

DOUGLAS COUNTY DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
JUDICIAL CENTER, 111 E. 11TH
LAWRENCE, KANSAS 66044-2966
785-832-5323

PAULA B. MARTIN, Judge
Fifth Division

PAIGE H. HILL
Administrative Assistant

DOUGLAS COUNTY
COURT REPORTERS
SHELEE SHAFER
785-832-5234
JOYCE E. LEDERER
785-832-5234 02

(Handwritten signature)

December 16, 2011

11CV65 *Oakley Homeowner's Association, Inc. v. Mark W. Hoffman and Tamara A. Hoffman*

MEMORANDUM DECISION

This is an action brought by a homeowners' association to enforce a restrictive covenant prohibiting fencing on defendants' property absent Association approval. Plaintiff asserts defendants violated the Declaration by erecting a six foot (6') wooden fence around their property. Plaintiff seeks to enjoin the defendants from building a fence and/or to remove the fence that defendants have constructed. Defendants assert that the Association is deemed to have approved the fence by (1) the Board's failure to act within twenty (20) days of their request, or (2) approving their request for a hot tub which, by city ordinance, is required to be enclosed by a six (6') fence. Alternatively, defendants assert that the Association is prohibited from enforcing the covenant by laches, waiver and estoppel. The matter is before the court on plaintiff's motion for summary judgment. The case was submitted on Stipulated Facts. See Joint Exhibit 1.¹

Standard of Review

The standard of review in motions for summary judgment is set out at K.S.A. 60-256(c) and provides, in pertinent part:

The judgment sought shall be rendered forthwith if the pleadings, depositions,

¹ Defendants attempted to include additional "facts" but the court found this to be in violation of the agreement of the parties. These contentions were not considered by the court.

subject to the covenants, conditions, restrictions, easements, charges and liens described in this Declaration, for the purposes of (i) enhancing and protecting the value, desirability and attractiveness of the Real Estate, (ii) encouraging and assisting the orderly economic development of the Real Estate, (iii) increasing the public benefit to be derived from the Real Estate, (iv) preserving the amenities and for the maintenance of the same located on the Real Estate, (v) promoting the efficient development of the Real Estate, and (vi) protecting the owners, lessees and sublessees of property against incompatible uses of surrounding property, and (vii) promoting safety to life, health and property in the area. These easements, covenants, restrictions and conditions shall run with the Real Estate and shall be binding upon all parties having or acquiring any right, title or interest in the Real Estate, or any part thereof, and shall inure to the benefit of each Owner thereof.

...

ARTICLE NINE

NEW CONSTRUCTION, IMPROVEMENTS, AND ALTERATIONS

1. Architectural Control Committee. The board of directors may establish an Architectural Control Committee, which shall consist of at least three (3) persons, the members of which shall be appointed by the board of directors. If the board of directors does not establish a separate Architectural Control Committee, then the Architectural Control Committee shall be the board of directors. A majority of the Architectural Control Committee may designate a representative to act for it. The affirmative vote of a majority of the members of the Architectural Control Committee shall be required in order to adopt or promulgate any rule or regulation or to make any finding determination, ruling, or order, or to issue any permit, consent, authorization, or approval pursuant to the authority contained in this Declaration.

...

3. New Construction. No Residential Unit or any other building, or construction of any kind, shall be erected, placed or performed on any Lot until construction plans and specifications including, but not limited to, specifications on exterior materials and colors, and a plan showing the location of the structure, have been approved by the Architectural Control Committee

9. Right to Remove or Correct Violations. In the event any Residential Unit, building, or other improvements or structure shall be commenced, erected, placed, moved or maintained upon any Lot, otherwise than in accordance with the provisions and requirements of this Article, then the same shall be considered to have

been undertaken in violation of this Article and without the required approval of the Architectural Control Committee, and, upon written notice from the board of directors of the Architectural Control Committee, such Residential Unit, building, or other structure or improvements shall be promptly removed. In the event it is not removed, or the violation is not otherwise terminated within fifteen (15) days after notice of such violation is delivered to the Owner of the Lot upon which such violation exists, then the Association shall have the right, through its agents and employees (but only after a resolution of the board of directors or the Architectural Control Committee) to enter upon such Lot and to take such steps as may be necessary to remove or otherwise terminate such violation. The costs (including legal and court costs) incurred by the Association to enforce the provisions hereof may be assessed against the Lot upon which such violations occurred. When the costs are so assessed, a statement of such costs shall be delivered to the Owner of said Lot at which time the assessment shall become due and payable and a continuing lien upon such Lot, and a binding personal obligation of the Owner of such Lot, in all respects. The Association shall have the further right, through its agents, employees or committees, to enter upon and inspect any Lot at any reasonable time for the purpose of ascertaining whether any violation of the provisions of this Article, or any other provisions or requirements of this Declaration, exist on such Lot; and neither, the Association nor any such agent or employee shall be deemed to have committed a trespass or other wrongful act by reason of such entry or inspection.

...

ARTICLE TWELVE GENERAL RESTRICTIONS

15. Fences and Enclosures. In order to maintain a sense of community within the Real Estate, no fencing on any of the Lots shall be allowed, except for required fencing shown on the Plat and except for "perimeter fencing" on the Lots located in Block 1 of the Real Estate (no fencing shall be allowed in those interior Lots located in Block 2). For purposes of the foregoing sentence, "perimeter fencing" is fencing that is located along the boundary of the Real Estate and adjacent properties; that is, perimeter fencing for (1) Lots 19-23, Block 1, may be located only along the south boundary of those Lots, (2) Lot 24, Block 1, may be located along the south and east boundaries of such Lot, (3) Lots 13-18, Block 1, may be located only along the west boundary of those Lots, (4) Lots 1-3, Block 1, may be

There is no requirement of irreparable injury in this context. The injury sustained by the violation of such covenants is inherently irreparable in nature; *i.e.*, one can generally never achieve a full, complete, and adequate remedy of the breach of restrictive covenants through recovery of calculable money damages. The court in *Persimmon Hill* explained the rationale by quoting from the Georgia Court of Appeals:

[T]he violation of a restrictive covenant that is part of the development scheme affects the grantor and all other grantees, causing irreparable harm to the value of their respective property interests, because such restrictive covenant was part of the valuable contract consideration given and relied upon in the conveyance of land. [Citation omitted.] Thus, irreparable harm automatically occurs as a matter of law arising from a violation of a covenant running with the land, the relationship of the parties as grantor-grantee, and the consideration of the conveyance of less than a fee simple absolute for the burden imposed upon the land in the form of a restrictive covenant to protect the grantor and others who may wish to purchase the remaining land in the future. *Focus Entertainment v. Partridge Greene*, 253 Ga.App. at 127-28, 558 S.E.2d 440 (2001).

31 Kan. App 2d at 894.

The Kansas Supreme Court has also set out rules of construction of restrictive covenants in *Sporn v. Overholt*:

The rules governing the construction of covenants imposing restrictions on the use of realty are the same as those applicable to any contract or covenant, including the rule that, where there is no ambiguity in the language used, there is no room for construction, and the plain meaning of the language governs. When construction is necessary, the language used will be given its obvious meaning.

Another well-settled rule is that covenants and agreements restricting the free use of property are strictly construed against limitations upon such use. Such restrictions will not be aided or extended by implication or enlarged by construction. Doubt

The court finds that the passage of time from the mailing of the formal request on November 10, 2010, to the Board's decision on December 5, 2010, is not an unreasonable delay. Defendants did not receive an exception from the fencing prohibition and under the plain language of the Declaration they are prohibited from building a fence.

(b) Implied approval

Defendants' next argument is tied to their earlier request to install a hot tub. On October 27, 2010, defendants submitted a request to install a hot tub. A photograph of the hot tub was attached, as was a drawing showing the location of the hot tub. The drawing did not show any fencing. Defendants argue the fence was necessarily approved when their request to install a hot tub was approved. The Board's approval contains the following caveat: "if installed by city codes and meets all regulatory requirements". Joint Exhibit 13.

Defendants are relying on the language in Section 303.2 of the City Code of Lawrence, Kansas, which requires hot tubs to be completely surrounded "by a fence or barrier at least seventy two (72) inches (1828.8 mm) in height above the finished ground level." According to defendants, since the city code requires a fence, approval of the hot tub necessarily approved the fence. The defendants fail to mention the remaining language of the ordinance which exempts a hot tub from the fencing requirement if it has a safety cover. Further, if defendants actually thought the hot tub approval was also approval for a fence they would not have requested an exception to the prohibition from the Board fourteen (14) days later. This argument of the defendants is disingenuous and is without merit.

2. Are there defenses?

The remaining issue is whether the Association is barred from enforcing the prohibition. "Kansas case law has recognized at least three general equitable defenses to the enforceability of restrictive covenants: (i) the right may be lost by laches, waiver, or acquiescence in the violation of such restrictions, *N.P. Dodge Corp. v. Calderwood*, 151 Kan. 978, 980-81, 101 P.2d 883(1940); (ii) enforceability may be denied when there has been a change in conditions so radical in nature as to neutralize the benefits of the restrictions and destroy their purpose, *South Shore Homes Ass'n v. Holland Holiday's*, 219 Kan. 744 Syl. ¶14, 549 P.2d 1035 (1976); and (iii) enforceability may be denied if contrary to the public interest. *Board of Reno County Comm'rs v. Asset Mgmt. and Marketing L.L.C.*, 28 Kan.App.2d 501, 506, 18 P.3d 286 (2001)." 31 Kan.App.2d at 892-93.

As the Kansas Supreme Court wrote in *Hecht*: "Courts should not hesitate to extend the strong arm of equity to safeguard and enforce valid covenants where the parties entitled to the benefit thereof have not waived them or permitted their breach under such circumstances as to create an estoppel." 204 Kan. at 566-67. See also *McColm, v.*

(a) Waiver

Defendants argue that by "allowing fences in the community, plaintiff has waived its ability to prohibit fences." Defendants' Response, p.24. The other fences, however, are, with one exception, perimeter lots and were in compliance with the Declaration when erected. The allowance of perimeter fences does not waive the Association's right to enforce the current Declaration. Defendants also argue that the Board allowed an exception to another property similarly situated and also has allowed the use of plants to create a "privacy screen."

There are thirty four (34) lots on two (2) streets in the development governed by the Association. There have been no previous violations of the fencing prohibition. As stated previously, there are existing fences on the perimeter lots that are in violation of the existing Declaration but all were in compliance with the Declaration existing at the time of construction. One exception has been granted to an interior lot owner to build a wrought iron fence. (4541 Lili Drive). The Board found the openness of the style and material to be not inconsistent with the purpose of the Declaration. One homeowner has landscaped with trees along the back property line of his interior lot. The landscaping does not enclose the property as does defendants' fence. It is also important to note that the Declaration does not expressly prohibit plantings and or landscaping.

The court finds these facts to be insufficient to support a finding of waiver.

(b) Laches/Estoppel

Defendants assert that plaintiff failed to act after knowing of defendants' intention to construct a fence. The time period from the initial notice by defendants, November 9, 2010, to December 5, 2010, the date the Board denied the request, has been previously addressed; but the Board's denial did not end the matter. In spite of Mr. Radner's warning to Mr. Hoffman on December 5, 2010, that if he built the fence, as he stated was his intention, he would ultimately have to take it back down, Mr. Hoffman advised that he would begin building the fence "once the weather allows." Joint Exhibit 28. On December 28, 2010, defendants' attorney advised Mr. Ratner that "we expect to begin installation of the fence later this week, weather permitting." Joint Exhibit 32. On December 30, 2011, defendants began construction. On December 31, 2010, plaintiff's attorney wrote that "on behalf of the Association I hereby demand that the Hoffmans cease construction of the fence immediately and abide by the provisions of the Declaration." Joint Exhibit 33. The parties then entered into negotiations to resolve their dispute. On January 11, 2011, the negotiations ended unsuccessfully. The Hoffmans resumed construction of the fence on January 14, 2011, and completed the fence that same day.

3. Remedies

(a) Injunction

Article 15(d) grants authority to the Board to bring legal proceedings to enjoin the continuance herein, the plaintiff's motion for summary judgment is granted. Defendants are ordered to remove the fence which has been erected in violation of the Declaration.

(b) Costs

Article 9, §9 provides that if the violation is not terminated within fifteen (15) days after notice of such violation the Association shall have the right, after a resolution of the Board, to enter upon the property to remove or otherwise terminate the violation. Article 15(d) grants the Board the right to enter upon the property to remove and abate the violation at the expense of the owner. Article 5, §5 grants authority to the Association to levy charges against an owner to reimburse the Association for costs incurred to bring an owner into compliance with the Declaration, after notice and an opportunity to be heard. The costs, including legal fees and court costs, may be assessed against the property owner and the property. Article 15 (c) provides that in any proceeding arising from an alleged failure to comply with the terms of the Declaration, the Association shall be entitled to recover the costs of the action, including reasonable attorney's fees.

Having found for plaintiff that a violation has occurred, this memorandum decision shall constitute the notice required by Article 9 and defendants shall have fifteen (15) days from this date to come into compliance with the Declaration by removing the fence. Failure to alleviate the violation shall give the Association the rights provided for in the Declaration, including removal of the fence and assessment of the associated costs.

(c) Imposition of Fine

At the January 19, 2011, meeting the Board levied a \$1,000.00 fine against defendants for their noncompliance. Defendants argue the Association is without authority to levy a fine based on lack of notice, relying on Article 5 §5, as set out in the previous section. This section clearly grants notice and the opportunity to be heard before being assessed charges incurred by the Association to terminate the violation. Article 15 (a) is the specific provision granting authority to assess a fine and provides that the Association by three quarters vote of the Board, may levy fines up to \$1,000.00 against an Owner for breach of the Declaration "and to charge such fine as an addition assessment in accordance with Article 5." The issue then is whether the reference to Article 5 incorporates the notice and opportunity to be heard or only the authority to charge the fine as an additional assessment. Due process requires that notice be