A detached garage is a free-standing structure without a common wall with the residence. In his affidavit sworn to March 14, 2006, at ¶ 11, Mr. Fox states that “several of the homes in Creekwood Estates have more than one garage. Four of the homes have a two car garage and then an additional adjoining garage, which appears to be used for additional vehicle parking, lawn maintenance equipment, property gear, plows, etc.” Photographs are attached to support this assertion. In response, plaintiff Debra Agostinelli in her affidavit sworn to March 20, 2006, at ¶7 to ¶9, states: “[S]everal of the homes in the Creekwood Estates have a three-car garage [as depicted in the Fox photographs]. From my personal knowledge, I am familiar with these garages. Each of these attached three-car garages were constructed at the time that the homes were built in the Creekwood Estates as is required under the Declaration of Restrictions, Restriction 4. Moreover, each of these three car garages is open inside. Accordingly, none of the homes in the Creekwood Estates have any separate or additional garages which are detached.”

Thus, while the photographs could suggest two attached garages with a common wall between them and another common wall connecting the garages to the residence, this appears not to be the case. Each of these residences have attached a single three-car garage with a common wall shared by the garage and the residence.

given the steep slope of the driveway leading up to and into the existing garage from the south, and, in any event, would interfere with the side entrance door next to the existing garage leading into a great room. Second, construction of another garage on the back of the house would require elimination of the great room and picture windows, and would violate the town's rear lot setback requirements.⁵ Based upon this advice, and ostensibly their desire to avoid impairment of their side entrance and great room, the Foxes opted for a detached garage proposal offered by Mr. Gerber.

The Gerber Home proposal called for construction of a detached garage two stores high with roof lines comparable to the existing home, and a cupola on top of the roof line. The building proposed was 32 feet wide and 36 feet deep, located about eight feet and slightly angled from the southeasterly back corner of the residence, accessed directly by the existing driveway. Plans were drawn and a building permit issued by the Town on December 13, 2005, with construction commencing almost immediately pursuant to a contract in which the Foxes agreed to pay Gerber \$66,670 for construction of the additional structure.

On December 19, 2005, shortly after construction started, Mr. Gerber was approached at the building site by James Hollingsworth, the individual responsible for the Declaration of Restrictions, who indicated to Mr. Gerber that the restrictions required that the additional garage be attached to the residence.⁶ Apparently this triggered the beginning of neighborhood unrest about the new garage construction, as the Foxes felt it necessary to send a letter shortly thereafter to the other residents and property owners in Creekwood Estates explaining their actions, expressing their good faith and desire to be good neighbors, and to allay any concerns their neighbors might have about the garage under construction. More significantly, it triggered issuance of letters both dated December 21, 2005, from the respective attorneys for the Foxes and Mr. Hollingsworth to

⁵For purposes of this decision, it is unnecessary for the Court to determine whether Mr. Gerber's assessment was correct or not. That determination would be a necessary exercise if the issue before the Court was whether the Foxes were entitled to an area variance from the municipal set-back requirements to construct a garage on the back of their house.

⁶ Mr. Hollingsworth apparently no longer owns any part of Section II of the Heinike Subdivision (Creekwood Estates). The Court so concludes by virtue of the allegation by plaintiff Debra Agostinelli that the present action is brought by all the property owners in Section II and the fact that Mr. Hollingsworth is not a plaintiff.

the other's clients stating their differing legal positions on the issue whether the garage under construction complied with the Declaration of Restrictions.⁷

Construction nevertheless proceeded, prompting this action being commenced on February 2, 2006, by the filing of a Summons and Complaint. The complaint names 23 plaintiffs represented in the Affidavit of plaintiff Debra Agostinelli to be all the owners of the lots in Creekwood Estates. Twenty two plaintiffs are couples that jointly own and occupy their individual residences out of the eleven residences apparently now in Creekwood Estates. The other plaintiff is a corporation, which owns at least one lot in the subdivision, which apparently is either unimproved and/or unoccupied for residential purposes. The lead plaintiffs are Debra and James Agostinelli, the daughter and son-in-law of James Hollingworth, The Agostinelli's own Lots 16 and 17 in the subdivision, known respectively as 7658 and 7666 Creekwood Estates. They have their residence at the former address. 7666 Creekwood Estates adjoins and is south of the Fox property, and 7658 Creekwood Estates adjoins and is south of 7666 Creekwood Estates. There is substantial distance between the Fox and the Agostinelli residences, given that those residences are separated by most of Lot 18 owned by Fox and all of Lot 17 owned by Agostinelli. Further, the lots on which the Foxes have their residence is bordered on the north by Lake Road and the west by the road known as and servicing Creekwood Estates. It appears that the residences across these roads in closest proximity to the Foxes' residence are not in the Creekwood Estates Subdivision, and are not burdened by the restrictive covenants that predicate the instant case, or, for that matter, any restrictive covenants.⁸ The same may be said for the apparently undeveloped property adjoining and lying east of the Foxes' two lots.

The Complaint sets out a cause of action for injunctive relief prohibiting the construction of the garage as well as another for damages in the amount of plaintiffs' attorney fees resulting from the necessity of bringing the action to secure compliance with the Declaration of

⁷ Obviously on December 21st the attorneys were not aware of the other's involvement.

⁸ The property northwest of the Foxes's residence is Lot 4 of Section I of the Heinike Subdivision. Southwesterly of the Foxes' residence is Lot 5 of Subdivision II known as 7671 Creekwood Estates and owned by plaintiffs Dwight and Karen Critchell, The latter is burdened by the restrictive covenants; the former is not.

Restrictions.⁹ The Foxes, now defendants, answered the complaint by pleading dated February 22, 2006, denying the assertions that they had violated the restrictive covenants by erection of the garage. Judicial intervention was quickly sought by the plaintiffs, who secured an order to show cause issued February 17, 2006, by this Court, seeking a preliminary injunction requiring the defendants, pending final judgment, to immediately cease construction of the garage and remove that construction that had already occurred.¹⁰ During the pendency of plaintiffs' application for a preliminary injunction and before its scheduled return on March 21, 2005, plaintiffs filed a further motion seeking summary judgment granting the relief requested in their Complaint pursuant to CPLR ¶3212. The defendants filed papers in opposition to both of plaintiffs' motions, and cross-moved for summary judgment as well, seeking dismissal of the complaint. All motions were heard on March 21st, and after spirited oral argument, the Court reserved decision.

II. POSITIONS OF THE PARTIES

A. Logical Form and Content

Stripped to their essentials, the parties' positions differ over the meaning and application of the Declaration of Restrictions to the garage constructed by the Foxes. Cast in the form of syllogistic deductive argument, their core positions are simple. The proposition forming the plaintiffs' major premise is that residential use in the subdivision allows and indeed requires (1) one and only one garage on a lot and (2) that such garage must be attached to a dwelling on the lot. With a minor premise that the Foxes have constructed a second garage that is detached from

⁹ The second cause of action is based upon the 14th enumerated restriction, which reads:

14. Enforcement shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenant and may in addition to obtaining restraint as to the violation, obtain damages resulting therefrom including the attorneys fees required to bring proceedings to enforce these covenants.

¹⁰ In conjunction with their application for an order to show cause, the plaintiffs also applied for a temporary restraining order directing the defendants to halt further construction. This application was denied, based upon a lack of irreparable injury and the power of the Court to order the garage removed in the event the plaintiffs ultimately prevailed. The construction is now completed.

the dwelling on the lot, they deduce by logical necessity that the Foxes have violated the Declaration of Restrictions from which the major premise derives.

On the other hand, the defendants' major premise is the proposition that residential use in the subdivision (1) requires at least one garage on a lot, (2) allows more than one garage on a lot, and (3) permits any garage to be attached to or detached from the dwelling on a lot. With the same minor premise that the Foxes have constructed a second detached garage on the lot, the Foxes logically deduce that they have not violated the Declaration of Restrictions from which their major premise derives.

As readily gleaned, the logical form of the parties' arguments is impeccable; it is the different content of their major premises that drives opposite conclusions.

B. The Semantic Context

A restrictive covenant is a species of contract. "The construction or interpretation of a contract is the determination of the meaning attached to the words 'written or spoken' that make the contract" (17 Am Jur 2d, Contracts §240). In this process, we can start, as do the parties, with a strictly semantic approach, which, if not dispositive, may serve to narrow and focus the issues.¹¹

The term "garage" or "garages" is used only twice in the restrictions. Paragraph 3 states that the square footage of "garages" shall not be considered in computing the square footage of dwelling houses for the purpose of determining whether the minimum square footage requirements for dwelling houses are met. Paragraph 4 states that construction of a dwelling must include at the same time the construction of a "garage" meeting minimum size requirements. Defendants argue that the use of "garages" in the plural in paragraph 3 contemplates the permissibility of multiple garages on a lot. Further, the term "garage" in paragraph 4 is in the context of a prescriptive rule – there shall be a garage with a dwelling – without restrictive import as to the number of garages

¹¹ "Semantic considerations are those that pertain to the literal, logical, and relatively acontextual meaning of sentences" (Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 Harv L Rev 923, 987 [1996]). Here both sides argue that summary judgment is appropriate given the plain import of the contents of the restrictive covenants at issue.

except the size of the one mandated garage. Indeed, paragraph 1 states that “[e]ach lot shall have only one single family dwelling.” There is no comparable language imposing a similar restriction with respect to garages.

Plaintiffs argue that the use of term “garages” in the plural in paragraph 3 must be put in the context of the entire paragraph, which reads:

3. All dwelling houses erected on the lots shall have a minimum square footage of 2000 square feet. Square feet will not include attics, cellars, basements, crawl spaces, garages, decks, patios, porches, enclosed porches, breezeways or other accessory portions.

Clearly, argue the plaintiffs, the use of the plural throughout paragraph 3 refers to all the dwellings in the subdivision and accessory portions thereof in the aggregate, and does not contemplate multiple garages on any one lot any more than it contemplates multiple attics, cellars, and basements on any one lot. To imply otherwise twists the normal rules of syntax. Paragraph 4 prescribing “a garage” in conjunction with a dwelling means just that - a garage, not multiple garages.

More important, plaintiffs argue, defendants’ argument ignores paragraph 6, which categorically prohibits “all accessory structures” except in-ground swimming pools specially located and screened from view by natural means. They argue that a detached garage is an accessory structure, albeit not one of those specifically enumerated for illustrative, not definitive purposes. They point to the Ontario Town Zoning Ordinance, which specifically mentions garages as accessory structures for code purposes, as providing an instructive, albeit not dispositive, interpretive tool in concluding that a garage is an accessory structure for purposes of the restrictive covenants.

Defendants parry by noting that restrictive covenants are separate and distinct from municipal land use requirements, and one does not bear upon the other. The term “accessory structures” is not self-defining, and as such, its application must be confined to the types of structures specifically defined in paragraph 6 as accessory structures - utility sheds, barns, and above-ground pools. Indeed, one might add, given that the Declaration of Restrictions specifically address garages two times earlier in the restrictions, it is at least odd that they were not mentioned

in paragraph 6 if they were intended as accessory structures. This may indicate, given the garage requirement in paragraph 4, that garages were regarded as preferred uses encouraged in the circumstances of this subdivision notwithstanding that they may be regarded as regulated accessory structures in other contexts. This would dovetail with and compliment the apparent thrust of some of the other restrictions against outside storage of various items, vehicles, and equipment.

C. The Doctrinal Context

As indicated earlier, restrictive covenants are a form of contract. They invoke a body of judicial doctrine melding modern contract concepts with the ancient tenets of real property law. This Court has covered some of this terrain before. In *Sodus Bay Heights Golf Club v Andrews* (2002 WL 237037 [Sup Ct Wayne Co 2002]), this Court stated:

“The law of real property servitudes has been called ‘one of the most complex and archaic bodies of 20th century American law.’ (1 Restatement [Third] of Property, Servitudes 3 [2000]). So much so that one major treatise opines that ‘[t]he judicial reaction to this confusion has often been to state the law so as to achieve the desired result in a particular case.’ (9 Powell on Real Property §69 [1978]). This court has no such intent, nor does it view the law in this area incapable of principled application.”

In *Sodus Bay Heights Golf Club*, as in this case, the landowners resisting enforcement of restrictive covenants invoked the canon of strict construction against the party seeking to enforce them. Said this Court on that issue:

“This case involves a species of servitudes commonly termed restrictive covenants or negative easements. They grant no possessory rights in other than the owner whose land is subject to the restriction, but do restrain the owner from making otherwise lawful use of his property in some manner (*see, Witter v Taggart*, 78 NY2d 234, 237; 11 Warren’s *Weed*, New York Real Property §1.03 [4th ed 2001]); 9 Powell on Real Property §60.01[2] [1978]). It is nearly canonical in this area of law that such covenants ‘are strictly construed against those seeking to enforce them,’ in light of public policy favoring ‘free and unencumbered use of real property’ (*Witter*, *supra* at 237).

The public policy girding the canon of strict construction of restrictive covenants is to promote the alienability of land and by preserving the common law incidents of ownership, such as the prerogatives of use and dominion. Whether the

canon actually does so has been questioned, inasmuch as ‘such covenants act as private zoning schemes, generally tending to maintain or enhance the value and alienability of the property involved’ (9 Powell on Real Property, supra at §60.05). Indeed the recent Restatement of the Law of Property eschews the canon and states that such covenants should be ‘interpreted to give effect to the intentions of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitudes, and to carry out the purpose for which they were created’ (1 Restatement [Third] of Property, Servitudes, supra at §4.1). The Restatement acknowledges that its rule departs from that of strict construction, but opines that any historical justifications should yield to the ‘recognition that servitudes are widely used in modern land development and ordinarily play a valuable role in utilization of land resources’ (Id., comment a).

In New York, the classic exposition of the rule of strict construction is found in *Premium Point Park Association, Inc. v Polar Bear, Inc.* (306 NY2d 507) to the effect that the policy of free use of property requires ‘that, if a restrictive covenant is capable of one more than interpretation, it will be construed against the party who is endeavoring to extend it.’ But to give voice to the waggish observation that for every canon of construction there is an equal and opposite canon (see, e.g. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. [1950], courts occasionally hold that the rule of strict construction must yield “to the general rule of construction that the intent of the parties is the paramount consideration’ (11 Warren’s *Weed*, supra at §4.01; see, e.g. *Jennings Beach Association, Inc. v Kaiser*, 145 AD2d 607 [declining to apply the rule of strict construction, holding instead that the first rule of construction is to ascertain and give effect to the intention of the parties as gleaned from the language employed, surrounding circumstances, and object to be achieved]). Yet the rule enunciated in *Premium Point Park* has survived in the Court of Appeals without sign of abatement or qualification (see, e.g. *Huggins v Castle Estates, Inc.*, 36 NY2d 427). This Court will not therefore reexamine or depart from it. Indeed, a title examiner perforce relies upon the recorded instruments in the chain of title without extrinsic materials to decipher the transactional entrails that might bear upon the parties’ intent. A rule that entitles a title examiner to opine by resolving ambiguities against a restrictive covenant as a matter of law better promotes certainty in real property than one requiring the title examiner to resolve those ambiguities as matters of fact subject to the uncertain results of subsequent litigation.”

Regardless of the normative justifications for the rule of strict construction, the plaintiffs are quite correct that the rule still prevails. In *Ludwig v Chautauqua Shores Improvement Association, Inc.* (5 AD3d 1119 [4th Dept 2004]), the Court repeated with approval the now familiar catechism:

“The law has long favored the free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them. Therefore, a party seeking to enforce a restrictive covenant must prove, by clear and convincing evidence, the scope, as well as the existence, of the restriction. The presence of an ambiguity in the restrictive covenant requires the court to construe the covenant to limit, rather than extend, its restriction. Moreover, where the language used in a restrictive covenant is equally susceptible of two interpretations, the less restrictive interpretation must be adopted (internal quotations, punctuation, and citations omitted).”

(Id. at 1120; *see also Ewing v Watson*, 15 AD3d 340 [2nd Dept 2005], *Kaufman v Fass*, 302 AD2d 497 [2nd Dept], *lv to app den*, 100 NY2d 51 [2003]).

III. DISCUSSION OF THE MERITS

At the outset, the present procedural context determines the function of the court at this point in the litigation. CPLR §3212(b) authorizes a court to grant summary judgment “if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” The material facts of this case are not in dispute. Generally, the question of interpretation of written instruments is one for the court to decide on a motion for summary judgment (*see Mallad Construction Corp. v County Federal Savings and Loan Association*, 32 NY2d 285 [1973]). Neither party has proffered evidence, which, if adduced at trial, would involve material issues of disputed fact relevant to the legal merits of their respective claims. Indeed, both plaintiffs and defendants argue this action is appropriate for resolution by summary judgment. The Court agrees.

Plaintiffs argue that the relevant restrictions are clear and unambiguous, and conclude that the defendants’ new garage must go. Defendants’ argue that the restrictions do not explicitly or implicitly preclude their new garage. At a minimum, defendants argue, their interpretation of the restrictions is just as reasonable as the plaintiffs, and under New York law, as indicated above, where the language used in a restrictive covenant is equally capable of two interpretations, the interpretation that limits the restriction must be adopted.

The Court agrees with both parties in certain respects and disagrees in others. “The 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 in the agreement, but the entire context ...” (*Schuman v Schechter*, 215 AD2d 291, 293 [2d Dept 1926]). The Court sees two challenges to the defendants’ arguments. First, regarding the reference to garages in the plural in paragraph 3, it is clear from the syntax and sentence structure that the plural does not mean or reflect anything other than the fact that there would be more than one garage in the total subdivision, as do the plural terms “dwelling houses,” “attics,” and “cellars” used in the same paragraph. Secondly, and more importantly, the Court disagrees that a garage cannot be an “accessory structure” within the meaning of paragraph 6.

The Court so finds for essentially three reasons. First, the term “accessory structure” does not have to be specifically defined to be capable of intelligent application. Defendants rely upon the recent Fourth Department case of *Ludwig v Chautaugua Shores Improvement Association, Inc.* (5 AD3d 119 [4th Dept 2005]). In that case, the court found ambiguous and hence unenforceable a restrictive covenant governing the height of single family dwellings, which stated that “[o]nly one single family dwelling not more than one and one-half stories in height ... shall be placed on any lot.” The Court so concluded because those seeking to enforce the restriction failed to present adequate proof as to what number of feet constituted a “story in height.” The instant case is distinguishable. The term “accessory structure” standing alone is not so ambiguous as to be incapable of intelligent judicial application, as is the term “story in height.” In *Irish v Besten*, 143 Misc.2d 183 [Sup Ct Columbia Co. 1989] affd 158 AD2d 67 [3rd Dept 1990]), Justice Connor granted summary judgment and enforced a restrictive covenant that allowed a subdivision lot to be improved only by a single family dwelling together with “normal accessory structures.” The court found that a public roadway was not a “normal accessory structure” within the contemplation of the restrictive covenant. There was no issue whether the term was so ambiguous as to be incapable of enforcement without further definition, either within the restrictive covenant itself or through extrinsic evidence.

Secondly, although paragraph 6 of the Declaration of Restrictions does not specifically define what an accessory structure is, the paragraph does give specific instances of accessory structures. The doctrine of *ejusdem generis* comes into play, which is “a universal rule of contract construction that limits the general words in question to things of the same kind, character or

nature as those enumerated before [or, in this case, after] them” (*W.K. Ewing Co., Inc. v New York State Retirement System*, 23 Misc 812, 815 [Sup Ct Albany Co 1960] *rev'd on other grounds*, 14 AD2d 113 [3rd Dept 1961] *aff'd*, 11 NY2d 749 [1962]). And it is a rule that has been long been applied in the interpretation of restrictive covenants (*see e.g. Kress v Westside Tennis Club*, 57 Misc2d 772 [Sup Ct Queens Co 1968]; *Fishman v Town of Islip*, 20 Misc2d 180 [Sup Ct Suffolk Co 1959], *aff'd* 10 AD2d 984 [2nd Dept], *app and rearg den*, 11 AD2d 949 [2nd Dept 1960]). A garage shares the characteristics of utility sheds and barns as relevant to accessory residential use.

Secondly, the term “accessory structure” is commonly used in land use matters and frequently appears in local legislation and judicial decisions. As defendants point out, it is well settled that “[t]he use that may be made of land under a zoning ordinance and the use of land under an easement or restrictive covenant are, as a general rule, separate and distinct matters, the ordinance being a legislative enactment and the easement or covenant a matter of private agreement” (*Matter of Friends of the Shawangunks v Knowlton*, 64 NY2d 387, 392 [1985]). Thus, the definition or usage of the term “accessory structure” that may be found in a zoning law or ordinance cannot be dispositive of the definition or usage of that same term in private restrictive covenants, unless the covenants expressly adopt such definition or usage. Yet, it can be a powerful interpretive tool if the legislative definition reflects a general common understanding or consensus of what the term means. The Town of Ontario Zoning Ordinance, the locality in which the Creekwood Estates subdivision exists, states that a garage is an accessory structure. This accords with the general practice throughout the country where “[a] garage is regarded as an accessory use” for zoning purposes” (83 Am Jur2d, Zoning and Planning §170).¹² Further, the Court takes judicial notice of the zoning laws or ordinances currently enacted by towns and villages in the County of Wayne with regard to the definition of “accessory use,” “accessory building,” or

¹² Plaintiffs cited *Pitz v Town of Amherst Zoning Board of Appeals* (198 AD2d 832 [4th Dept 1993]) in the context of their initial application for a temporary restraining order for the proposition that “a detached garage constitutes an ‘accessory structure’” (Plaintiffs’ Memorandum of Law, February 3, 2006, at 9). This is unremarkable, given that the zoning law in that case specifically enumerated detached garages as accessory structures. What is very interesting, reviewing the Record on Appeal, is the opinion of Justice Gorski at Supreme Court. Coincidentally, the garage at issue in that case is exactly the same size as that here - 32 feet by 36 feet. Justice Gorski rejected the argument that a garage of that large size was not “accessory” to the home.

“accessory structure.” In all cases where instances of accessory uses, buildings, or structures are enumerated, a garage is expressly included. Most of these laws and ordinances, however, do not enumerate instances of accessory use, building, or structure. Rather, they rely upon essentially the same general definition of an accessory use or structure as one subordinate to the principal use of a building on the same lot and servicing a purpose customarily incidental to the principal use or structure. This use of the term “accessory” accords with the common dictionary of “accessory” as “aiding the principal design or assisting subordinately” (Funk & Wagnalls College Standard Dictionary [1946]). There is no evidence before the Court indicating that the term “accessory structure” as used in paragraph 6 of the Declaration of Restrictions was intended to have a more limited scope than that usually accorded the term when used in other contexts and generally understood. Although paragraph 6 does not mention garage among the instances enumerated of accessory structures, the Court does not read this as negatively implying that garages were intended to be excluded. Thus, the Court concludes that, except as the Declaration of Restrictions may otherwise provide, a garage is an accessory structure for purposes of paragraph 6 of that document.

That said, it is apparent to the Court that not every garage in the Creekwood Estates subdivision must be classified as a prohibited accessory structure. The term “accessory” describes a relation between two structures, one a principal use and the other a subordinate use. The principal uses allowed in the subdivision are set out in paragraphs 1 and 4 as one single family dwelling and a garage. The one garage required to meet the requirement of paragraph 4 can reasonably be interpreted as a principal use conjoined with the principal dwelling use.¹³ The defendants are correct that there is no requirement that the mandated garage be attached or detached, just that there is a garage of the stipulated square footage. Plaintiffs implicitly argue that

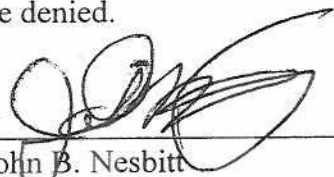
¹³ Garages other than those required under paragraph 6 are prohibited accessory structures. This negates the absurd and unintended result that a property owner could sprinkle his or her lot with several garages ostensibly to service his or her one dwelling, which would truly be the “tail wagging the dog.”

the term “accessory structure” denotes any garage separate from the dwelling.¹⁴ Some zoning ordinances say just that (see, e.g. Sodus Town Code §135-2 [defining “accessory building as “[a] building **detached from** and subordinate to a main building on the same lot and used for purposes customarily incidental to those of the main building]); Palmyra Village Code §29-9 [defining “accessory structure” as “[a] **detached** subordinate structure, the use of which is incidental to the main structure or the use of the land”][emphasis added]. The definition of accessory structure in the Ontario Town Ordinance relied upon by the plaintiffs does not have comparable language, nor do most others.¹⁵ The Court declines to import such a requirement into the Declaration of Restrictions.

IV. CONCLUSION

The Court finds and concludes as a matter of law that the defendants’ property in the Creekwood Estates as currently improved and configured violates the Declaration of Restrictions to which it is subject. Summary judgment is granted to the plaintiffs to that extent, and an injunction issued directing the defendants to bring their property into compliance with the Declarations of Restrictions consistent with this decision. This requires that the defendants (1) remove the detached garage, or (2) eliminate the attached garage, or (3) attach the two garages to make a single garage. All other motions before the Court are denied.

Dated: May 26, 2006
Lyons, New York



John B. Nesbitt
Acting Supreme Court Justice

¹⁴ Thus, all detached garages are prohibited accessory structures, requiring the one mandated garage to be attached to the dwelling so as not be a separate structure. See generally Davis, *Garage as Part of House with which it is Physically Connected within Zoning Regulations or Restrictive Covenants*, 7 ALR2d 593 at §1 (“[T]he consensus of opinion seems to be that were the garage is so attached to the dwelling as to be an integral part thereof, presenting the appearance of and being, in fact, architecturally and otherwise, part of it, the structure is not an ‘outbuilding’ or ‘accessory building’ but is to be considered as a part of the dwelling house.”)

¹⁵ Ontario Town Code §150-5 provides the following definition:
ACCESSORY BUILDING or STRUCTURE - A subordinate building or structure, the use of which is customarily incidental to that of the principal building and which is located on the same lot with the principal building. “Accessory building” includes a garage, swimming pool, stable, toolhouse, children’s playhouse and similar uses.