SHORT FORM ORDER

INDEX No. 10-1350
CAL. No. 16-01443OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 3-22-17 (004)
MOTION DATE 5-3-17 (005)
ADJ. DATE 8-16-17
Mot. Seq. # 004 - MD
005 - XMG; CASEDISP

BIRCH TREE PARTNERS LLC,

Plaintiff,

- against -

WINDSOR DIGITAL STUDIO LLC,

Defendant.

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Upon the following papers numbered 1 to 81 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26 ; Notice of Cross Motion and supporting papers 27 - 69 ; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers 73 - 78 ; Other memoranda of law 70 - 72, 79 - 81; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor is denied; and it is further

ORDERED that the cross motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted.

This is an action to enforce a restrictive covenant against the real property known as 408 Further Lane, Amagansett, New York, which is owned by the defendant (the defendant's property). The plaintiff owns real property located at 382 Further Lane, Amagansett, New York (the plaintiff's property). Both properties are located south of Further Lane, which runs in an easterly and westerly direction. The plaintiff's property is located to the west of the defendant's property, and the properties share a common boundary line along the portion of their properties at issue herein.

It is undisputed that the plaintiff acquired title to its property from its immediate predecessor in title June de H. Weldon (Weldon) by deed dated November 8, 2004, recorded on November 24, 2004 in the Office of the Suffolk County Clerk at Liber 12356, page 939. Weldon acquired title to the plaintiff's property from Jane Augusta Howell Lovejoy by deed dated February 21, 1966, recorded on February 25, 1966 at Liber 5917, page 50. The defendant acquired title to its property from Stephen A. Schwarzman (Schwarzman) by deed dated December 13, 2005, recorded on December 21, 2005 at Liber 12426 page 782. The defendant's predecessor in title, Schwartzman, acquired title to the defendant's property from Douglas E. Dayton, as Executor of the Estate of Constance L. Francisco, deceased, by deed dated May 18, 1992, recorded on May 29, 1992 at Liber 1 1474, page 27.

By deed dated October 18, 1956, recorded in the Office of the Suffolk County Clerk on October 19, 1956 at Liber 4199, page 203, the plaintiff's predecessor in title Jane Augusta Howell Lovejoy conveyed title to a 0.106-acre strip of land that was previously part of the plaintiff's property to the defendant's earlier predecessors in title Donald and Constance L. Francisco (the 1956 deed). Said deed contained a restrictive covenant which provided:

> SUBJECT also to the further restriction that the strip or parcel, which is the subject of the conveyance, shall be perpetually unavailable for use as a site for the erection in whole or in part of any building or structure, and further that no desirable trees or vegetation shall be removed from the strip or parcel in the manner which would injure the appearance of the said strip or parcel and detract from its use as a screen between premises of the grantor and her successors in interest and other premises of the grantee and their successors in interest.

It is further undisputed that the defendant removed certain trees and vegetation from the 0.106-acre strip of land (the strip of land) in 2007, that the defendant planted a 12-foot tall privet hedge near the boundary between the plaintiff's property and the defendant's property in August of 2008, and that the defendant erected a six-foot tall, 40-foot long, stockade fence along said boundary in 2009 with the approval of the local municipality. In August 2016, the defendant revegetated the strip of land by planting various trees and vegetation.

The plaintiff commenced this action by the filing of a summons and complaint on January 6, 2010. In its complaint, the plaintiff sets forth three cause of action. In its first cause of action, the plaintiff seeks an order pursuant to RPAPL Article 20 enforcing the restrictive covenant and directing the defendant to remove the stockade fence. In its second cause of action, the plaintiff alleges that the removal of trees and vegetation from the strip of land is a violation of the restrictive covenant and seeks an order enjoining the defendant from removing any additional trees or vegetation from the subject area and directing the defendant to "undertake the repair and reestablishment of [the strip of land] so as to restore the same to substantially the same state in which it existed prior to [the defendant's] violation of the restrictive covenant." In its third cause of action, the plaintiff alleges that the installation of the privet hedge is a violation of the restrictive covenant and seeks an order directing the defendant to remove said planting.

After issue was joined, the plaintiff moved by order to show cause for an order to enforce the restrictive covenant and enjoining the defendant from removing any trees or vegetation from the strip of

land, and the defendant cross-moved for summary judgment dismissing the complaint. By order dated June 21, 2011, the undersigned granted the plaintiff's motion to the extent that the defendant was "enjoined from further removing trees or vegetation and from erecting any additional structures on the disputed land," and denied the defendant's cross motion for summary judgment. Thereafter, the defendant timely filed an appeal challenging the denial of its cross motion for summary judgment. By decision and order dated May 23, 2012, the Appellate Division, Second Department affirmed the subject order with a modification that granted the branch of the defendant's motion which sought to dismiss the plaintiff's third cause of action seeking to remove the privet hedge planted by the defendant.

In its decision and order, the Appellate Division, Second Department found that, "given the ambiguity in the language of the covenant, including whether a fence should be considered a 'structure,' and what are 'desirable' trees and vegetation, it cannot be determined, as matter of law, that the defendant had the right to erect a fence or to remove trees and vegetation from the property," and that there were triable issues of fact whether the original parties to the restrictive covenant intended to prohibit the installation of the type of fence allegedly built by the defendant or the removal of the type of trees and vegetation allegedly removed by the defendant, leaving said issues to be resolved by the determination of "the circumstances surrounding the drafting of the restrictive covenant in order to glean the extent and scope of the covenant." The Appellate Division, Second Department also found that "[t]here is nothing in the restrictive covenant that could be read as prohibiting the introduction of new vegetation onto the surface of the property."

The plaintiff now moves for summary judgment on its first and second causes of action on the grounds that the undisputed facts indicate that the defendant "decimated the natural pre-existing appearance of [the strip of land]," and "eliminated ... the screen between the surrounding properties." The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of its motion, the plaintiff submits, among other things, the pleadings, the affidavits of its members and an expert witness, and photographs of the strip of land before, during, and after the defendant's removal of trees and vegetation from the strip of land. In his affidavit dated September 24, 2010, submitted in support of the plaintiff's earlier motion for a preliminary injunction, Peter Sobel swears that he is a member of the plaintiff limited liability corporation, that the restrictive covenant "effectively created a scenic and conservation easement over the entirety of [the strip of land]," and that the purpose of the restrictive covenant "was to perpetually prohibit the owner of [the defendant's property] from fully incorporating [the strip of land] into [the defendant's property] through the erection of a fence or other such boundary."

In his affidavit dated July 28, 2016, Jonathan Sobel swears that he is a member of the plaintiff limited liability corporation, and that the defendant's planting of the privet hedge in June 2016 was a violation of the preliminary injunction issued by the undersigned on June 21, 2011 which enjoined the defendant from removing any further vegetation from the strip of land because some vegetation that had grown in the interim had to have been removed.

The plaintiff also submits the affidavit of William Crawbuck (Crawbuck) who swears that he is certified as a photogrammetrist by the American Society for Photogrammetry and Remote Sensing, that photogrammetry "involves using technology to extract measurements and make maps and interpret data from images," and that his work frequently involves the review and interpretation of aerial photographs. He states that, pursuant to the plaintiff's request, he has reviewed aerial photographs of the subject properties along their "shared border, from Spring 1959, March 1978, April 1996 and Spring 2007." He indicates that "it is my opinion that from Spring 1959 through the Spring of 2007, the area in question was largely made up of natural forest growth, and that such natural growth appears to be substantially unchanged during this time period."

The law has long favored free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them (***Hidalgo v 4-34-8, Inc.***, 117 AD3d 798, 988 NYS2d 64 [2d Dept 2014]; *see* ***Fader v Taconic Tract Development, LLC,*** 128 AD3d 887, 11 NYS3d 184 [2d Dept 2015]). "Courts will enforce such restraints only where the party seeking enforcement establishes their application by clear and convincing evidence" ***(Hidalgo v 4-4-8, Inc.***, 117 AD3d at 800, 988 NYS2d at 67; quoting ***Dever v DeVito***, 84 AD3d 1539, 922 NYS2d 646 [3d Dept 2011]; *see also* ***Greek Peak, Inc. v Grodner***, 75 NY2d 981, 982, 556 NYS2d 509 [1990]).

The Appellate Division, Second Department has found that the language in the subject restrictive covenant regarding "structure" and "desirable trees or vegetation" is ambiguous. Generally, any ambiguity is construed against the party seeking to enforce a restrictive covenant (*see* ***Witter v Taggart***, 78 NY2d 234, 573 NYS2d 146 [1991]). However, this rule is preempted by the rule of construction that treats the intention of the parties as paramount (*see* ***Jennings Beach Assn. v Kaiser***, 145 AD2d 607, 536 NYS2d 143 [2d Dept 1998]). "Restrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy" (***Chambers v Old Stone Hill Rd. Assoc.***, 1 NY3d 424, 431, 774 NYS2d 866, 868 [2004]; *see* ***Matter of Perrin v Bayville Vil. Bd.***, 70 AD3d 835, 894 NYS2d 131 [2d Dept 2010]). The parties' intent may be gleaned not only from the language of the covenant itself, but from extrinsic evidence such as the circumstances surrounding the agreement (*see* ***Booth v Knipe***, 225 NY 390, 225 NYS 390 [1919]; ***Kitching v Brown***, 180 NY 414, 73 NE 241 [1905]; ***Jennings Beach Assn. v Kaiser***, *supra*). Where extrinsic evidence does not provide a basis for discerning the intent of the parties as a matter of law, triable issues exist that must be resolved by the trier of fact (*see* ***Aronson v Riley***, 59 NY2d 770, 464 NYS2d 723 [1983];***Camperlino v Town of Manilus Mun. Corp.***, 78 AD3d 1674, 911 NYS2d 755 [4th Dept 2010]).

Here, the plaintiff has failed to submit any extrinsic evidence regarding the intention of the original parties to the restrictive covenant and to eliminate all issue of fact regarding the scope, as well as the existence, of the restrictions claimed herein (*see* ***Greek Peak, Inc. v Grodner***, *supra*; ***Butler v Mathisson***, 114 AD3d 894, 981 NYS2d 441 [2d Dept 2014]). The failure to make a prima facie showing

of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hospital***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]). Accordingly, the plaintiff's motion for summary judgment is denied.

The defendant cross-moves for summary judgment dismissing the plaintiff's two remaining causes of action. In support of its application, the defendant submits, among other things, the transcripts of the deposition testimony of the members of the plaintiff corporation, the affirmations of two of its attorneys, the affidavits of two nonparty witnesses, a copy of the title insurance policy issued to the plaintiff at the time it purchased its property, and certain surveys of the subject properties.

Jonathan Sobel was deposed in this action and a related action by the plaintiff against the defendant. He testified that when he first viewed the strip of land in April 2004, it was populated with trees, ground cover, and vegetation, and that he never saw a fence located in the strip of land. He indicated that "there may have been [a fence there] but I didn't see it," that the plaintiff cultivated the strip of land from November 2004 to 2007, and that there were irrigation "heads" located on the plaintiff's property along the border of the strip of land which were used to irrigate the area. Jonathan Sobel further testified that he did not have any discussions with the predecessors in title of the parties to this action, and that he had no knowledge as to why the strip of land was sold to the defendant's predecessor in title in 1956. He acknowledged drafting a letter to "our new neighbors" dated August 14, 2007 wherein he attempted to resolve the dispute with the defendant. He stated that a survey dated March 20, 1992, as well as the survey guaranteed to Peter Sobel and him dated August 27, 2004 relative to the plaintiff's purchase of the subject property and the relevant title insurance policy, indicate a fence on the border between the plaintiff's property and the strip of land. He indicated that he agrees that whether something is "desirable" is a matter of opinion, that the restrictive covenant makes all of the trees in the strip of land desirable, and that he first became aware of the restrictive covenant in 2009.

Peter Sobel was deposed in this action and a related action by the plaintiff against the defendant. He testified that he had no evidence of the intent of the parties to the 1956 deed, and that a dilapidated deer fence was located on the eastern border of the strip of land in April 2004. He stated that no previous property owner had erected a fence in the strip of land for 50 years, and that his statement was based on his visit to the plaintiff's property in April 2004 and the language of the restrictive covenant.

In his affidavit, nonparty witness David A. Weaver swears that he is the president of George Walbridge Surveyors, P.C., that he has worked as a licensed surveyor for said corporation since 1989, and that he is personally familiar with both parties' properties as his corporation had been commissioned to survey said properties "numerous times." He states that the copy of a map of the defendant's property surveyed on March 20, 1992 submitted herein is a true and accurate copy, and that the survey shows a fence approximately 60 feet long along the border between the plaintiff's property and the strip of land. He indicates that a second map submitted, which was prepared following a survey performed on November 11, 2005, shows a fence "along most of the boundary between [the strip of land] and [the plaintiff's property]" generally within the defendant's property, and that said map contains the notation "fence broken down in spots."

In his affidavit, nonparty witness Charles Marder swears that he is the president of Marders The Landscaping Store, Inc., that he first became familiar with the strip of land in the late 1970s when he performed landscaping services for the defendant's predecessor in title, Constance Franciso, and that, at that time, there were several small buildings on the defendant's property "just to the east of [the strip of land]." He states that his corporation performed landscaping work for the defendant in 2007 which included the installation of an auto-underground irrigation system and the removal of trees "that were lacking lower branches and foliage," that, based on his experience, the situation was "the result of years of damage by the local deer population and general lack of sunlight," and that said trees were no longer an effective screen between the respective properties. He indicates that, after the Appellate Division decision permitting the defendant to plant new vegetation in the strip of land, he prepared and executed a "revegetation plan" in 2016 with the goal of creating "a largely natural looking hedgerow," including the planting of numerous trees shrubs, and other relatively mature vegetation in the strip of land. Mr. Marder further swears that, in his professional opinion, the new plantings "contain more desirable trees and vegetation, particularly for screening purposes, than the trees that were removed in 2007.

The defendant also submits a copy of the correspondence dated August 14, 2007, which Jonathan Sobel drafted according to his deposition testimony summarized above. In said correspondence, the members of the plaintiff corporation state "[in] the 1950s, a portion of the property line between our two parcels was modified to accommodate the setback requirements for the houses that straddle the property line."

Further, in response to the plaintiff's contention that the stockade fence and irrigation system installed in the strip of land constitute "structures" which are prohibited by the restrictive covenant, the defendant submits the affirmation of one of its attorneys, Kevin A. McGowin. Essentially, Mr. McGowin contends that the plaintiff's reliance on the current zoning code of the Town of East Hampton to define the term "structure" is faulty, as the Town did not adopt any zoning code until 1957, after the restrictive covenant was created.

Here, the defendant has established its prima facie entitlement to summary judgment dismissing the complaint on the grounds that the restrictive covenant is ambiguous, that the plaintiff cannot establish the application and scope of the restrictive covenant by clear and convincing evidence, and that it cannot be found to have violated the subject restrictive covenant. As discussed above, courts only enforce a restrictive covenant when the party seeking enforcement establishes its application by clear and convincing evidence (***Hidalgo v 4-4-8, Inc.***, *supra*; quoting ***Dever v DeVito***, *supra*; *see also* ***Greek Peak, Inc. v Grodner***, *supra*).

The plaintiff contends that, pursuant to the language of the restrictive covenant, the defendant cannot erect a "building or structure," and that the defendant cannot remove any "desirable trees or vegetation ... which would injure the appearance of the said strip or parcel and detract from its use as a screen between premises." Where the language used in a restrictive covenant is equally capable of two interpretations, the interpretation which limits the restriction must be adopted (*see* ***Huggins v Castle Estates***, 36 NY2d 427, 430, 369 NYS2d 80 [1975; ***Kaufman v Fass***, 302 AD2d 497, 756 NYS2d 247 [2d Dept 2003]). It is determined that the subject language can be interpreted to prohibit only the erection of buildings and structures similar to those that existed near the common boundary line of the properties at

the time of the creation of the restrictive covenant, and that the prohibition against the removal of trees or vegetation from the strip of land was only to provide an effective screen between the properties.

Because the Appellate Division decision establishes that the phrases "structure" and "desirable trees or vegetation" are ambiguous, and that the defendant is entitled to plant within the strip of land, including a 12-foot high privet hedge, the plaintiff's contention that the restrictive covenant prohibits the alteration of the "appearance" of the strip of land or provides a "scenic and conservation easement" is without merit. "The doctrine of 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (***Erickson v Cross Ready Mix, Inc.***, 98 AD3d 717, 950 NYS2d 175 [2d Dept 2012], quoting ***Martin v City of Cohoes***, 37 NY2d 162, 165, 371 NYS2d 687 [1975]; ***Brownrigg v New York City Hous. Auth.***, 29 AD3d 721, 815 NYS2d 681 [2d Dept 2006]).

Where a phrase in a restrictive covenant is patently vague and the determination of whether an activity violates the covenant would be largely subjective, the restriction is unenforceable as the plaintiff will be unable to meet its burden of demonstrating the scope of the restriction by clear and convincing evidence (***Turner v Caesar***, 291 AD2d 650, 737 NYS2d 426 [3d Dept 2002]; *see also* ***Ford v Fink***, 84 AD3d 725, 924 NYS2d 94 [2d Dept 2011]; ***Matter of Perrin v Bayville Vil. Bd.***, 70 AD3d 835, 894 NYS2d 131 [2d Dept 2010]).

In opposition to the cross motion, the plaintiff submits the affirmation of its attorney, photographs of the strip of land, a survey and a sketch of the defendant's property, and an article from a local newspaper. In his affirmation, counsel for the plaintiff contends that the aerial photographs submitted by the plaintiff establishes that the strip of land remained untouched until 2007, that the defendants' actions "improperly detract from the plaintiff's right to enjoy the then existing 'appearance of' [the strip of land] and right to have that 'appearance' serve as the natural and intended screen between the two adjoining properties." Counsel for the plaintiff further contends that the submitted survey and sketch indicate that the defendant cannot establish that a fence existed in the strip of land as the surveys relied upon by the defendant are "untrustworthy."

The survey of the defendant's property submitted by the plaintiff is a revised copy of the survey submitted by the defendant surveyed on November 11, 2005 which shows a fence on the westerly border of the strip of land. The submitted map indicates that it was revised on July 16, 2016 to reflect the addition of a garage. However, the revised map also indicates that the subject fence is still present in 2016 when it is undisputed that the strip of land was cleared in 2007, and any fence would have been removed.

The sketch of the defendant's property submitted, prepared on June 14, 1976, does not indicate a fence located anywhere on the borders of the defendant's property. However, the sketch indicates that it was prepared "from information in the office of George H. Walbridge Co." and is entitled "Sketch of Proposed Division of Property." The unauthenticated copy of an article from a local newspaper, even if admissible, merely stands for the proposition that cleared land should be left to revegetate naturally.

Here, the plaintiff has failed to submit any evidence or raise an issue of fact regarding the intention of the original parties to the restrictive covenant, or the surrounding circumstances, which would permit a

trier of fact to do more than subjectively determine the scope of the restrictive covenant (***Turner v Caesar***, *supra*; *see also* ***Ford v Fink***, *supra*; ***Matter of Perrin v Bayville Vil. Bd.***, *supra*). In addition, the plaintiff has failed to address the defendant's evidence that the plaintiff was aware that the restrictive covenant was intended to resolve the issue of the 1956 setback requirements imposed on the defendant's property as indicated in its letter dated August 14, 2007. The submitted survey, sketch, and newspaper article do not raise issues of fact which would alter the determination of questions before the Court. Accordingly, the defendant's motion for summary judgment dismissing the complaint is granted.

Dated: February 2, 2018

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**