Shmeira LLC v Sea Gate Assn.
2021 NY Slip Op 31354(U)
April 21, 2021
Supreme Court, Kings County
Docket Number: 507075/17
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 21st day of April, 2021.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

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SHMEIRA LLC,

Plaintiff,

-against-

THE SEA GATE ASSOCIATION,

Defendant.

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DECISION / ORDER

Index No.: 507075/17

Motion Seq. No. 7

The following e-filed papers read herein:	NYSCEF Doc. No.
Notice of Motion/Cross Motion, Affirmation (Affidavit), and Exhibits Annexed	170 - 262
Affirmation (Affidavit) in Opposition and Exhibits Annexed	265 - 266
Reply Affirmation (Affidavit) and Exhibits Annexed	267

Plaintiff Shmeira LLC (Shmeira) moves, in motion sequence no. 7, pursuant to CPLR 2221, for an order granting it leave to reargue the court's decision for motion sequence nos. 5 and 6 to the extent the court awarded defendant, The Sea Gate Association (Sea Gate), summary judgment dismissing Shmeira's declaratory relief action[1] and, upon

[1] The action sought a declaratory judgment extinguishing certain restrictive covenants, to wit 1. limitation on use; 2, limitation on improvements, and 3. fencing requirement and signage restrictions.

reargument, vacating part of the decision and issuing a decision and order granting plaintiff summary judgment.

Background[2]

Shmeira brought 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. The rear of the property abuts Sea Gate, a private community in Brooklyn, New York located directly west of Coney Island.

The Premises' dimensions are approximately 160 feet long by 100 feet deep. It was originally two separate tax lots prior to being merged at some point before Shmeira purchased the Premises from Levko. Levko used the Premises as an auto repair shop (NYSCEF Doc. 116 [Levko aff].

In 1948, as a result of court proceedings, several restrictive covenants were placed on the southerly portion of the Premises.[3] This portion was, before the lots were merged, 60 feet of the 160 feet along West 37th Street and 100 feet deep. There is no dispute that

[2] For a complete history of the dispute, the court refers to, and incorporates by reference, the court order, dated September 29, 2020 (September order) (*see* NY St Cts Elec Filing [NYSCEF] Doc. 165 [September order] at 2-6).

[3] Prior to 1948 Sea Gate owned the Premises. Sea Gate is organized under the New York Not-for-Profit Law, and, as such it was required to receive judicial approval prior to selling the property to one of Shmeira's predecessors-in-interest.

the restrictive covenants do not apply to the other part of the Premises. The restrictive covenants were memorialized in the 1948 deed transferring ownership from the Sea Gate Association 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 restrictive covenants were as follows:

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 with 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" (NYSCEF Doc. 154, at 2-4).

Subsequent to purchasing the Premises, Shmeira was notified by Sea Gate of the restrictive covenants encumbering the southerly portion.[4] Shmeira then commenced the instant action pursuant to RPAPL 1951 to extinguish the restrictive covenants embodied in the 1948 deed. Sea Gate interposed an answer with various affirmative defenses and a counterclaim, pursuant to RPAPL § 1951, seeking 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.

Sea Gate then moved, pursuant to CPLR 3212, for an order dismissing the complaint and Shmeira likewise moved, pursuant to CPLR 3212, for an order extinguishing the restrictive covenants. Those motions were resolved by decision, order, and judgment, dated September 29, 2020 (the September order). Shmeira now moves pursuant to CPLR

[4] The restrictive covenants were erroneously omitted from plaintiff's title report and therefore were omitted from plaintiff's deed.

2221 for an order granting reargument, and upon reargument, summary judgment extinguishing all of the restrictive covenants limiting the use and improvements, requiring fencing, and restricting signage.

The September Order

The September order awarded Sea Gate summary judgment dismissing Shmeira's complaint to the extent it sought to extinguish three of the restrictive covenants embodied in the 1948 deed, to wit: 1. limitation on use; 2. limitation on improvements, and 3. fencing requirement and signage restrictions. The September order also awarded Shmeira summary judgment extinguishing the restrictive covenant limiting street access and dismissed the defendant's counterclaim, thereby leaving in place the covenant limiting the dues paid by Shmeira to Sea Gate. The court concluded, based upon the evidence presented, that Sea Gate established its prima facie case that the three restrictive covenants constituted actual and substantial benefits to Sea Gate and that its purpose had not been accomplished nor had the restrictive covenants been abandoned. In rendering the September order, the court relied upon, among other evidence, the prior deeds, the court's records for the 1948 matter, Sea Gate's Rules and Regulations and the sworn statements of Mr. Lance Burns.

The Parties' Positions

Shmeira's arguments are: 1. The court misapplied the law when it accepted as admissible evidence Sea Gate's Rules and Regulations and Sea Gate's By-Laws; 2. The court made a mistake of fact in determining that the residential parking lot maintained by Sea Gate occupies the Premises; 3. The court misapplied the law when it considered the New York City Zoning Law in rendering the September order; 4. The court misapplied the

law when it found that the balance of equities favored Sea Gate, as Shmeira's "hardship" was self-created.[5] Fundamentally, Shmeira maintains that these aforementioned misapplications of law and mistakes of fact resulted in the court improperly leaving intact the three restrictive covenants on the Premises.

Shmeira asserts that the court misapplied the law when it considered Sea Gate's Rules and Regulations and its By-Laws as being in admissible form. It argues that Sea Gate neither relied upon the Rules and Regulations nor did it lay the proper foundation for the court to consider the document. Shmeira also avers that, as the Rules and Regulations provided by Sea Gate in its papers were not relied upon in Sea Gate's motion papers, it was deprived the right to challenge the admissibility of the document. Similarly, Shmeira contends that Sea Gate's By-Laws are likewise inadmissible as the proper foundation was never laid by counsel for its submission into the record. Shmeira maintains this misapplication of the law of evidence must result in a modification of the September order, denying Sea Gate's summary judgment motion and granting its own, as the proffered evidence submitted by Sea Gate was inadmissible.

[5] Shmeira's papers also provide further arguments concerning Mr. Burns' affidavit, asserting that his sworn statements were conclusory, unsupported by the record, and were insufficient to warrant awarding Sea Gate summary judgment. Shmeira also argues that it, not Sea Gate, demonstrated entitlement to summary judgment. Such arguments are not appropriately presented in a motion to reargue and were not considered. Shmeira's contention that Mr. Burns' affidavit is conclusory and insufficient was not present at the time of the prior motions and the arguments presented in support of its entitlement to summary judgment were considered in rendering the September order (*see Jaspar Holdings, LLC v Gotham Trading Partners # 1, LLC*, 186 AD3d 582, 584 [2d Dept 2020] [internal quotations marks and citations omitted] ["a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented]).

Shmeira also claims that the court's finding that Sea Gate's residential parking lot occupies the Premises is a mistake of fact. Shmeira states that, regardless of the admissibility of the Rules and Regulations, the residential parking lot identified in the document is not located at the Premises. It further highlights that Sea Gate neither presents nor argues that the residential parking lot identified in its Rules and Regulations constitutes the vacant portion of the Premises. Shmeira also claims to clarify that the residential parking lot is "a large parking lot inside Sea Gate's security gates, just on the other side of Shmeira's property and located between Surf Avenue and Mermaid Avenue" (NYCEF Doc. 171 at 8 - 9, ¶ 31).

Thus, Shmeira argues the court misapprehended and overlooked both law and fact in considering and reviewing Sea Gate's Rules and Regulations and By-Laws, and in determining the residential parking lot was situated on the Premises.

Addressing the court's "consideration" of the New York City Zoning Law, Shmeira posits that such weight given to the zoning restrictions on the Premises was a misapplication of the law, as zoning represents a separate and distinct issue from the relief before the court concerning restrictive covenants. Shmeira maintains that the zoning laws placed on the property have no bearing on whether the restrictions should be enforced or extinguished because the zoning laws are unrelated to whether the restrictive covenants provide an actual and substantial benefit to Sea Gate. Shmeira's position is that whether it needs to bring further proceedings regarding the zoning laws is not relevant to the instant discussion, which is narrowly focused on extinguishing "private" restrictions on its property rights, rather than regulations imposed by a municipality. Shmeira submits that

governing case law clearly supports the conclusion that a court may not consider zoning restrictions in an action brought pursuant to RPAPL § 1951.

Finally, Shmeira argues that the court misapplied the law in finding that the balancing of the equities favor Sea Gate, when it determined the hardship of the restrictive covenants was self-created. Shmeira argues that unlike the case cited in the September order, it is undisputed that it did not have actual knowledge of the restrictive covenants until after it purchased the Premises.[6] Accordingly, Shmeira maintains the hardship was not self-created. Further, it contends, contrary to the court's conclusions, the restrictive covenants not only interfere with its business interests, but prevent Shmeira's free, unencumbered and unobstructed use of its real property. Thus, it concludes that the court misapplied the law in finding the balance of equities favored Sea Gate, as it had no actual knowledge of the restrictive covenants prior to purchasing the Premises and the balance of equities favor it, rather than Sea Gate.

In opposition, Sea Gate argues that the September order was decided properly and the court neither made a mistake of fact nor misapplied the law in rendering its decision. Sea Gate maintains that Shmeira merely presents broad general allegations of error and mistake, which are insufficient to warrant reargument. It also rejects Shmeira's assertions that Mr. Burns' affidavit is conclusory. Further, Sea Gate advances that the admissibility of its Rules and Regulations is irrelevant as the court cited ample evidence supporting its determination that the restrictive covenants represented actual and substantial benefits to

[6] This is because the title report was deficient, which was not Sea Gate's fault.

Sea Gate. Regarding the residential parking lot, Sea Gate notes that the residential parking lot is in close proximity to the Premises. Additionally, Sea Gate highlights that the 1948 deed, wherein the restrictive covenants are first reflected, also provides specific language referring to the rules and regulations promulgated by Sea Gate.

Addressing its By-Laws, Sea Gate contends that Mr. Burns' affidavit provides sufficient basis for their admissibility, and that regardless, Shmeira likewise presented the By-Laws in its motion for summary judgment, rendering moot Shmeira's contention that this document is inadmissible, as it adopted the By-Laws by including them in its papers. Finally, Sea Gate insists the court properly applied the law when considering the balance of equities and RPAPL § 1951. Sea Gate maintains that the court properly found the balance of the equities favor it, as it protects the community standards and interests of Sea Gate's 860 homeowners, outweighing the individual business interests of Shmeira. It also argues that Shmeira's contention that the harm was not self-created is misplaced, as it is attempting to disavow its title agent's failure to locate and reveal the restrictive covenants which run with the land prior to closing.

In reply, Shmeira reiterates the arguments presented in its initial moving papers. At its core, Shmeira's reply rejects Sea Gate's opposition, as it maintains Sea Gate fails to cite any authoritative or controlling case law refuting Shmeira's position that the September order was based on misapplication of law and mistake of fact. It further contends that Sea Gate's opposition essentially concedes that the Rules and Regulations were inadmissible and admits that Sea Gate's residential parking lot does not occupy the Premises, but rather is a separate parcel that is adjacent to it. Additionally, Shmeira rejects Sea Gate's

contention that the court properly considered its By-Laws. Shmeira maintains that it did not adopt the By-Laws by merely presenting it as an exhibit to its motion papers, nor does including the By-Laws in their papers render the document admissible. Finally, Shmeira reiterates its contention that the court improperly considered the New York City Zoning Law applicable to the Premises when it issued the September order and emphasizes that Sea Gate fails to cite any case law supporting the court's consideration of the zoning laws.

Discussion

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d] [2]). "While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided" (*Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011] [internal citations and quotations marks omitted]). Nor may it be used by a movant "to present arguments different from those originally presented" (*id.*). Further, the fact or law overlooked or misapprehended by the court must have been decisive in rendering the prior decision (*see Matter of Quinby v Public Serv. Commn. of State of N.Y. for Second Dist.*, 227 NY 601, 602 [1919]; *Fosdick v Town of Hempstead*, 126 NY 651, 652 [1891]; *Gutierrez v Gutierrez*, 70 Misc 2d 16, 16 [Sup Ct, Kings County 1972]).

Here, Shmeira demonstrates its entitlement to reargument of the previous motions by arguing that the court misapprehended the facts in rendering the September order. However, upon reargument, the court adheres to its prior decision.

Admissibility of Sea Gate's By-Laws & Rules and Regulations

The court did not misapply the law in considering both Sea Gate's By-Laws and its Rules and Regulations. Addressing Sea Gate's By-Laws, a party waives any challenges to the admissibility of a document when it presents the same item in support of their own motion (*see Pouncey v New York City Tr. Auth.*, 135 AD3d 728, 730 [2d Dept 2016] citing *Field v Waldbaum, Inc.*, 35 AD3d 652 [2d Dept 2006]; *Pech v Yael Taxi Corp.*, 303 AD2d 733 [2d Dept 2003]; *Raso v Statewide Auto Auction*, 262 AD2d 387 [2d Dept 1999]). Therefore, Shmeira waived any objections to the admissibility of Sea Gate's By-Laws by submitting the same document as part of its motion for summary judgment. Thus, Shmeira's contention that the court erred in considering Sea Gate's By-Laws is wholly unsupported by the applicable law governing admissibility.

Next the court addresses Shmeira's contention that it misapplied the law when it admitted and considered Sea Gate's Rules and Regulations. An affirmation of an attorney, even if he has no personal knowledge, may serve as the vehicle for the submission of admissible documents or the certification of a copy of a document, which can constitute authentication of the document (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Gihon, LLC v 501 Second St., LLC*, 103 AD3d 840, 842 [2d Dept 2013]; *Tingling v C.I.N.H.R., Inc.*, 74 AD3d 954, 956 [2d Dept 2010]). Further, there is a long standing legal principle in New York jurisprudence that "a paper so referred to and described in a

written instrument that it may be identified, beyond a reasonable doubt, is *thereby made a part of the instrument, the same as if incorporated therein*" (*In re Bd. of Com'rs of Washington Park*, 52 NY 131, 131 [1873] [emphasis added]; see also *Jones v Cunard S.S. Co.*, 238 AD 172, 173 [2d Dept 1933]; *cf. Chiacchia v National Westminster Bank*, 124 AD2d 626, 628 [2d Dept 1986] [wherein the Appellate Division determined a question of fact existed as to whether the documents referred to in a rental agreement could be identified beyond a reasonable doubt]). Finally, a party waives objections to admissibility when it fails to contest admissibility upon presentation of the evidence in question (*see Santiago v Rodriguez*, 38 AD3d 639, 640 [2d Dept 2007]; *Scudera v Mahbubur*, 299 AD2d 535, 535 [2d Dept 2002] [wherein Appellate Division reversed lower court's denial of defendant's summary judgment where deficiencies in evidence were waived when plaintiff failed to raise them]).

Here, in the prior motion, as an exhibit to Sea Gate's attorney's affirmation, he presented its Rules and Regulations. While Sea Gate's Rules and Regulations were difficult to find in the motion papers, as counsel failed to identify his twenty-plus exhibits in the NYSCEF e-file system, it nevertheless was included in Sea Gate's motion for summary judgment as Doc 97.[7] Additionally, the 1948 deed, which includes the restrictive covenants, the focus of this entire matter, expressly provides "[t]hat the party of the second part shall and will comply with, and shall not and will not violate *the rules and regulations*

[7] Sea Gate's Rules and Regulations was first included in Sea Gate's responses to Shmeira's discovery demands, (Doc 22) and was also included as an exhibit to Sea Gate's attorney's affirmation (Doc 97).

of the said Sea Gate Association, except as herein expressly provided" (NYSCEF Doc. 154 at 4 [emphasis added]). Likewise, Sea Gate's By-Laws, presented by both Sea Gate and Shmeira, provides:

> "The Board of Directors shall be the governing body of the Community; the power of the Board of Directors shall include but not limited to the *adoption of the rules and regulations* for maintenance, protection, preservation and improvement of the Community known as Sea Gate, and the safety, security, comfort, and general welfare of the Community residents. Said *Rules and Regulations*, which may, at the Board's discretion include the imposition of fees or charges, shall be binding upon the owners of property within Sea Gate Community and the residents thereof and upon the non-residents of said Community at such times as they may be within the Sea Gate Community" (NYSCEF Doc. 153 at 6 [emphasis added]).

Thus, as both the 1948 deed (the admissibility of which is uncontested) and the By-Laws (deemed admissible as it was presented by both parties) refer to and describe Sea Gate's Rules and Regulations - permitting identification beyond a reasonable doubt - the Rules and Regulations are deemed to be part of each as if incorporated therein. Accordingly, Sea Gate's Rules and Regulations are admissible as the document is deemed incorporated into other admissible documents.

Further, beyond this independent basis for admission, Shmeira did not contest or raise the issue of admissibility regarding Sea Gate's Rules and Regulations when the document was initially presented to the court. While Shmeira is correct in its contention that Sea Gate did not expressly rely on the Rules and Regulations in the substance of its arguments, Sea Gate nevertheless presented the Rules and Regulations to the court as an exhibit to its motion papers. In addition, the 1948 deed includes a clear reference to Sea

Gate's Rules and Regulations. The burden was on Shmeira, as the party opposing Sea Gate's motion, to raise any issues of admissibility. The role of the court is to examine the parties' arguments and whether the proffered evidence supports such contentions. Accordingly, as Shmeira failed to raise the issue of the admissibility of the Rules and Regulations in the prior motion papers, such arguments may not be made or considered on a motion to reargue (*Anthony J. Carter, DDS, P.C.*, 81 AD3d at 820) and is deemed waived (*Scudera*, 299 AD2d at 535).

Residential Parking Lot

Shmeira next argues that the court made a mistake of fact in rendering the September order when it seemed to infer that Sea Gate's residential parking lot was in part on the Premises. In the September order, the court [Page 16] states:

> "The continuing need for [the restrictive covenant on use], 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.

Shmeira, by its attorney, asserts that the court erred in concluding that the residential parking lot identified in Sea Gate's Rules and Regulations is referring to the vacant portion of the Premises. Shmeira points out that the residential parking lot is a separate, nearby property. Sea Gate's opposition does not dispute this claimed error of fact and points out that the residential parking lot is an adjacent lot, not the Premises subject to the instant dispute (*see* NYSCEF Doc. 265 at 6, ¶¶ 26 & 27).

The court did not think that Shmeira's property was part of Sea Gate's parking lot, and was instead pointing out that parking has been an important amenity for this community since the 1948 court proceeding which resulted in the restrictive covenant on the subject property, which states "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."

Nevertheless, this alleged mistake of fact is neither dispositive nor grounds for altering the September order as there was ample evidence supporting the enforcement of the restrictive covenants. "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]). A party advocating for extinguishment of a restrictive covenant pursuant to RPAPL § 1951 must demonstrate that "the restriction is of no actual and substantial benefit to the persons seeking its enforcement or . . . the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment" (*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 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 A.D.3d 1312 [2d Dept 2009]). Conversely, a party which demonstrates that the restrictive covenants are of actual and substantial benefit is entitled to enforcement of the restrictive covenants.

Here, the court relied upon various evidence in determining that the restrictive covenants represented a substantial and actual benefit to Sea Gate, including Mr. Burns' affidavit, Sea Gate's By-Laws, 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.

Sea Gate is a unique private community, designed and maintained by its Board of Directors, which oversees its development and maintenance. In 1948, when Sea Gate sold the property that constitutes the Premises, it went to court for permission to sell and for permission to impose the restrictive covenants. The affidavit of Mr. Burns attests that the restriction on use represents a substantial and actual benefit to Sea Gate, as he and other members of the Sea Gate community have gone to the [no longer there] Garage on the Premises "to service our cars" (NYSCEF Doc. 104 at 5, ¶ 17), that the limitation on improvements prevents the Sea Gate community from being subjected to oversized and unsightly buildings (*id.* at 6, ¶ 20), and that the fence and sign restrictions aid in Sea Gate's ability to control the aesthetics of the community (*id.*, ¶ 21).

Sea Gate presented ample evidence that it is charged with maintaining the characteristics of the community. In this context, Sea Gate's residential parking lot is in close proximity to the Premises, and this demonstrates that the restrictive covenant as to use advances Sea Gate's mission to control the aesthetic of Sea Gate by ensuring that all vehicle storage is confined to a defined area.

Finally, Sea Gate's By-Laws demonstrate that the restrictive covenants aid and benefit Sea Gate in accomplishing its mission and objectives. The By-Laws provide:

> "[Sea Gate] is *organized for the mutual comfort and convenience of its members*; to provide and maintain suitable means of access between properties of its members, and suitable sanitary arrangements for their comfort and health; to provide and maintain a casino or other buildings for mutual convenience; to provide and maintain open places on the beach or elsewhere at Sea Gate for the common use of its members; to provide generally for the care, protection, and maintenance of the property at Sea Gate of itself and its members, and to promote social intercourse among its members, and, to the ends of aforesaid, *to acquire, take, hold and dispose of such property, real and personal, as the purpose of the Associate may require*, subject to such limitations as may be presented by law. To provide parks and playgrounds, buildings or grounds for camp, musical or other meetings; to preserve and maintain the private community known as Sea Gate in the Borough of Brooklyn, City and State of New York, including all the facilities therein and to take all means for the improvements, betterment and welfare of said community and the properties and facilities located therein" (NYSCEF Doc. 98 at 14 [emphasis added]).

The By-Laws, taken together with the affidavit of Mr. Burns, demonstrate that the restrictive covenants provide an actual and substantial benefit to Sea Gate, by providing a means to realize the mutual comfort and convenience of its members, and aligns with its

mission to protect and maintain the property at Sea Gate and to promote social intercourse among its members.[8]

Thus, even reading the language in the September Order as a mistake of fact, such mistake is not dispositive, as there is ample evidence supporting the court's determination that the restrictive covenants serve an actual and substantial benefit to Sea Gate.

Consideration of Zoning Laws

The court did not misapprehend the law when it considered the applicable New York City Zoning Law, in dicta, while considering the balance of the equities. Both *Chambers v Old Stone Hill Rd. Assoc.* and *Matter of Friends of Shawangunks v Knowlton*, cited by Shmeira, fail to support the conclusion that the court may not consider zoning regulations when rendering a decision under RPAPL § 1951. The legal conclusions with regard to zoning and restrictive covenants presented in these cases are that "a particular use of land may be enjoined as in violation of a restrictive covenant, although the use is permissible under the zoning ordinance and the issuance of a permit for a use allowed by a zoning ordinance may not be denied because the proposed use would be in violation of a restrictive covenant" (*Chambers v Old Stone Hill Rd. Assoc.*, 1 NY3d 424, 423 [2004]; *see also Matter of Friends of Shawangunks v Knowlton*, 64 NY2d 387, 392 [1985]). Such conclusions do not preclude a court from considering zoning laws when rendering a decision in an action brought pursuant to RPAPL § 1951. Further, search of the Appellate

[8] As noted in the September order, restrictive covenants preserving the "essential feel" and "harmonious character of [a] community," are deemed substantial benefits to the entities seeking to enforce them (*Lattingtown Harbor Prop. Owners Assn., Inc. v Agostino*, 34 AD3d 536, 538 [2d Dept 2006]).

Division's cases revealed only one case specifically addressing the consideration of zoning laws in the context of an action brought pursuant to RPAPL § 1951. In *Matter of Zimmerman v Seven Corners Dev.*, the Fourth Department found the court properly extinguished a restrictive covenant when the zoning laws prohibited the use required by the restrictive covenant (237 AD2d 892, 893 [4th Dept 1997]).[9] Accordingly, the court did not "misapprehend the law" when it considered the applicable zoning regulations in rendering the September order.[10]

Balance of Equities

The court did not misapply the law in finding that the balance of equities favored Sea Gate. As provided in the September order, "[o]wners 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" (*Corrarino v Byrnes*, 43 AD3d 421, 423-424 [2d Dept 2007]). The 1948 deed was duly recorded and available for Shmeira's

[9] *Zimmerman* specifically provides:

> "The court properly extinguished the restriction pursuant to RPAPL 1951 (1) (*see, Clintwood Manor v Adams*, 29 AD2d 278, affd 24 NY2d 759). "The first and foremost factor to be considered [in determining whether to extinguish a restriction] is whether the property is capable of being put to the use required by the restriction[ ]" (*Board of Educ. v Doe*, 88 AD2d 108, 115; *see, Orange & Rockland Utils. v Philwold Estates*, 52 NY2d 253, 265). *Here, the 1986 amendment to the Town of Hamburg zoning ordinance permitted commercial development and prohibited residential construction on the property now owned by Wal-Mart. Thus, the property is not capable of being put to the use required by the restriction*" (*Zimmerman*, 237 AD2d at 893 [emphasis added]).

[10] Aside from the appropriateness of considering the zoning regulations, the court notes that its discussion concerning zoning regulations is merely dicta.

title insurer to locate and reveal prior to the purchase of the Premises. Thus, regardless of the lack of actual notice conferred to Shmeira, it was provided constructive notice by virtue of the recording of the 1948 deed. Simply because its title search was deficient does not tip the balance of equities in its favor.

Regardless, the court's finding that the balance of equities favored Sea Gate did not rest solely on the principle of self-created harm. The court found that the balance of equities favored Sea Gate because it is "charged with managing the community for the best interests of its members since 1899 and has overseen those duties since its incorporation" (NYSCEF Doc. 166 at 20) and that Shmeira is already using the existing structure located at the Premises for its desired commercial purposes (*id.* at 19 n 2). As such, even without considering that the alleged hardship was self-created, this courts determination that the equities favor Sea Gate are supported by the other considerations and evidence presented to the court by Sea Gate in the prior motions.

Conclusion

Accordingly, it is **ORDERED** that reargument is granted, and upon reargument, the court adheres to its prior order.

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

This constitutes the decision and order of the court.

E N T E R,

Hon Debra Silber, J.S.C.