

<b>Shehan v Commisso</b>
2018 NY Slip Op 33333(U)
December 19, 2018
Supreme Court, Suffolk County
Docket Number: 16461/2015
Judge: Sanford N. Berland
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

INDEX No. 16461/2015  
CAL. No. \_\_\_\_\_

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

**PRESENT:**

Hon. SANFORD NEIL BERLAND

Acting Justice of the Supreme Court

MOTION DATE: June 29, 2016  
ADJ. DATE: January 23, 2018  
Mot. Seq. # 001 - MD  
Mot. Seq. # 002 - MG; CASEDISP

-----X  
MARK T. SHEHAN,

Plaintiff,

- against -

LOUIS COMMISSO and ANTHONY J.  
CASSANO, JR.,

Defendant.  
-----X

Attorney for Plaintiff  
Richard T. Haefeli, Esq.  
48F Main Street, POB 1112  
Westhampton Beach, NY 11978

Attorney for Defendant  
Welby, Brady & Greenblatt, LLP  
11 Martine Ave, 15<sup>th</sup> Floor  
White Plains, NY 10606

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated April 7, 2016, and supporting papers (including Memorandum of Law dated April 7, 2016); (2) Notice of Cross Motion by the defendants, dated June 21, 2016, and supporting papers (including Memorandum of Law dated June 21, 2016); (3) Affirmations in Opposition by the plaintiff, dated July 11, 2016 and July 13, 2016, and supporting papers (including Memorandum of Law dated July 13, 2016; and (4) Reply Affirmation by the defendants, dated August 3, 2016, and supporting papers (including Memorandum of Law dated August 3, 2016; and

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers,  
it is

**ORDERED** that the plaintiff's motion for summary judgment is denied; and it is further

**ORDERED** that the cross-motion by defendants for summary judgment is granted and the complaint is dismissed.

This is an action to enforce covenants contained in a 1929 deed restricting the ability to subdivide defendants' lot. Plaintiff and defendants are owners of adjoining parcels of land in the subdivision known

Sheehan v. Commisso, et al.

IN: 16461/2015

Page 2

as Lilac Farm in the Village of Westhampton Beach in Southampton, New York (the "Subdivision"). Plaintiff owns 24 Lilac Road, designated as Lot 5 on the Subdivision Map of Lilac Farm recorded in the Suffolk County Clerk's Office on August 31, 1928 (the "Map") and as 0905-05-01-022 on the Suffolk County Tax Map ("Lot 5"). Defendants own 30 Lilac Road, designated as Lot 6 on the Map and as 0905-05-01-021 on the Suffolk County Tax Map ("Lot 6"). The Map reveals that the Subdivision originally consisted of 28 lots that were transferred by deeds from the Executors and Trustees of the Estate of Ralph L. Cutter, the original owner of the land, as grantors, to various individuals and entities as grantees. Lot 5 and Lot 6 were each first transferred by the grantors by deeds dated September 20, 1929 and June 4, 1929, respectively, to different grantees, for use as residential property. Both 1929 deeds contain identical covenants, which plaintiff now seeks to enforce. The papers before the court do not establish the complete chain of title for Lot 6, but include only the deed, dated February 18, 2015, by which Lot 6 was transferred from the seller to the defendants herein, with an attached Schedule A that contains the description of Lot 6. However, although Schedule A references the Map and the metes and bounds of Lot 6, it does not contain a reference to the covenant set forth in the 1929 deed.

It is not disputed that the Subdivision now contains approximately 40 lots, as most of the lots, including lots on Lilac Farm Road, have been subdivided since the Map was filed. However, at the time plaintiff purchased Lot 5 in May 1987 and defendant purchased Lot 6 in February 2015, neither lot had been subdivided. In March 2015, defendants applied to the Planning Board of the Village of Westhampton Beach (the "Village Planning Board") to subdivide Lot 6 into two lots and, as the second proposed lot was a flag lot for which the Village Code lacked any provision, for an area variance under the Village Code.

In response to defendants' application, on September 21, 2015, plaintiff commenced the instant action, seeking a declaratory judgment that he has the right to enforce the covenants contained in the 1929 deed, which allegedly restrict defendants' ability to subdivide Lot 6, and for a permanent injunction restraining and enjoining defendants, their heirs, agents, successors and assigns from subdividing or proceeding with any application to subdivide Lot 6. In his complaint, plaintiff alleges, *inter alia*, that Lot 5 and Lot 6 were sold conditioned upon the covenants and restrictions set forth in both deeds; that the Map provided for a common scheme and plan for the development of the Subdivision; that defendants' proposal to subdivide Lot 6 into two lots is a violation of the covenants and restrictions; and that plaintiff, as a successor in interest to the original grantees of Lot 5, based upon the mutuality of covenants, has the right to enforce the covenants and restrictions against defendants, who are the successors in interest to the original grantees of Lot 6.

In their answer, defendants deny that their proposed plan pending before the Village Planning Board violates the covenant contained in the 1929 deeds and that the approval of their proposed subdivision of Lot 6 will adversely impact the value of plaintiff's lot. Defendants also interpose several affirmative defenses, including, *inter alia*, that plaintiff lacks standing to bring this action as he "is not a party for whose benefit the alleged restrictive covenants were designed to protect"; the covenants were not intended to create a common scheme or plan; as deeds prior to the subject 1929 deeds contained different restrictions that, by their terms, terminated in 1933 and the subject deeds reserved to the grantors the right to impose other and different restrictions in any future deeds, the covenants cannot be said to have been intended to create a uniform restriction throughout the subdivision as to which plaintiff can claim to be a beneficiary; plaintiff

has adequate remedies at law, which precludes injunctive relief; and the action is premature, as the Village Planning Board has not yet ruled on the defendants' application.

Plaintiff now moves for summary judgment in his favor, and defendants cross-move for summary judgment dismissing the complaint. Plaintiff seeks enforcement of the following covenants:

The party of the second part [the grantee] for himself, his heirs and assigns, hereby covenants and agrees to and with the parties of the first part [the grantors], their successors and assigns:

\* \* \*

2. That the premises above described shall not be subdivided or sold, except in a plot or plots substantially as designated and described on the said map.

\* \* \*

3. That the premises shall not be utilized for any except exclusively residential purposes....Not more than one residence with the usual outbuildings, including servants' quarters, shall be erected or maintained on each lot as designated and described on said map of the above described premises....

\* \* \*

The covenants above set forth, except as specified, are declared to be and shall be covenants attached to and running with the land hereby conveyed, and shall bind and enure to the benefit of the parties to whom any part of the said premises, likewise made subject to said restrictions, shall at any time come or belong, and the said covenants and restrictions may be enforced by action or injunction in favor of any or either of the parties, their heirs, successor or assigns.”

Plaintiff argues that he has standing to maintain this action as the inclusion in the deeds of the above-quoted covenants evidences the grantors' intent to form a common scheme or plan for the Subdivision.

In support of their cross-motion, defendants rely on the following language contained in the deed to support their contention that plaintiff does not have standing to bring this action as he is not a party for whose benefit the restrictive covenants were intended and that the covenants were not intended to create a common scheme or plan:

The covenants contained in paragraphs 2 and 3 or any part or parts thereof, may at any time be annulled, modified or waived by an instrument

Sheehan v. Commisso, et al.

IN: 16461/2015

Page 4

in writing executed by the parties of the first part [the grantors], the survivor or survivors of them, their successors or assigns, under seal, and filed in the office of the Clerk of the County of Suffolk, State of New York.

It is mutually covenanted and agreed that the parties of the first part may impose other and different restrictions in any future deeds, mortgages or conveyances on any part of the property which they may own adjoining or adjacent to the premises above described.

Further, defendants maintain that the language of the paragraph numbered "2" above, purporting to limit the subdivision of their lot is ambiguous and, thus, cannot be the subject of an enforcement action. In reply to this argument, plaintiff posits that it does not so much prohibit subdivision as ensure that the lots on Lilac Road substantially comply with the dimensions set forth on the Map.

A common plan or scheme of development will be found to exist where a common grantor divides its land and imposes substantially similar restrictive covenants on all of the parcels conveyed, with the intent that the restrictions are enforceable by any grantee included in the common plan, on the theory that there is a mutuality of covenant and consideration which binds each grantee (*Huggins v Castle Estates*, 36 NY2d 427, 432 [1975]; *Korn v Campbell*, 192 NY 490, 85 NE 687 [1908]; *Graham v Beermunder*, 93 AD2d 254, 462 NYS2d 231 [2d Dept 1983]; *Gordon v Incorporated Village of Lawrence*, 84 AD2d 558, 443 NYS2d 415 [2d Dept 1981], *affd* 56 NY2d 1003, 453 NYS2d 683 [1982]). It is well established that the law favors free and unencumbered use of real property, and therefore any covenants purporting to restrict use will be strictly construed against the party seeking enforcement (*see Witter v Taggart*, 78 NY2d 234, 573 NYS2d 147 [1991]; *Huggins v Castle Estates*, *supra*; *Fleetwood Chateau Owners Corp. v Fleetwood Garage Corp.*, 153 AD3d 1238, 1239, 61 NYS3d 287 [2d Dept 2017]; *Bear Mountain Books, Inc. v Woodbury Common Partners*, 232 AD2d 595, 649 NYS2d 167 [2d Dept 1996]; *Sunrise Plaza Assocs. v International Summit Equities Corp.*, 152 AD2d 561, 543 NYS2d 490 [2d Dept 1989]). The existence of a common plan of uniform development must be demonstrated by the party seeking enforcement through "clear and definite proof" (*Huggins v Castle Estates, Inc.*, *supra* at 432; *Thomas v June*, 194 AD2d 842, 846, 598 NYS2d 615 [3d Dept 1993]; *see Greek Peak v Grodner*, 75 NY2d 981, 556 NYS2d 509 [1990]; *Fader v Taconic Tract Dev., LLC*, 128 AD3d 887, 11 NYS3d 184 [2d Dept 2015]; *Hidalgo v 4-34-68, Inc.*, 117 AD3d 798, 800, 988 NYS2d 64 [2d Dept 2014]). Ambiguities will generally be construed against the drafter; thus if a covenant is capable of more than one interpretation, it will be construed against the party seeking to extend it and the less restrictive interpretation will be adopted (*see Fader v Taconic Tract Dev., LLC*, *supra*; *Bear Mountain Books, Inc. v Woodbury Common Partners*, *supra*; *Sunrise Plaza Assocs. v International Summit Equities Corp.*, *supra*).

Here, plaintiff has failed to present clear and definite proof of a common plan for uniform development of the Subdivision. The mere filing of the Subdivision Map does not constitute the adoption of a common plan of development (*see Thomas v June*, *supra*). Notably, no declaration of covenants or restrictions on use are documented on the Map, nor is there any proof that a separate document setting forth any restrictive covenants was filed together with the Map (*id.*). Rather, plaintiff relies on the language contained in the 1929 deeds from the grantors conveying Lot 5 and Lot 6 and deeds to other lots on Lilac

Sheehan v. Commisso, et al.  
IN: 16461/2015  
Page 5


Road that contain the same language. The chain of title to the deeds proffered have not been submitted. Moreover, the papers before the court contain deeds to lots on the Map that contain different covenants, e.g., a restriction of lot size to a minimum of 40,000 square feet, and, in other instances, no such restriction, as well as restrictions against subdivision that expired in 1933. The difficulty of plaintiff's attempts to parse the Map based upon the relative location of lots in the Subdivision to explain the variations in the covenants belies his argument that the grantors intended a common plan or scheme for the Subdivision.

Plaintiff has failed to establish that the grantors intended a common scheme or plan for the Subdivision. Accordingly, plaintiff is without standing to enforce the restrictive covenant contained in defendants' deed. Therefore, plaintiff's motion is denied and the defendants' motion to dismiss the complaint is granted.

The foregoing constitutes the decision and order of the court.

Dated:

12/19/2015

  
\_\_\_\_\_  
HON. SANFORD NEIL BERLAND, A.J.S.C.

X  FINAL DISPOSITION         NON-FINAL DISPOSITION