

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FOURTH JUDICIAL DEPARTMENT

Halaby v. Denzak

2022 NY Slip Op 07344 (App. Div. 2022) · No. CA 21-01120 · Decided December 23, 2022

SUMMARY

The New York Appellate Division, Fourth Department, addressed enforcement of restrictive covenants governing outbuildings and fencing in a residential subdivision. The court held that the covenant did not clearly prohibit defendants from erecting an outbuilding other than the specifically listed structures, but affirmed denial of injunctive relief requiring removal of the garden fencing because the balance of equities favored defendants. The court modified the order and judgment accordingly and otherwise affirmed.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department
WRITING FOR THE COURT	Lindley, J.P.; Nemoyer, J.; Winslow, J.; Bannister, J.; Montour, J.
JURISDICTION	New York
DECIDED	December 23, 2022
DOCKET	CA 21-01120
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal and cross appeal from an order and judgment entered after trial. The judgment granted plaintiff relief barring certain structures, denied plaintiff injunctive relief requiring removal of defendants' garden fencing, and partially granted and denied defendants' motion for a directed verdict.
STANDARD OF REVIEW	The court reviewed the legal interpretation of the restrictive covenant de novo and reviewed the grant or denial of equitable relief for abuse of discretion, including whether irreparable injury and a favorable balance of equities were established.
PRECEDENTIAL VALUE	published
PARTIES	Samuel A. Halaby, Jr. v. James M. Denzak, Sara J. Denzak

TOPICS

covenants and restrictions

equitable relief

contract interpretation

real estate

appellate procedure

PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether the Uniform Plan of Restrictions prohibited defendants from erecting an outbuilding other than a pool cabana or architecturally compatible gazebo.
2. Whether plaintiff was entitled to equitable relief requiring defendants to remove the fencing surrounding their garden after establishing that the fencing violated the restrictive covenant.

HOLDINGS

1. The restriction did not establish that defendants were prohibited from erecting every outbuilding other than a pool cabana or architecturally compatible gazebo. Because the covenant's language excepted such structures and other structures permitted by the developer from the prohibition, plaintiff failed to prove the restriction's scope by clear and convincing evidence and was not entitled to an injunction against the proposed outbuilding.
2. Although the Uniform Plan of Restrictions unambiguously prohibited the fencing surrounding defendants' garden, plaintiff was not entitled to an injunction requiring its removal because he failed to establish that the balance of the equities favored enforcement. The defendants' lack of awareness of the restrictions, the absence of an express reference in their deed, the existence of similar fences on other lots, and the limited benefit to plaintiff supported denial of equitable relief.

KEY QUOTATIONS

*"Generally, 'restrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy'" (*1)*

*"[T]he party seeking to enforce such a restriction 'must prove, by clear and convincing evidence, the scope, as well as the existence, of the restriction'" (*2)*

*"[A] party is not automatically entitled to equitable relief when a violation of a restrictive covenant is established'" (*2)*

*"The court has discretion whether to grant an equitable remedy after balancing the equities'" (*2)*

FACTUAL BACKGROUND

The parties owned adjacent lots in the University Park subdivision in Mendon, New York. In 1992, the developer recorded a Uniform Plan of Restrictions governing the subdivision. Plaintiff claimed that defendants' fenced garden and intended shed violated the restrictions. The record showed that defendants were unaware of the restrictions, their deed did not expressly mention the Uniform Plan of Restrictions, and other subdivision lots had similarly fenced gardens.

PROCEDURAL HISTORY

Plaintiff brought an RPAPL article 15 action seeking enforcement of restrictive covenants in a recorded Uniform Plan of Restrictions. After trial, Supreme Court, Monroe County, denied plaintiff's request to require removal of a fenced garden, granted plaintiff judgment barring defendants from constructing or maintaining certain structures, and denied defendants' motion for a directed verdict concerning that relief. The Appellate Division modified the judgment by vacating the fourth decretal paragraph, granting defendants' directed-verdict motion as to the requested injunction against outbuildings, and dismissing the complaint to that extent; it affirmed as modified.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The order and judgment was modified by vacating the fourth decretal paragraph, granting defendants' motion for a directed verdict as to plaintiff's request to enjoin defendants from constructing, placing, or maintaining specified outbuildings, and dismissing the complaint to that extent. The judgment was affirmed in all other respects as modified.

CASES CITED

- Dodge v Baker, 194 AD3d 1348, 1349 [4th Dept 2021]
- Chambers v Old Stone Hill Rd. Assoc., 1 NY3d 424, 431 [2004]
- Kleist v Stern, 174 AD3d 1451, 1453 [4th Dept 2019]
- Greek Peak v Grodner, 75 NY2d 981, 982 [1990]
- Witter v Taggart, 78 NY2d 234, 237 [1991]
- Ludwig v Chautauqua Shores Improvement Assn., 5 AD3d 1119, 1120 [4th Dept 2004], lv denied 3 NY3d 601 [2004]
- Maven Tech., LLC v Vasile, 147 AD3d 1377, 1378 [4th Dept 2017]
- Rautenstrauch v Bakhru, 64 AD3d 554, 556 [2d Dept 2009]
- Single v Whitmore, 307 NY 575, 582 [1954]
- Kleist v Stern, 187 AD3d 1666, 1667-1668 [4th Dept 2020]
- DiMarzo v Fast Trak Structures, 298 AD2d 909, 910-911 [4th Dept 2002]

OPINION

PER CURIAM.

Halaby v Denzak (2022 NY Slip Op 07344) Halaby v Denzak 2022 NY Slip Op 07344 Decided on December 23, 2022 Appellate Division, Fourth Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on December 23, 2022 SUPREME

COURT OF THE STATE OF NEW YORK Appellate Division, Fourth Judicial Department
PRESENT: LINDLEY, J.P., NEMOYER, WINSLOW, BANNISTER, AND MONTOUT, JJ. 794.1
CA 21-01120 [*1]SAMUEL A. HALABY, JR., PLAINTIFF-APPELLANT-RESPONDENT,
vJAMES M. DENZAK AND SARA J. DENZAK, DEFENDANTS-RESPONDENTS-
APPELLANTS.

FRANK A. ALOI, ROCHESTER, FOR PLAINTIFF-APPELLANT-RESPONDENT. FINUCANE
AND HARTZELL, PITTSFORD (THOMAS CARROLL HARTZELL JR OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS-APPELLANTS. Appeal and cross appeal from an order and
judgment (one paper) of the Supreme Court, Monroe County (Gail Donofrio, J.), dated May 7,
2021.

The order and judgment, among other things, granted in part and denied in part the motion of
defendants for a directed verdict dismissing the complaint, and granted plaintiff judgment
prohibiting defendants from constructing certain structures on their property. It is hereby
ORDERED that the order and judgment so appealed from is unanimously modified on the law by
vacating the fourth decretal paragraph, granting that part of defendants' motion for a directed
verdict with respect to plaintiff's request for injunctive relief enjoining defendants from
"constructing, placing, or maintaining any outbuildings such as steel tool sheds, lean-tos, portable
or detached garages or the like except as may be permitted by the Uniform Plan of Restrictions"
and dismissing the complaint to that extent and as modified the order and judgment is affirmed
without costs.

Memorandum: In this action pursuant to RPAPL article 15 seeking enforcement of restrictive
covenants, plaintiff appeals and defendants cross-appeal from an order and judgment that, inter
alia, denied plaintiff's request for injunctive relief requiring defendants to remove a garden and
surrounding fencing from their property, granted plaintiff a judgment barring defendants from
"constructing, placing, or maintaining any structure/outbuilding other than pool cabanas and
architecturally compatible gazebos" on their property, and denied defendants' motion for a directed
verdict with respect to that relief.

Plaintiff and defendants live in the University Park subdivision in Mendon, New York. There are
10 lots in the University Park neighborhood. Each lot consists of approximately three acres of land
on the south side of Tennyson Way, where the dwellings are located, and approximately two acres
of land on the north side of Tennyson Way. Plaintiff and defendants own adjacent lots.

In 1992, Smith-McCall Development, Inc. recorded a Uniform Plan of Restrictions (UPR) relating
to the neighborhood, with the stated purpose "to encourage development and maintenance of a
fine, suburban residential development in order to promote and provide collective individual
ownership benefits." Plaintiff commenced this action to enforce the UPR, claiming that

defendants' installation of a fenced garden on the northern portion of their lot and their intended erection of a shed on the southern portion violated the provisions of the UPR.

"Generally, 'restrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy' " (Dodge v Baker, 194 AD3d 1348, 1349 [4th Dept 2021], quoting Chambers v Old Stone Hill Rd. Assoc., 1 NY3d 424, 431 [2004]; see Kleist v Stern, 174 AD3d 1451, 1453 [4th Dept 2019]). "[T]he party seeking to [*2]enforce such a restriction 'must prove, by clear and convincing evidence, the scope, as well as the existence, of the restriction' " (Dodge, 194 AD3d at 1349, quoting Greek Peak v Grodner, 75 NY2d 981, 982 [1990]; see Kleist, 174 AD3d at 1453).

Inasmuch as "the law has long favored free and unencumbered use of real property,... covenants restricting use are strictly construed against those seeking to enforce them" (Witter v Taggart, 78 NY2d 234, 237 [1991]; see Kleist, 174 AD3d at 1453; Ludwig v Chautauqua Shores Improvement Assn., 5 AD3d 1119, 1120 [4th Dept 2004], lv denied 3 NY3d 601 [2004]). Defendants contend on their cross appeal that Supreme Court erred in concluding that plaintiff established that the restrictive covenant bars defendants from placing any shed on their lot.

We agree. With respect to outbuildings, section six of the UPR states that "[n]o structures such as steel tool sheds, lean-to's or mini-barns will be permitted, excepting pool cabanas and/or such architecturally compatible gazebos or such other structure as may be permitted by the undersigned."

Here, the court erroneously concluded that section six "does not permit any structure except pool cabanas and/or such architecturally compatible gazebos." In reaching that conclusion, the court relied on the language of section 1 (A) providing that "[n]o structure shall be erected, altered, placed, or permitted to remain on any of said lots other than one single-family dwelling[.]"

The court's interpretation ignores the language of section six "excepting pool cabanas and/or such architecturally compatible gazebos or such other structure as may be permitted by the undersigned" (emphasis added) from its general prohibition against "structures such as steel tool sheds, lean-to's or mini-barns." There is no basis for interpreting the term "structure" in such a limited manner, particularly considering the use of the word "other," i.e., something differing from either a pool cabana or gazebo.

Rather, "a contract must be read as a whole to give effect and meaning to every term" (Maven Tech., LLC v Vasile, 147 AD3d 1377, 1378 [4th Dept 2017] [internal quotation marks omitted]; see Rautenstrauch v Bakhru, 64 AD3d 554, 556 [2d Dept 2009]). Inasmuch as plaintiff did not establish that the restrictions contained in the UPR prohibited defendants from erecting an outbuilding other than a pool cabana or gazebo, plaintiff is not entitled to equitable relief enjoining that action and the court erred in denying defendants' motion for a directed verdict with respect to

plaintiff's request to enjoin defendants from erecting such a structure (see *Single v Whitmore*, 307 NY 575, 582 [1954]; *Kleist*, 174 AD3d at 1452-1453; cf. *Dodge*, 194 AD3d at 1349).

We therefore modify the order and judgment accordingly. Further, although we agree with plaintiff that the UPR unambiguously prohibits the fencing surrounding defendants' garden, we reject plaintiff's contention on his appeal that the court erred in granting defendants' motion to dismiss that portion of the complaint seeking injunctive relief requiring defendants to remove the fencing. "[A] party is not automatically entitled to equitable relief when a violation of a restrictive covenant is established" (*Kleist v Stern*, 187 AD3d 1666, 1667 [4th Dept 2020]).

Entitlement to equitable relief "depends on the particular circumstances of each case," and of particular importance is "whether enforcing [a] covenant and restriction would substantially harm the defendant without any substantial benefit to the plaintiff" (*id.*).

The plaintiff must establish irreparable injury and that the balance of the equities weighs in his or her favor (see *DiMarzo v Fast Trak Structures*, 298 AD2d 909, 910-911 [4th Dept 2002]). Ultimately, "[t]he court has discretion whether to grant an equitable remedy after balancing the equities" (*Kleist*, 187 AD3d at 1667; see *DiMarzo*, 298 AD2d at 911).

Here, the court properly concluded that the balance of the equities weighed in defendants' favor inasmuch as the record at trial established that defendants were not aware of the restrictions under the UPR, there is no express mention of the UPR in defendants' deed, other lots in the subdivision contained similarly fenced gardens on the north side of Tennyson Way, and "enforcement of the restriction would have little benefit to plaintiff" (*Kleist*, 187 AD3d at 1668).

We have considered the remaining contentions on plaintiff's appeal and defendants' cross appeal and conclude that none warrants further modification or reversal of the order and judgment. Entered: December 23, 2022 Ann Dillon Flynn Clerk of the Court