

**Incorporated VII. of Brightwaters v Chiappetta**

2015 NY Slip Op 30104(U)

January 22, 2015

Supreme Court, Suffolk County

Docket Number: 11-35517

Judge: Thomas F. Whelan

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**ORDERED** that the cross motion by defendants Carmine Chiappetta and Debra Chiappetta for an order pursuant to RPAPL § 1951 extinguishing the restrictive covenant dated February 21, 1991 allowing the Incorporated Village of Brightwaters the opportunity to inspect their home on a yearly basis is denied.

Plaintiff Incorporated Village of Brightwaters commenced this action against defendants Carmine Chiappetta and Debra Chiappetta to enforce a restrictive covenant against the residential property, known as 480 Pines Acres Boulevard, which is owned by defendants and located in the Village. The restrictive covenant, which provides the Village, on a yearly basis, the opportunity to inspect defendants' home to verify that it only is being used as a single family home, was granted by defendants and filed on February 21, 1991, when defendants sought to add a rear and second-story addition to the subject premises. Defendants instituted counterclaims to extinguish the restrictive covenant and alleging that the restrictive covenant violated their constitutional rights under the First and Fourth Amendments.

The Village now moves for summary judgment on the complaint. The Village asserts that defendants agreed to the placement of a restrictive covenant on their premises as consideration for a building permit allowing them to make alterations and additions to their home, and that, now that the project is complete, defendants are breaching such covenant by refusing to allow access to their home for the annual inspection. In support of the motion, the Village submits copies of the pleadings, the restrictive covenant at issue, and a copy of the deed to the subject premises.

Defendants move for summary judgment in their favor on the basis that the Village failed to obtain authorization for the institution of the subject litigation as required by New York State Village Law § 1-102 and, therefore, lacks the capacity to maintain the action. In addition, defendants seek reasonable attorney fees and costs pursuant to New York State Public Officer's Law § 1079(2) due to the Village's failure to comply with the Open Meetings Law. The Village opposes the motion on the grounds that defendants failed to commence either a declaratory judgment action to declare the vote to institute the instant action null and void, or an Article 78 proceeding as required by § 107(1) of the Public Officers Law.

Defendants also cross-move for summary judgment on the basis that the restrictive covenant placed on their home, which provides for an annual inspection of their home by the Village, does not serve an actual and substantial benefit to the Village, and it violates their constitutional rights under the First and Fourth Amendments of the United States Constitution.

In general, the equitable remedy of specific performance is available in the court's discretion when the remedy at law is inadequate (*see Burke v Bowen*, 40 NY2d 264, 386 NYS2d 654 [1976]). "Restrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy" (*Chambers v Old Stone Hill Road Assocs.*, 1 NY3d 424, 774 NYS2d 866 [2004]; *see Matter of Perrin v Bayville Vil. Board*, 70 AD3d 835, 894 NYS2d 131 [2d Dept 2010]; *Forest Hills Gardens Corp. v 150 Greenway Terrace, LLC*, 37 AD3d 759, 830 NYS2d 581 [2d Dept 2007]). "A party seeking to enforce a restriction on the use of land must prove, by clear and convincing evidence, the scope, as well as the existence, of the restriction" (*Greek Peak, Inc. v Grodner*, 75 NY2d 981, 982, 556 NYS2d 509 [1990]).

The restriction at issue here provides, in pertinent part, that “Carmine Chiappetta and Debra Chiappetta, his wife, are fee simple owners by deed dated October 19, 1990 of the improved parcel of land [located at 480 Pines Acres Boulevard, Village of Brightwaters, Town of Islip, Suffolk County, State of New York, and that they covenant and agree that the improved parcel has only a one family house; that the aforementioned parcel is subject to yearly inspections by designated officials of the Village of Brightwaters and/or Town of Islip.” Here, the intention of the restrictive covenant placed upon defendants’ premises, which defendants entered into in exchange for a permit to construct a second-story addition to their home by the Village, was to preserve the residential character of the neighborhood by limiting the area to single family residential use (see **9394, LLC v Farris**, 10 AD3d 708, 782 NYS2d 281 [2d Dept 2004]). Such limitation as that placed upon defendants’ home in the subject restrictive covenant is reasonable and does not offend public policy (see **Broadway-Flushing Homeowners’ Assn, Inc. v Dilluvio**, 97 AD3d 614, 948 NYS2d 386 [2d Dept 2012], *lv denied* 21 NY3d 856, 969 NYS2d 442 [2013]). Further, the record demonstrates that defendants had clear knowledge of the scope of the restrictive covenant placed upon their residence and that they chose to encumber their property under a covenant, which granted access to the Village to perform a yearly inspection of their home to ensure that it remained a single family home, in order to continue with the construction of the additional story to the subject premises. Thus, the Village has clearly established its entitlement to summary judgment as a matter of law seeking specific performance by submitting evidence demonstrating that such covenant is reasonable, that it does not offend public policy, and that the equities are balanced in its favor (see **Ehrlich v Incorporated Vil. of Sea Cliff**, 95 AD3d 1068, 945 NYS2d 98 [2d Dept 2012]).

In opposition, defendants have failed to raise a triable issue of fact. Contrary to defendants’ argument that §128-6 of the Code of the Incorporated Village of Brightwaters accomplishes the same purpose as that of the covenant at issue, the evidence submitted failed to establish that the covenant is unenforceable or that it does not benefit the Village’s preservation of single family residential homes in the area, as well as, ensure that any additional construction commenced by defendants complies with such regulations (see **Broadway-Flushing Homeowners’ Assn, Inc. v Dilluvio, supra**; **Neri’s Land Improvement, LLC v J. J. Cassone Bakery, Inc.**, 65 AD3d 1312, 886 NYS2d 202 [2d Dept 2009]; **Rautenstrauch v Bakhru**, 64 AD3d 554, 884 NYS2d 77 [2d Dept 2009]). Moreover, the record clearly demonstrates that defendants were the individuals who encumbered their own premises, that they were advised by counsel prior to placing such encumbrance on their premises, and that, prior to 2011, defendants complied with the restrictive covenant requiring an annual inspection of their home. In addition, the evidentiary material submitted with defendants’ opposition has not shown that their compliance with the restrictive covenant would cause them economic harm, inconvenience them, or make them incapable of putting their property to use if the restrictive covenant was enforced, or that the purpose of the covenant was incapable of being enforced due to changed conditions (see RPAPL § 1951[2]; **Orange & Rockland Utils. v Philwold Estates**, 52 NY2d 253, 437 NYS2d 291 [1981]; **Nature Conservancy v Congel**, 296 AD2d 840, 744 NYS2d 281 [4th Dept]; *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]; **Hoffman v Lang**, 251 AD2d 292, 674 NYS2d 385 [2d Dept 1998], *lv denied* 92 NY2d 819, 685 NYS2d 421 [1999]). Accordingly, the Village’s motion for summary judgment on its claim for specific performance of the restrictive covenant at issue is granted.

Defendants’ motion to dismiss the complaint on the grounds that the Village failed to obtain authorization, in violation of the Open Meetings Law and New York State Village Law § 1-102, to institute

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the instant action is denied. Public Officers Law § 103(a), provides that “every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat.” In addition, Public Officers Law § 105(1)(d) states, in pertinent part, that “[u]pon a majority of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no formal vote shall be taken to appropriate public moneys...discussions regarding proposed, pending or current litigation” (see *Perez v City Univ. of New York*, 5 NY3d 522, 806 NYS2d 460 [2005]; *Roberts v Town Board of Camel*, 207 AD2d 404, 615 NYS2d 725 [2d Dept 1994]). Thus, the Open Meetings Law prohibits public bodies from conducting business in executive session outside the view of the public (see Public Officers Law § 103[a]). However, an exception exists for “discussions regarding proposed, pending or current litigation” (Public Officers Law § 105[1][d]; see *Matter of Lancaster v Incorp. Vil. of Freeport*, 22 NY3d 30, 978 NYS2d 101 [2013]).

One of the enumerated purposes for conducting an executive session is the “discussion of proposed, pending or current litigation,” and in the case at bar, an executive session was called to discuss a litigation matter involving the authorization of filing suit in a zoning matter in the Village. Prior to going into executive session, a motion was made by one of the Trustees and seconded by another, stating the purpose of entering into the executive session. Following the discussion of the litigation matter, the executive session ended and the public meeting was called back into order, at which time, the attorney for the Village stated on the record the general nature of the matters discussed in the executive session. As no members of the public attended the meeting, although notices had been posted throughout the Village regarding said meeting, and the topics to be discussed, the meeting, after a motion was made and seconded, was properly adjourned.

Defendants failed to establish that the Village Board’s failure, if any, to comply precisely with the requirements of the Open Meetings Law, Public Law § 105(1)(d), was intentional and, therefore, warrants invalidation of the Board’s action (see *Matter of Lancaster v Incorp. Vil. of Freeport*, *supra*; *Matter of Edwards v Incorp. Vil. of Hempstead*, \_\_ AD3d \_\_, 2014 NY Slip Op 07505 [2d Dept 2014]; *Matter of Imburgia v Procopio*, 98 AD3d 617, 949 NYS2d 727 [2d Dept 2012]). The purpose of the Open Meetings Law is to “open the decision making process of elected officials to the public while at the same time protecting the ability of the government to carry out its responsibilities” (*Gordon v Village of Monticello*, 87 NY2d 124, 126, 637 NYS2d 961 [1995]; see Public Officers Law § 100 et. seq.). Moreover, the provisions of the law are to be liberally construed in accordance the statute’s purpose (see *Orange County Publications v Council of City of Newburgh*, 45 NY2d 947, 411 NYS2d 564 [1978]). The record demonstrates that despite notices being placed around the Village indicating the date, time, place and reason for the meeting, the public did not attend the subject meeting; that the Open Meeting Law quorum requirement was met; that prior to going into an executive session a motion was made; and that following the executive session, there was a return to a public meeting and the reason for the executive session was stated on the record. Although the trustee making the motion may not have identified with particularity the reason for convening the executive session, he did state that the session was being convened to discuss a litigation matter regarding a zoning violation in the Village. As a result, it cannot be stated that the Village Board intentionally and willfully violated the mandate of the Open Meetings Law (see *Adesso v Sharpe*, 44NY2d 925, 408 NYS2d 8 [1978]; cf. *Daily Gazette Co. v Town Board, Town of Cobleskill*, 11 Misc. 2d 303, 444 NYS2d 44 [Sup. Ct. Scholharie County 1981]). Thus, defendants failed to demonstrate good

cause to vitiate the Village Board's decision to institute the subject action (*see Matter of Wilson v Board of Educ. Harborfields Cent. School Dist.*, 65 AD3d 1158, 885 NYS2d 207 [2d Dept 2009]; *Burgher v Purcell*, 87AD2d 888, 449 NYS2d 527 [2d Dept 1982]).

In addition, not every violation of the Open Meetings Law automatically triggers its enforcement sanctions (*see Gordon v Village of Monticello, supra*), and where a defendant has made a good-faith, reasonable effort to comply with the statute, or whose violations are wholly unintentional, attorneys' fees may not be awarded (*see Clark v Lyon*, 147 AD2d 838, 537 NYS2d 934 [3d Dept 1989]). Here, defendants have not provided any proof demonstrating that the Village Board's actions were done so as to circumvent the Open Meetings Law quorum requirement or that there has been prejudice to them due to the Village Board's conduct, therefore, the Court cannot sanction an award of attorneys' fees (*see Matter of Imburgia v Procopio, supra; compare Gordon v Village of Monticello, supra*). Accordingly, defendants' motion to dismiss the complaint is denied.

Finally, as to defendants' cross motion, CPLR 3212(a) provides that "any party may move for summary judgment in any action, after issue has been joined, provided however, that the court may set a date after which no motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of the court on good cause shown" (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2005]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *Lyebyedyev v Hoffman*, 84 AD3d 751, 921 NYS2d 866 [2d Dept 2011]; *State Farm Fire & Cas. v Parking Sys. Valet Serv.*, 48 AD3d 550, 849 NYS2d 891 [2d Dept 2008]). Moreover, the Court of Appeals has determined that "'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, nonprejudicial filings, however tardy . . . No excuse at all, or a perfunctory excuse, cannot be 'good cause.'" (*Brill v City of New York, supra* at 652; *see Gonzalez v Zam Apt. Corp.*, 11 AD3d 657, 782 NYS2d 922 [2d Dept 2004]).

Here, defendants' cross motion for summary judgment is untimely, having been made more than 120 days after the filing of the note of issue and without a showing of good cause for the delay (*see Brill v City of New York, supra; Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]; *Thompson v Leben Home for Adults*, 17 AD3d 347, 792 NYS2d 597 [2d Dept 2005]; *Colon v City of New York*, 15 AD3d 173, 788 NYS2d 606 [1st Dept 2005]). Although, a court may consider an untimely cross motion for summary judgment where a timely motion for summary judgment was made on nearly identical grounds (*see Alexander v Gordon*, 95 AD3d 1245, 945 NYS2d 397 [2d Dept 2012]; *Altschuler v Gramatan Mgt., Inc.*, 27AD3d 304, 811 NYS2d 379 [1st Dept 2006]; *Osario v BRF Constr. Corp.*, 23 AD3d 202, 803 NYS2d 525 [1st Dept 2005]), defendant's cross motion does not seek summary judgment on the same grounds as asserted by the Village's motion for summary judgment, or even its own previously submitted motion for summary judgment (*see Bicity Brokerage Corp. v Burlington Ins. Co.*, 101 AD3d 778, 957 NYS2d 161 [2d Dept 2012]; *compare Das v Sun Wah Rest.*, 99 AD3d 752, 952 NYS2d 232 [2d Dept 2012]; *Grande v Peteroy*, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]).

In addition, absent a showing of newly discovered evidence or other sufficient cause, successive motions for summary judgment should not be entertained (*see Yakima Tingling v C.N.H.R. Inc.*, 120 AD3d

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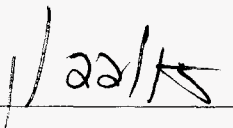
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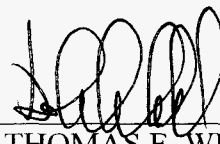
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570, 992 NYS2d 43 [2d Dept 2014]; *Vinar v Litman*, 110 AD3d 867, 972 NYS2d 704 [2d Dept 2013]; *Sutter v Wakefern Food Corp.*, 69 AD3d 844, 892 NYS2d 764 [2d Dept 2010] ). Prior to the submission of this cross motion, defendants submitted a motion for summary judgment seeking, inter alia, the dismissal of the instant matter on the ground that the Village failed to obtain authorization to institute the subject action. Despite defendants labeling this motion as a cross motion for summary judgment and seeking relief on a different ground than that sought in their prior motion for summary judgment, it is nothing more than an attempt to submit a second motion for summary judgment in violation of the proscription against successive motions for summary judgment (see *Coccia v Liotti*, 101 AD3d 664, 956 NYS2d 63 [2d Dept 2012]; cf. *Pittman v S.P. Lenox Realty, LLC*, 119 AD3d 846, 989 NYS2d 359 [2d Dept 2014]). Indeed, “successive motions for summary judgment should not be made based upon facts or arguments which could have been submitted on the original motion for summary judgment” (*Capuano v Platzner Intl. Group*, 5 AD3d 620, 621, 774 NYS2d 740 [2d Dept 2004]).

In any event, even if the Court were to consider the cross motion, defendants failed to demonstrate that in balancing the equities, the restrictive covenant is of no actual and substantial benefit, or that the purpose of the restriction was incapable of being accomplished due to changed conditions, and, therefore, should be extinguished (see RPAPL§ 1951[2]; *Neri’s Land Improvement, LLC v J. J. Cassone Bakery, Inc.*, *supra*; *New York City of Economic Dev. Corp. v T.C. Foods Import & Export Co., Inc.*, *supra*; *Deak v Heathcote Assn.*, 191 AD2d 671, 595 NYS2d 556 [2d Dept 1993]). The party claiming that a restriction is unenforceable bears the burden of proving it (see *Chambers v Old Stone Hill Road Assocs.*, *supra* at 434; *New York City of Economic Dev. Corp. v T.C. Foods Import & Export Co., Inc.*, 19 AD3d 568, 797 NYS2d 549 [2d Dept 2005]). Here, the evidence showed that the purpose of the restriction imposed upon defendants’ residence was to ensure that the home would remain as a single family home, even after the additions that were being made to the subject premises were complete, in accordance with §128-6 of the Code of the Incorporated Village of Brightwaters. Moreover, the evidence failed to demonstrate that the purpose of the restriction contained in the covenant had already been accomplished or that by reason of changed conditions or other cause, its purpose was not capable of accomplishment (see *Deak v Heathcote Assn.*, *supra*; *Orange & Rockland Utilities v Philwold Estates*, 52 NY2d 253, 437 NYS2d 291 [1981]). Accordingly, defendants’ cross motion to extinguish the restrictive covenant on the subject premises is denied.

Dated: \_\_\_\_\_

1/22/15  




THOMAS F. WHELAN, J.S.C.