STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SCHUYLER MEADOWS COUNTRY CLUB, INC.,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 5620-09
RJI NO. 01-09-97646

MARGARET F. HOLBRITTER,
ELEANOR H. NASNER and JANE B. HOLBRITTER,

Defendants.

Supreme Court Albany County All Purpose Term, March 31, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Plaintiff commenced this action, pursuant to RPAPL §2001, to enforce a restrictive covenant encumbering Defendants' real property. Issue was joined by Defendants, discovery is complete and a trial date certain is set. Plaintiff now moves for summary judgment, which is opposed by Defendants[1]. Defendants likewise move for summary judgment, and Plaintiff

[1] Defendants did not oppose, however, that portion of Plaintiff's motion for summary judgment of their third affirmative defense. As Plaintiff demonstrated its prima facie entitlement to dismissal of such affirmative defense, which was effectively conceded by Defendants failure to oppose it, this portion of Plaintiff's motion is granted and Defendants' third affirmative defense is dismissed.

opposes their motion. Because Plaintiff failed to demonstrate that no issues of fact remain and Defendants did not demonstrate their entitlement to judgment as a matter of law, both motions are denied.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (Smalls v. AJI Industries, Inc., 10 NY3d 733 [2008] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). All evidence must be viewed in the light most favorable to the opponent of the motion. (Amidon v. Yankee Trails, Inc., 17 A.D.3d 835 [3d Dept. 2005]; Crosland v. New York City Transit Auth., 68 NY2d 165 [1986]).

"Restrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy." (Rugby Road Corp. v. Doane Builders, Inc., 61 AD3d 1157 [3d Dept. 2009], quoting Chambers v. Old Stone Hill Rd. Assoc., 1 NY3d 424 [2004]).

On this record, Plaintiff duly demonstrated the restrictive covenant's applicability to Defendants' property, and Defendants failure to abide by such restriction. Plaintiff submits a copy of Defendants' deed, which was granted "subject to... restrictions of record"; and the applicable "...Declaration of Restrictions..." (hereinafter "Restrictive Covenant"). The

Restrictive Covenant term at issue herein states: "[n]o fences shall be erected until plans for such fences including height, location and type have been submitted to and approved by the ACC [Architectural Control Committee]." Such restriction is not ambiguous, clearly delineating a property owner's obligation prior to erecting a fence. Moreover, Plaintiff demonstrated that Defendants failed to comply with the above restriction, by annexing a copy of defendant Margaret F. Holbritter's (hereinafter "Ms. Holbritter") deposition[2]. Ms. Holbritter unequivocally stated that neither she, nor her co-defendants, applied for or received approval from the ACC for the fence they installed. Additionally, considering this record as a whole, it is uncontested that the restriction at issue is reasonable and not contrary to public policy. As such, Plaintiff demonstrated its prima facie entitlement to judgment as a matter of law.

Plaintiff failed to demonstrate, however, that Defendants' affirmative defenses are unavailing. On this record, Defendants construe their first and second affirmative defenses as sounding in laches. Plaintiff, opposing such construction, claims that neither of these affirmative defenses set forth a laches defense, that Defendants are belatedly raising this defense and waived it by failing to plead it. Despite Defendants' failure to use the term "laches" in their first and second affirmative defenses, construing their answer liberally as required by CPLR §3026, Defendants pled a laches defense. (Brodeur v. Hayes, 305 AD2d 754 [3d Dept. 2003]).

To plead the defense of laches the Defendants were required to allege: "(1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in

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[2]While the deposition was not signed and was not exchanged in accord with CPLR §3116(a), it was certified. As such it will be considered herein because on "a motion for summary judgment, just as an affidavit may be used, an unsigned certified deposition may also be used." (In re Estate of Ciraolo, 10 Misc3d 1070(A) [Sur. Ct. Kings Co. 2005]). Moreover, Defendants did not object to its consideration and relied upon it to support their motion.

asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant." (Bailey v. Chernoff, 45 AD3d 1113, 1115 [3d Dept. 2007] quoting Kuhn v. Town of Johnstown, 248 AD2d 828 [3d Dept. 1998] [internal quotation marks omitted]). Here, Defendants' affirmative defenses set forth the required elements. Defendants alleged their own offending conduct, i.e. installation of the fence. They allege delay, albeit inartfully, by claiming that Plaintiff knew and acquiesced in their fence construction. Defendants further alleged their lack of knowledge that Plaintiff would assert their claim for relief; by claiming that Plaintiff's president stated there was no ACC to apply to and that Plaintiff voiced no objection to the fence construction. Lastly, the answer alleges Defendants' injury, by asserting that the fence has been constructed based upon Plaintiff's representatives' actions and statements. Accordingly, liberally construing the answer and viewing it in a light most favorable to Defendants, Plaintiff failed to demonstrate that Defendants waived their laches defense.

Nor has Plaintiff demonstrated its entitlement to judgment as a matter of law dismissing Defendants' laches defense. Plaintiff supports its motion with the deposition testimony of Edward O'Connor, its president at the time of Defendants' fence construction.[3] The deposition fails to demonstrate that no delay occurred, that Defendants suffered no injury by the delay nor that Defendants knew that Plaintiff would assert their claim for relief. Likewise, Plaintiff's current secretary's affidavit failed to allege that he had any first hand knowledge of the fence

[3] Again, this deposition was neither signed nor exchanged in accord with CPLR §3116(a), but it was certified. Defendants again did not object to its consideration and relied upon it to support their motion. As such, for the reason set forth above, it is considered herein.

construction events. Nor did he set forth the basis for his claim that "Plaintiff promptly notified Defendants of this substantial violation", failing to set forth any time frame applicable to his "promptly" allegation. Such unexplained and conclusory statement is of no probative value. Nor did any of Plaintiff's attachments demonstrate, as a matter of law, its entitlement to judgment dismissing Defendants' laches defense.

Turning to Defendants' motion for summary judgment, they failed to set forth sufficient proof demonstrating their entitlement to judgment as a matter of law. Defendants submit no affidavit of facts supporting their motion, relying instead on three attachments and the exhibits attached to Plaintiff's motion. Considering the Defendants' attachments first, neither the Plaintiff's Notice to Admit, which is unanswered, nor Defendants' attorney's letter are of any probative value. They are neither sworn, nor otherwise admissible. Likewise, Defendants laid no foundation for its proffered "Minutes of Architectural Control Committee", it is not signed or sworn and is submitted without explanation as to its admissibility. As such, Defendants' exhibits fail to demonstrate their entitlement to judgment as a matter of law.

Nor did Defendants demonstrate their entitlement to judgment by reliance on Plaintiff's attachments.[4] To support their motion for summary judgment of their laches claim, Defendants rely heavily on Ms. Holbritter's deposition testimony. Such testimony, however, fails to demonstrate, as a matter of law, Plaintiff's delay. Rather, she speculates about the delay by

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[4] Procedurally, Defendants' motion must be denied for failure to attach a copy of the pleadings to their motion. (CPLR §3212[b], Welton v. Drobnicki, 298 AD2d 757 [3d Dept. 2002], Bonded Concrete, Inc. v. Town of Saugerties, 3 AD3d 729 [3d Dept. 2004], Senor v. State, 23 AD3d 851 [3d Dept. 2005]). Although Defendants relied on Plaintiff's record to support their motion, Defendants did not specifically incorporate such record in their motion, did not demonstrate Plaintiff's consent to such incorporation or otherwise offer an excuse from compliance with CPLR §3212(b).

claiming that Plaintiff received notice of Defendants' fence by operation of its members participation in one of Plaintiff's golf tournaments. Such unsubstantiated speculation fails to demonstrate notice and delay as a matter of law. Nor do Ms. Holbritter's statements about her conversations with Plaintiff's president demonstrate Plaintiff's delay. Even accepting Ms. Holbritter's self serving testimony about her conversations with Plaintiff's president, she did not specifically notify Plaintiff that she was constructing a fence. Rather, her statements establish that she was inquiring about the ACC. Moreover, while Ms. Holbritter admitted that Plaintiff's president referred her to the Plaintiff's attorney for clarification of the ACC issue, she admits that she failed to contact him prior to fence construction. As such, Defendants failed to demonstrate, as a matter of law, the elements of "delay" or "lack of knowledge" required for a laches finding.

Defendants also failed to demonstrate their entitlement to judgment as a matter of law on their claim that the Restrictive Covenant is "ambiguous." As set forth above, the Restrictive Covenant term at issue is not ambiguous. Defendants "ambiguous" claim focuses not on the term at issue, but rather on the term providing for ACC membership. Such focus, however, is misplaced without sufficient proof that the ACC was non-existent. For, as long as the ACC exists, the Restrictive Covenant term at issue unambiguously requires Defendants to obtain its approval prior to fence construction. In the event that the ACC did not exist, however, the Defendants' ambiguity argument may be pursued. On this record however, Defendants failed to demonstrate the nonexistence of the ACC. Ms. Holbritter's testimony that the Plaintiff's president twice told her, during informal social conversations at the Plaintiff's "Grill Room", that the ACC did not exist does not constitute sufficient evidence to demonstrate its nonexistence. Especially in light of the Plaintiff's president's referral of Ms. Holbritter to Plaintiff's attorney,

and Ms. Holbritter's failure to follow up with him. Likewise, Ms. Holbritter failed to demonstrate that the president of the East Ridge Home Owner's Association's purported denial of the existence of the ACC was of any legal consequence. Especially in light of the Restrictive Covenant's ACC membership term, which provides Plaintiff and "lot owners"[5] the authority to appoint ACC members, not the Home Owner's Association.

Accordingly, both Plaintiff's and Defendants' motions are denied, except as set forth in footnote number one above.

This Decision and Order is being returned to the attorneys for the Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: April 12, 2010
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated March 12, 2010, Affidavit of John Favreau, dated March 5, 2010, Affirmation of Daniel Sleasman, dated March 12, 2010, with attached Exhibits 1-8.
2. Notice of Cross Motion, dated March 24, 2010, Affidavit of Kevin Luibrand, dated March 24 2010, with attached Exhibits A-C.

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[5] While qualifications apply to "lot owners", such qualifications are not relevant to resolution of this issue.