Shmeira LLC v Sea Gate Assn.
2020 NY Slip Op 33198(U)
September 29, 2020
Supreme Court, Kings County
Docket Number: 507075/2017
Judge: Debra Silber

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of September, 2020.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

----------X

SHMEIRA LLC,

Plaintiff,

-against-

THE SEA GATE ASSOCIATION,

Defendant.

----------X

DECISION/ORDER/
JUDGMENT

Index No.: 507075/2017

Motion Seq. Nos. 5 & 6

The following e-filed papers read herein:	NYSCEF Doc. Nos.
Notice of Motion, Affirmation (Affidavit), and Exhibits Annexed	81-106, 107-136
Affirmation (Affidavit) in Opposition and Exhibits Annexed	137-141, 143-159
Reply Affirmation (Affidavit) and Exhibits Annexed	160-162

In this declaratory judgment action concerning certain restrictive covenants on real property, defendant The Sea Gate Association (Sea Gate) moves (Motion Seq. No. 5), pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint. Defendant does not ask for summary judgment on its counterclaim. Plaintiff Shmeira LLC (Shmeira) also moves (Motion Seq. No. 6), pursuant to CPLR 3212, for an

order granting it summary judgment declaring the restrictive covenants on its property extinguished and dismissing defendant's counterclaim.

Background

Shmeira brings this action for a declaratory judgment to extinguish the restrictive covenants on its real property, known as 2902 West 37th Street, Brooklyn, New York [Block 7031, Lot 18] (Premises). The Premises, which consists of a one-story commercial structure on the northern portion and a parking lot on the southern portion, was purchased from Levko, LLC (Levko) by Shmeira in November 2016 (NYSCEF Doc. 118 [2016 Deed]). The property is on the most western block of Coney Island, on the west side of the street, between Mermaid and Surf Avenues, and the rear of the property abuts Sea Gate, a private community in Brooklyn, New York located directly west of Coney Island.

The subject property is 160 feet long and 100 feet deep. It was originally two 100-foot deep lots: the northernly one was 100' x 100', and is the lot on which the building is located, and the southerly one was 60' x 100', which is vacant land on which a parking lot is situated. The two lots were merged many years prior to Shmeira's purchase in 2016 from Levko. Levko operated an auto repair shop, called Sea Gate Car Care, at the Premises for the 12 years it owned the property prior to its sale to Shmeira (NYSCEF Doc. 116 [Levko aff]; *see also* NYSCEF Doc. 88 [tax assessment documents listing the Premises' "building class" as G2—"auto body/collision or auto repair"—for tax years 2006 and 2015 but "G1"—"parking garage"—in tax years 2016 and 2018]).

The Premises were, until 1948, owned by Sea Gate, and were sold following a proceeding for court approval of the sale, pursuant to the Not-For-Profit Corporations Law, in 1948 (*see* NYSCEF Doc 99, Exhibit T; NYSCEF Doc. 87 [court file from Sea Gate's

1948 proceeding under Ind. No. 6502/1948]). The deed by which Sea Gate transferred its title to the Premises (1948 Deed) is the instrument which first established the restrictive covenants at issue in this action (NYSCEF Doc. 154).

Shmeira asserts that it was unaware of the restrictive covenants encumbering the Premises when it purchased the property in 2016 (NYSCEF Doc. 108 [averring that Levko never advised Shmeira about the encumbrances]). The title report prepared for Shmeira in connection with its November 2016 purchase did not mention the restrictive covenants (NYSCEF Doc. 119). Shortly after Shmeira acquired title, Sea Gate informed it of the existence of the restrictive covenants which, pursuant to the 1948 Deed, encumbers only the southerly (60' x 100') parking (vacant) lot portion of the Premises by, among other things, limiting its use and development. Sea Gate also informed Shmeira that it intended to enforce the restrictive covenants. This action followed.

As stated above, prior to Shmeira's taking title of the Premises, an auto garage and repair business existed on the 100' x 100' portion of the property. Shmeira has performed considerable renovation work on the building located on the northerly, unencumbered (100' x 100') lot. It is now a commercial warehouse, showroom, and offices for Caprice Electronics, Inc., a business affiliated with plaintiff. The former auto garage building on that northerly lot has been renovated completely, and it is no longer possible to drive a car through the building on the property, as it was before. It appears from the record that Levko operated its auto repair business, Sea Gate Car Care, on the property from 2004 to 2016 (*e.g.* NYSCEF Doc. 116]).

While it is unclear from the record precisely how the property was configured when Shmeira bought it, the Building Information System website maintained by the New York City Department of Buildings (DOB) indicates that plaintiff filed plans in 2017 to renovate the interior of the building "with no change in use, egress or occupancy." The building is still classified as "G1 – garage/gas station" by DOB and the NYC Department of Finance. This is clearly no longer accurate.

After it was notified by defendant of the restrictive covenants, Shmeira commenced the instant action pursuant to RPAPL § 1951. Plaintiff is represented by counsel hired by its title insurer, who, it seems, is seeking to change the actual circumstances of the property to match its erroneous title report. Sea Gate interposed an amended answer with various affirmative defenses and a counterclaim, also pursuant to RPAPL § 1951, which seeks a judgment and order extinguishing the provision in the restrictive covenants that provides for a discounted rate for the association's dues for the Premises that Shmeira is required to pay.[1] Discovery and motion practice ensued. Sea Gate now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and Shmeira moves, pursuant to CPLR 3212, for an order and judgment declaring that the restrictive covenants are extinguished and dismissing Sea Gate's counterclaim.

The Deeds and the Restrictive Covenants

As noted above, Shmeira acquired title to the Premises in November 2016 and the 2016 Deed was recorded in the Kings County Office of the New York City Register on

[1] The court notes that Sea Gate filed an amended answer with court permission. Thus, the court treats this document as Sea Gate's answer and the operative responsive pleading.

November 16, 2016 in City Register File No.: 2016000402887 (NYSCEF Doc 118). The 2016 Deed transferred the Premises from Levko to Shmeira and did not include the restrictive covenants at issue.

The restrictive covenants apply solely to the vacant southerly (60' x 100') portion of the property pursuant to the 1948 Deed, dated May 24, 1948 and duly recorded in the Kings County Office of the New York City Register on June 2, 1948, in reel 7310, page 193 (NYSCEF Doc. 154). The 1948 Deed, when Sea Gate sold the property after approval by a majority vote of its board of directors and judicial authorization, includes the following restrictive covenants (numbers added):

1. "The said premises shall never be used for any purposes other than the storage or parking, or public garage for motor vehicles, or for a gasoline service station; and no dwelling house, store, shop or business enterprise other than those hereinabove expressly mentioned shall be conducted or erected thereon.

2. That no structure exceeding one story in height shall ever be erected on said premises, nor shall such a structure or any other structure be erected thereon without the written prior approval of the plans and specifications therefor having first been obtained from the Board of Directors of the said Sea Gate Association, its successors and assigns.

3. That the party of the second part shall install, erect within thirty (30) days after the delivery of the deed hereunder, and maintain an eight foot high rustic fence or enclosure along the westerly, southerly and easterly sides of said premises and shall not erect or maintain any signs of any kind or nature on the said fences or premises.

4. That the party of the second part shall not have nor permit access to said premises or any part thereof from West 37th Street, nor shall there be any ingress to or egress from or entrance to or exit from said premises, to or from West 37th Street, it being understood that any access to or from the said premises shall only be through or from the southerly side of the existing garage situate [sic] immediately north of said premises. In the event that an emergency exit from said premises is required by the City

> Authorities, such emergency exit shall open only on the westerly side of said premises and in no event on West 37th Street.
>
> 5. That the party of the second part shall and will comply with, and shall not and will not violate the rules and regulations of the said Sea Gate Association, except as herein expressly provided.
>
> 6. The party of the second part, for itself, its successors and assigns further covenants that the property conveyed by this deed and any and all buildings and improvements to be erected thereon, as provide, for herein, shall be subject to an annual charge on the same basis as will be fixed by the said [Sea Gate] . . . except that the amount of such annual charge shall not exceed a sum equal to One and 75/100 ($1.75) Dollar per the hundred ($100.00) Dollars of assessed valuation of such land and improvements as fixed by the Department of Taxes and Assessments of the City of New York for the purpose of Taxation" (*id.* at 2-4).

Thus, the restrictive covenants encumbering the 60' x 100' vacant lot portion of the Premises are, in sum: (1) a limitation on use - parking and vehicle services only; (2) a limitation on improvements - no residential structure nor any structure exceeding one story in height, and no structure shall be erected without prior written approval; (3) a fence requirement - maintain an eight-foot high "rustic" fence or other enclosure; (4) a prohibition of any signage on the fence or on the premises; and (5) a limitation on access - access to the parking lot shall only be through the then-existing garage structure and never to or from West 37th Street. Further, the 1948 Deed limited the amount of dues Sea Gate is permitted to charge to the titleholder of the Premises, an apparently discounted rate of no more than $1.75 for every $100.00 of assessed valuation.

The Parties' Contentions

Sea Gate's principal argument is that Shmeira is legally only entitled to the extinguishment of a restriction if it can demonstrate that the restriction provides no actual and substantial benefit to Sea Gate and, further, Shmeira must provide a legally cognizable reason to extinguish each restrictive covenant. Sea Gate contends that Shmeira cannot demonstrate either of these things, and, further, that Sea Gate has demonstrated the need for each of these restrictions to continue.

Sea Gate, in support of its position, proffers, among other evidence, the affidavit of Lance Burns, a member of Sea Gate's Board of Directors (NYSCEF Doc 94). Mr. Burns attests that Sea Gate is a not-for-profit corporation formed in 1899, which was organized to create, develop, manage, and maintain a private community located at the westernmost part of Coney Island, Brooklyn, New York (*see also* NYSCEF Doc. 85 at 3-4 [Sea Gate Rules and Regulations]). Mr. Burns avers that each restrictive covenant instituted by the 1948 Deed continues to be necessary and each benefits Sea Gate.

Addressing the first restriction, the limitation on use, Mr. Burns asserts that this restriction is vital to Sea Gate, as there are no other community parking areas available for Sea Gate's residents or visitors and a commercial parking amenity is thus "essential" (NYSCEF Doc. 104). He avers that the Premises has served as a gas station/auto repair and parking amenity since "at least" the 1950s, and that having such an amenity in the Sea Gate area is in line with the community's needs (*id.*). Mr. Burns attests to similar reasons for the continuing need for the second and third restrictive covenants – the limitation on improvements and the fence requirement and the sign restriction; namely, that Sea Gate is

responsible for maintaining a visual appearance standard for its community's owners. Mr. Burns further avers that the fourth restriction, which bars street access, is critical, even though access through Sea Gate is now impossible, because Sea Gate must have control over access to the community for security reasons. When written, this restriction required all residents and visitors wishing to park in the lot or to have their car serviced to enter through the gate at Surf Avenue to access the Premises, and to then drive through the auto garage. Apparently, there was an opening on the Sea Gate side into the garage, and another opening on the south side of the building into the parking lot. However, permission to install the existing roll-down gate, which permits access to the parking lot at the Premises from West 37th Street, was consented to by Sea Gate (pursuant to its purported authority to modify the agreement) after Hurricane Sandy and before plaintiff took title. This gate allows street access to the vacant lot/parking lot and eliminates the need to enter the lot through the building, which is no longer possible, or through the entrance from the Sea Gate side of the property, which is also no longer possible, as the building as renovated does not permit access to vehicles from any of the four sides of it. With the installation by Sea Gate of a ten-foot fence around Sea Gate, and the renovation of the building on the Premises, it is not possible to drive into Sea Gate from the parking lot at the Premises, and the only access is through the roll-down gate on West 37th Street.

Sea Gate provides a copy of its Rules and Regulations. Among other provisions, the Rules and Regulations enumerate Sea Gate's policies concerning parking. The Rules and Regulations specifically provide:

> "No buses, commercial vehicles, vehicles with any writing or decals or vehicles with Dealer plates are permitted to park on

> Sea Gate Streets or in *the Residential Parking Lot (located between Surf and Mermaid Avenue)* overnight. All vehicles, including but not limited to automobiles, motorbikes and motorcycles (hereinafter "vehicles") parked on Sea Gate streets overnight may only be parked in valid and legal parking areas and must display a [Sea Gate] resident sticker on the left side of the windshield. Vehicles without this sticker cannot park on Sea Gate streets (or in *the Residential Parking Lot*) overnight and are subject to a fine and/or summons"
> (NYSCEF Doc 97 at 19-20 [emphases added]).

Sea Gate contends that the need for each restrictive covenant continues to be necessary to protect Sea Gate's interests and continues to benefit the community. Asserting that the fundamental question before the court in an RPAPL § 1951 action is the balance of equities, Sea Gate argues that balance heavily favors the 860 homes in the Sea Gate community, whose residents receive direct benefits from the restrictive covenants, rather than Shmeira's financial interests.

In opposition to Sea Gate's motion and in support of its own motion for summary judgment, Shmeira asserts that the proffered evidence demonstrates its entitlement to an accelerated judgment extinguishing the restrictive covenants. Shmeira emphasizes that the law favors free and unencumbered use of real property and that outmoded restrictions on property should be removed pursuant to RPAPL § 1951. It argues that the restrictions serve no actual or substantial benefit to Sea Gate due to the substantial changes in the neighboring area since the imposition of the restrictive covenants in 1948. Further, it maintains that Mr. Burns' affidavit serves no evidentiary value as it is contradicted by his deposition testimony.

Shmeira provides, among other evidence, the deposition testimony of Mr. Burns, in

which, Shmeira asserts, he fails to identify the purpose of any of the restrictive covenants (NYSCEF Doc. 157 [Burns' tr]; *see also* NYSCEF Doc 158 [Wynn's tr]). Shmeira proffers the affidavit of Mark Laufer, its managing member (NYSCEF Doc 108), who attests that when Shmeira purchased the property it was unaware of any restrictions on its use or development. He avers that Shmeira is seeking to remove the restrictions to permit development of the Premises for use as a showroom, storage warehouse, and office space for its business enterprise.[2]

The court notes that there is no evidence in the record as to what zoning is applicable to the Premises. When asked by the court, plaintiff's counsel opined that the issue is irrelevant. However, while it may be irrelevant to counsel, winning this motion wouldn't permit plaintiff to build anything which is not permitted by the zoning rules.

Addressing the restriction on improvements, Shmeira asserts that many multi-story buildings[3] have been constructed within the Sea Gate community since 1948 and that the entire community is now surrounded by a metal fence, rendering the fence requirement for the Premises duplicative. Concerning the street access restriction, Shmeira argues that Sea

[2] At oral argument, it was revealed that Shmeira is already using the existing building, located on the 100' x 100' portion of the Premises that is not subject to the restrictions, for those business purposes.

[3] Sea Gate is an R3-1 zone, a low density zone, which has a maximum building height of 35 feet and requires a 15-foot deep front yard, while the Premises are zoned C-2, which is a "commercial overlay" in a residential district, to serve "local retail needs," such as a dry cleaner, bakery or drugstore, that requires parking spaces to be available for the commercial use (*see e.g.* Zola.planning.nyc.gov). Thus, without a zoning variance, plaintiff couldn't make unrestricted use of the property. It is not clear that plaintiff's current use of the building is a qualified use, and the court has no opinion on this issue. Further, as the property is in a flood hazard area, there are other restrictions on construction (*see* New York City Zoning Res.§ 64-oo *et seq.*). In any event, the court is not rendering any opinion with regard to the lawful use of the Premises.

Gate has waived its ability to object to removal of this restriction as it abandoned its right to enforce it by permitting Shmeira's predecessor-in-interest to construct an entrance-and-exit gate on West 37th Street for ingress-and-egress to and from the Premises.

Thus, Shmeira maintains it has established that a balancing of equities favors it, because the restrictive covenants serve no actual or substantial benefit to Sea Gate, as the purposes for the covenants have either been accomplished or abandoned, necessitating the extinguishment of all of the restrictive covenants encumbering the Premises.[4]

Standard for Summary Judgment

On a motion for summary judgment, the court's function is issue finding, not issue determination (*see Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP*, 164 AD3d 864, 865 [2d Dept 2018] [internal citations omitted]). "A party moving for summary judgment must demonstrate that 'the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014], quoting CPLR 3212 [b]). "[T]he 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient

[4] In response, both parties assert that the other has not established their prima facie case and, thus, each is entitled to the relief it requests and denial of the opponent's motion.

to establish the existence of material issues of fact which require a trial of the action" (*id.*, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1986]). In other words, the nonmoving party "need only raise a triable issue of fact regarding the element or elements on which the [movant] has made its prima facie showing" (*McCarthy v Northern Westchester Hosp.*, 139 AD3d 825, 826 [2d Dept 2016] [internal quotation marks omitted]).

"In determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" (*Santiago v Joyce*, 127 AD3d 954, 954 [2d Dept 2015] [internal citations omitted]). "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal citation omitted]). Further, "[s]ummary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011] [internal citation omitted]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

"Restrictive covenants, also categorized as negative easements, restrain servient landowners from making otherwise lawful uses of their property" (*MJK Bldg. Corp. v Fayland Realty, Inc.*, 181 AD3d 860, 862 [2d Dept 2020], quoting *Fleetwood Chateau Owners Corp. v Fleetwood Garage Corp.*, 153 AD3d 1238, 1239 [2d Dept 2017]). "Restrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy" (*Forest Hills Gardens Corp. v 150 Greenway Terrace, LLC*, 37 AD3d 759, 759 [2d Dept 2007]). However, RPAPL §

1951 authorizes the extinguishment of a restrictive covenant where "the restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason" (*Orange and Rockland Util., Inc. v Philwold Estates, Inc.*, 52 NY2d 253, 264 [1981], quoting RPAPL § 1951 [2]). "The party claiming unenforceability of a restriction bears the burden of proving unenforceability" (*Deak v Heathcote Ass'n*, 191 AD2d 671, 672 [2d Dept 1993], citing *Board of Educ., E. Irondequoit Cent. School Dist. v Doe*, 88 AD2d 108, 118 [4th Dept 1982]; *Nash v State of New York*, 61 AD2d 852, 855 [3rd Dept 1978]).

Unenforceability is demonstrated by proffering sufficient evidence that there is a "(1) lack of benefit derived from enforcement of the restriction, and (2) [a] legally cognizable reason for the extinguishment" (*id.* [internal citations omitted]). The inquiry focuses on the balance of the equities between the parties (*see generally Chambers v Old Stone Hill Rd. Assoc.*, 1 NY3d 424 [2004]; *Neri's Land Improvement, LLC v J.J. Cassone Bakery, Inc.*, 65 AD3d 1312 [2d Dept 2009]). Where a burden is largely self-created, the balance of the equities rarely favors extinguishing the restrictive covenants (*Chambers v Old Stone Hill Rd. Assoc.*, 303 AD2d 536, 537 [2d Dept 2003], *affd* 1 NY3d 424 [2004], citing *Cody v Fabiano & Sons*, 246 AD2d 726 [3rd Dept 1998]; *Deak*, 191 AD2d at 672).

The courts have permitted enforcement of, and prevented extinguishment of, restrictive covenants conferring competitive commercial advantages to the dominant landholder (*see Costco Wholesale Corp. v GAP Partners IV, LLC*, 703 Fed Appx 54, 56

[2d Cir 2017], citing *Hodge v Sloan*, 107 NY 244, 249 [1887] [nothing in public policy prevents seller from binding buyer of land to restriction of use that was intended to ensure sale would not be "detrimental to (the seller's) business"]). Similarly, the court has upheld restrictive covenants preserving the "essential feel" and "harmonious character of [a] community," finding such restrictive covenants confer a substantial benefit to the entities seeking to enforce it (*Lattingtown Harbor Prop. Owners Assn., Inc. v Agostino*, 34 AD3d 536, 538 [2d Dept 2006]).

As discussed below, Sea Gate has demonstrated its entitlement to summary judgment with regard to three of the restrictive covenants: (1) limitation on use; (2) limitation on improvements; (3) fence requirement and signage restriction. Shmeira has failed to raise a triable issue of material fact regarding these restrictive covenants. However, Shmeira has established that it is entitled to summary judgment extinguishing the restriction prohibiting entering and exiting the Premises from West 37th Street, and Sea Gate has not raised a triable issue of fact regarding the street access restriction.

Discussion

1. Limitation on Use

Shmeira's submissions fail to establish prima facie entitlement to the extinguishment of the limitation on use applicable to the Premises. That restriction requires the vacant 60' x 100' lot to serve as a garage/service station/parking lot amenity, which Shmeira argues has already been accomplished and rendered redundant because there is sufficient parking in the neighboring area to satisfy Sea Gate's needs and because there is a service station located near the Sea Gate community (*see* NYSCEF Doc. 125 [photograph of a vehicle servicing garage seemingly located on West 36th Street]). Shmeira also asserts

that the building on the Premises has not been used as an automobile garage since it purchased the property in 2016 and that it does not intend to use that portion of the property as a service station in the future, rendering the restriction that the Premises be a parking lot unnecessary (NYSCEF Doc. 108 [Laufer's aff]).

Shmeira's submissions are insufficient to establish prima facie entitlement to summary judgment extinguishing the limitation on use restriction (*e.g.* NYSCEF Docs 108, 116, 125-126, 136) as it fails to demonstrate that there is a lack of substantial benefit from the limitation on use restriction and a legally cognizable reason for its extinguishment. In fact, Shmeira's own evidence belies its position, in attesting that the Premises contained a service station and a parking lot for the 12 years preceding Shmeira's purchase of the property (*see* NYSCEF Doc. 116 [Kaplun aff] [discussing Levko's service station business]). Further, it appears that Shmeira performed its renovations of the building after it had learned of the restrictive covenants which had been omitted from its title report.

Sea Gate, however, has established its prima facie entitlement to summary judgment with regard to the limitation of use restriction, by demonstrating that it receives continuing actual and substantial benefit from this restrictive covenant. Sea Gate's evidence, including the affidavit of Mr. Burns, a copy of its Rules and Regulations, the 1948 Deed, and the record of the 1948 court proceeding, which resulted in a court order authorizing Sea Gate's transfer of the lot with the restrictive covenants, demonstrate that Sea Gate is obligated to maintain the safety, aesthetics, and standards of the community and to ensure that its members have access to beneficial commercial amenities. The limitation on the use of the 60' x 100' portion of the Premises, a vacant lot, for parking cars or as a gas/service station

ensures that the Sea Gate community retains the encumbered portion of the Premises as a parking lot or gas/service station for the benefit of its 860 home owners, many of whom own vehicles (NYSCEF Doc. 104 [Burns' aff]). In fact, Mr. Burns asserts that parking is an "essential" need for the community and attests to his own personal use of this lot (*id.*). Mr. Burns avers that the restriction on use is the only way to ensure that the community maintains a "Garage/Service Station/additional parking area" for Sea Gate, and that such amenities are actual and substantial benefits to the community members because the "garaging, servicing and parking of cars" are "daily essential neccessit[ies]" (*id.* at 2-3). The continuing need for this restrictive covenant, for the purpose of maintaining a vehicle servicing/parking amenity for the community, is supported by the Rules and Regulations, which expressly contemplate that this specific Premises shall include the "residential parking lot" for the use of its members and visitors, and also restricts the type and character of vehicles parked there overnight, in accordance with Sea Gate's aesthetics and character (NYSCEF Doc. 97).

The limitation on use also ensures that the community has a service station/parking lot for their numerous vehicle-owning members in their "own backyard" on West 37th Street. This has been the use of the property since Sea Gate's Rules and Regulations were drafted until 2016, when Shmeira obtained title and turned the existing vehicle service station into offices, a warehouse, and a showroom for its electronics business (*see* NYSCEF Doc. 104). It appears that Shmeira has continued to use the subject vacant property as a parking lot. As the property has "always [been] utilized for the benefit of Sea Gate home owners," the limitation maintains Sea Gate's need for . . . parking for its members and

visitors—and retains "harmony" with the other commercial amenities located . . . along West 37th Street just outside of the community's gate (*see id.*).

Accordingly, Sea Gate has established prima facie entitlement to summary judgment with regard to that the restrictive covenant limiting the use of the 60' x 100' vacant lot, which confers an actual and substantial benefit to Sea Gate and serves a legitimate purpose for its residents, who pay substantial dues for the services provided (*see Orange and Rockland Util., Inc.*, 52 NY2d at 264; *Hodge*, 107 NY at 249; *see also* RPAPL 1951 [2]). To be deemed an obsolete purpose, automobiles would need to become obsolete.

In opposition to Sea Gate's motion, Shmeira fails to raise an issue of fact warranting a trial. It acknowledges that an auto repair shop was located on the property when it obtained title (NYSCEF Doc. 138) but argues that it was unaware of the restrictive covenant when it purchased the property. Shmeira contends that the service station/parking restriction is unnecessary and that it should be permitted to use the property without restriction for its electronics business (which it is currently using the unencumbered portion of the Premises for). These arguments do not tip the balance of the equities in favor of Shmeira, whose asserted reason for extinguishing the limitation on use is to create the commercial building that it has seemingly already built on the 100' x 100' portion of the Premises.

2. <u>Limitation on Improvements</u>

As above, Shmeira's submissions do not establish a prima facie case to extinguish the restriction on improvements to the Premises. Shmeira speculates that the aesthetics of Sea Gate have changed since 1948 and asserts that multi-story buildings have been

constructed within the community since that time, but does not establish that the reason for this restriction has been accomplished or rendered obsolete or unnecessary.

On the contrary, Sea Gate's submissions establish its entitlement to summary judgment dismissing Shmeira's claim which seeks to extinguish the restriction, as it has demonstrated that the limitation provides a continuing benefit to the community and advances Sea Gate's mission as a non-profit organization organized to serve its homeowners. The restrictive covenant precludes the construction of any structure exceeding one story in height and requires that no structure shall be erected without prior written approval of Sea Gate's board, which provides a substantial benefit to Sea Gate and its community members. The limitation further ensures that the community will keep the residential parking lot contemplated in the Rules and Regulations and prevents buildings from being erected on the Premises that would not be in line with Sea Gate's aesthetic goals, or which would block light and air from the community's homes which are located on the adjacent property.

Sea Gate has established that the restriction further ensures that it maintains control over any development on the parking lot portion of the Premises, which is on a non-residential strip of West 37th Street that is zoned to offer commercial amenities to the community's members, as well as to residents of neighboring Coney Island. In requiring Sea Gate's permission to build a structure on the parking lot portion of the Premises, this restrictive covenant, limiting improvements, allows Sea Gate to control the usage, aesthetics, and amenities for its members, a basic function that Sea Gate is required to perform under its By-Laws and Rules and Regulations. Restricting any improvements to

those authorized by Sea Gate ensures that the lot will continue to serve its designated purpose and, moreover, prevents the community members from being "faced with an oversized or unsightly building" that does not meet Sea Gate's needs (*see* NYSCEF Doc 104).

Sea Gate has, thus, demonstrated that this restrictive covenant provides a continuing substantial benefit to it, in that it preserves Sea Gate's control over the use of the Premises, serving a legitimate purpose in advancing Sea Gate's mission as a not-for-profit (*see Orange and Rockland Util., Inc.*, 52 NY2d at 264; *Hodge*, 107 NY at 249; *see also* RPAPL 1951 [2]), and in that it allows Sea Gate to maintain the "essential feel" and "harmonious character" of the community with regard to the community's aesthetics (*Lattingtown Harbor Prop. Owners Assn., Inc.*, 34 AD3d 538).

Shmeira reiterates the same arguments it made with regard to the restriction on use, and does not raise a triable issue of fact with respect to the restriction on improvements.

3. <u>The Fence Requirements and the Signage Restrictions</u>

Shmeira has also failed to make a prima facie case for extinguishing the fence requirement or the signage restriction, arguing, generally, that the fence requirement has been accomplished and rendered unnecessary because Sea Gate has since erected a fence around the entire community. Sea Gate has, however, established that the fence requirement and signage restrictions both provide a substantial benefit to the community and further benefit Sea Gate's purposes in that they allow Sea Gate to maintain a uniform appearance regarding the residential parking lot, which is located along the boundary of the community and near the entrance gate. The fence requirement calls for specific

fencing—an eight-foot high fence, to protect the cars parked in the parking lot from vandalism. The prohibition of any signage on the Premises or the surrounding fence plainly serves a continuing purpose that benefits Sea Gate and its members by controlling the appearance of the parking lot, as well as assuring an "essential feel" and a "harmonious character" with the community's aesthetic (*Lattingtown Harbor Prop. Owners Assn., Inc.*, 34 AD3d 538).

Contrary to Shmeira's contentions in opposition to Sea Gate's motion (and in further support of its own motion), Mr. Burns' affidavit is not contradicted by his deposition testimony. During Mr. Burns' deposition, he was asked a series of questions involving the purposes for the restrictions placed in the 1948 Deed (NYSCEF Doc. 157). In response, Mr. Burns asserted on various occasions that he did not write the document and was unable to answer the questions as asked. His affidavit, wherein he recites the benefits conferred to Sea Gate from the restrictive covenants, does not contradict this testimony, nor does it clearly present an attempt to avoid the consequences of his previous testimony (*see Shpizel v Reo Realty & Constr. Co.*, 288 AD2d 291, 291 [2d Dept 2001]; *Zylinski v Garito Contr.*, 268 AD2d 427, 428 [2000]). Likewise, Mr. Wynn's testimony does not raise triable issues of fact with regard to the above four restrictive covenants because he too could only speculate as to the drafters' intent (NYSCEF Doc. 158).

Further, the balance of the equities here, with respect to the four restrictive covenants discussed above, significantly favors Sea Gate. Sea Gate has been charged with managing the community for the best interests of its members since 1899 and has overseen those duties since its incorporation. Further, Shmeira's arguments that it did not have

notice of the restrictive covenants is unavailing, as the 1948 Deed was duly recorded, giving Shmeira constructive notice of the restrictive covenants prior to purchasing the Premises (*see Buffalo Academy of Sacred Heart v Boehm Bros.*, 267 NY 242, 250 [1935]; *see also Corrarino v Byrnes*, 43 AD3d 421, 423-424 [2d Dept 2007] ["Owners of a servient estate are bound by constructive or inquiry notice of easements which appear in deeds or other instruments of conveyance in their property's direct chain of title"]). Indeed, Shmeira's assertion that the restrictive covenants interfere with its business interests is, thus, a self-created burden arising from its failure (and its title company's failure) to properly inquire about the restrictive covenants in the Premise's chain-of-title (*Chambers*, 303 AD2d at 537).

In sum, Shmeira has failed to raise a triable issue of fact to overcome Sea Gates' prima facie entitlement to summary judgment with regard to the restrictions on use, improvements, fencing, and signage. None of the proffered evidence raises any material questions of fact as to whether or not Sea Gate derives an actual and substantial benefit from those four restrictive covenants. Further, Shmeira has failed to proffer any evidence demonstrating that the restrictive covenants are unenforceable within the meaning of RPAPL § 1951 (*see Deak*, 191 AD2d at 672). Accordingly, to the extent Sea Gate seeks dismissal of the complaint with regard as to these four restrictive covenants, the motion is granted.

4. <u>Limitation on Street Access</u>

Addressing the restrictive covenant prohibiting access to and from the encumbered property from West 37th Street, Shmeira has demonstrated entitlement to summary

judgment declaring this restriction extinguished. It has proffered sufficient evidence that this limitation is unenforceable pursuant to RPAPL § 1951. As discussed above, to extinguish a restrictive covenant pursuant to RPAPL § 1951, the party seeking extinguishment must demonstrate that the "purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason" (*Orange and Rockland Util., Inc.*, 52 NY2d at 264 [1981], quoting RPAPL § 1951 [2]).

Here, Shmeira has demonstrated that the limitation on street access, due to a change in circumstances and in the condition of the Premises, is no longer capable of accomplishment. The limitation on street access states:

> "That the party of the second part shall not have nor permit access to said premises or any part thereof from West 37th Street, nor shall there be any ingress to or egress from or entrance to or exit from said premises, to or from West 37th Street, it being understood that any *access to or from the said premises shall only be through or from the southerly side of the existing garage* situate [sic] immediately north of said premises. In the event that an emergency exit from said premises is required by the City Authorities, such emergency exit shall open only on the westerly side of said premises[5] and *in no event on West 37th Street*" (NYSCEF Doc No. 123 at 3 [emphasis added]).

Mr. Laufer avers that, from the time of purchase in 2016 to present, the Premises has been accessible from West 37th Street via a roll-down gate installed by a prior owner. Further, according to Mr. Burns, the installation of the gate was done with the consent of Sea Gate after Hurricane Sandy (NYSCEF Doc. 104, ¶ 23). Further, this restrictive

[5] Meaning into the Sea Gate community.

covenant can no longer be accomplished, as the restriction states that "in no event" should there be access to the Premises from West 37th Street. Sea Gate's approval of the installation of the roll down gate, combined with Sea Gate's installation of a metal fence (ten feet high) along the property line behind the lot, put an end to the reason for this restriction. Further, this limitation was voluntarily abandoned by Sea Gate when it permitted the installation of the roll-down gate, a legally cognizable basis for extinguishment (*see Deak,* 191 AD2d at 672).

In opposition, Sea Gate has failed to raise a triable issue of fact to overcome Shmeira's prima facie case with respect to the restriction on street access. Sea Gate's contention that it retained authority to "modify or withdraw . . . permission" to install the gate is unsupported by any documentary evidence and, critically, is contrary to the express language of the 1948 Deed, which does not grant Sea Gate any such authority. Further, as the gate has now been installed for a number of years and Sea Gate did not try to remove it and close the access point, combined with the renovation of the building on the Premises so it is no longer possible to drive through it as is contemplated in the restriction, the balancing of the equities do not favor enforcement of this restrictive covenant. Accordingly, the restrictive covenant limiting street access is extinguished (*see generally Chambers*, 1 NY3d at 424; *Deak,* 191 AD2d at 672).

5. <u>Reduced Association Dues</u>

With regard to the branch of plaintiff's motion to dismiss the defendant's counterclaim seeking extinguishment of the restrictive covenant limiting the association's dues due to it by the titleholder of the Premises, this is granted. Mr. Laufer attests that Sea

Gate has not and does not perform any security, maintenance, or services to the Premises, which is outside of the "gate," which is the reason the association's dues are discounted (*see also* NYSCEF Doc. 116 [establishing that Levko likewise paid reduced fees and received no services from Sea Gate for the 12 years it owned the property]). As such, Shmeira is entitled to summary judgment dismissing Sea Gate's counterclaim, as there has been no change in circumstances warranting the extinguishment of the restrictive covenant limiting the property owner's dues (*see Orange and Rockland Util., Inc.*, 52 NY2d at 264, *quoting* RPAPL 1951 [2]). Apparently, all of the property owners on this block pay dues to the Sea Gate Association at the same discounted rate.

To the extent not specifically addressed herein, the parties remaining contentions and arguments were considered and found to be without merit and/or moot.

Accordingly, it is

ORDERED that Sea Gate's motion (MS #5) for summary judgment is granted to the extent Shmeira's action is dismissed with regard to its prayer for a declaratory judgment extinguishing three of the restrictive covenants, to wit: 1. limitation on use; 2. limitation on improvements; and 3. fence requirement and signage restrictions; and it is further,

ORDERED that Shmeira's motion for summary judgment (MS #6) is granted to the extent that it is **adjudged, declared and decreed** that the restrictive covenant (¶ 4) limiting street access to the Premises is hereby extinguished; and it is further,

ORDERED that a correction deed or a copy of this order and judgment shall be recorded against the applicable block and lot within 60 days; and it is further

ORDERED that Shmeira's motion for summary judgment is granted to the extent that Sea Gate's counterclaim is dismissed; and it is further,

ORDERED that the motions are denied in all other respects.

This constitutes the decision, order and judgment of the court.

E N T E R :

Hon. Debra Silber, J.S.C.