

1977

Patton Leaver and Marge Leaver v. Ruth Grose : Brief of Defendant-Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Recommended Citation

Brief of Respondent, *Leaver v. Grose*, No. 14722 (Utah Supreme Court, 1977).
https://digitalcommons.law.byu.edu/uofu_sc2/463

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE STATE OF UTAH

PATTON LEAVER and
MARGE LEAVER,

Plaintiff-Appellants,

vs.

RUTH GROSE,

Defendant-Respondent.

:
:
:
:
:
:
:

Case No.
14722

BRIEF OF DEFENDANT-RESPONDENT

STATEMENT OF THE CASE

This is an action to enforce restrictive covenants of Loganview Subdivision located in Salt Lake County, State of Utah, to enjoin the Respondent from utilizing a residence located in that subdivision as a duplex dwelling.

DISPOSITION OF THE CASE BY LOWER COURT

The Plaintiff-Appellants moved the lower court for partial summary judgment determining that the restrictive covenants

were currently enforceable to enjoin the Defendant-Respondent from converting a single family residential dwelling to a duplex rental unit. (R. 19)

Upon hearing of the motion the Court entered its Order on July 27, 1976, denying motion of the Plaintiff-Appellants and determining that the restrictive covenants are not enforceable as against violations of said restrictions either committed or attempted after date of May 12, 1972. (R. 31)

RELIEF SOUGHT ON APPEAL

The Defendant-Respondent seeks to sustain the Order of the lower court.

STATEMENT OF FACTS

The Defendant-Respondent agrees with the Statement of Facts as set forth in the brief of the Appellants, except wherein it is stated that the lower court determined that the restrictive covenants had expired on the date of May 12, 1972, and do respectively show that the ruling of the court was that the said restrictions are not enforceable after date of May 12, 1972, (R. 31) the pleadings before the court having shown that the alterations and modifications made by the Defendant Respondent and of which the Plaintiff-Appellants complain, were not commenced until June 30, 1975. (R. 13)

ARGUMENT

THE RESTRICTIVE COVENANTS CONSTITUTED CONSTRUCTIVE NOTICE TO THE RESPONDENT THAT THEY WERE ENFORCEABLE ONLY AS TO VIOLATIONS COMMITTED PRIOR TO MAY 12, 1972 AND THEREFORE ARE NOT ENFORCEABLE AFTER THAT DATE.

Restrictive covenants are not strictly an easement in the general view of the Courts and do not run with the land in the true sense of the term, but such agreements are enforceable in equity and enforcement is based upon the equitable principle of notice. 20 Am Jur 2d, Covenants, Section 304. That is to say, the person against whom the covenant is sought to be enforced must have had either constructive or actual notice of the restrictive covenant.

In Hayes v. Gibbs, 110 Utah 54, 169 P2d 781, this Court considered the elements which must be found to be present in determining whether restrictive covenants of a subdivision were enforceable as between subsequent purchasers of lots in that subdivision. Therein the Court determined:

"The cases appear to be unanimous in supporting the proposition that if a general scheme for building or development is intended by the original Grantor, subsequent Grantees may bring action against each other to enforce the restrictive covenant. This intent may be gathered from the Grantor's acts and attendant circumstances. Constructive or actual notice of the general plan on the part of the Grantee is an essential requirement

in enforcing the restrictive covenant." (Emphasis added.) 169 P2d 783, 784

Therefore, the Respondent took title to her property subject only to the specific terms and conditions of the restrictive covenants of which she then had notice and said restrictive covenants are enforceable against her only to the extent of the notice conveyed and received.

Section XIV of the Building Restrictions provides as follows:

If the parties now claiming any interest in said residential lots hereinbefore described, or any of them, or their heirs, successors, grantees, personal representatives or assigns, shall violate or attempt to violate any of the covenants and restrictions herein contained prior to twenty - five (25) years from the date hereof, it shall be lawful for any other person or persons owning any other residential lot or lots in said area to prosecute any proceedings at law or in equity against the person or persons, firms or corporations so violating or attempting to violate any such covenant or covenants and/or restrictions or restriction, and either prevent him or them from so doing or to recover damages or other dues for such violation or violations. (Emphasis added.) (R. 22)

The Building Restrictions were dated and recorded on May 12, 1947. (R. 20, 22) Therefore, Section XIV now does and always has constituted clear and concise notice that the covenants were to be enforced only as against violations committed or attempted prior to May 12, 1972.

The Appellants correctly assert that the lower court was

required to find that the Respondent had constructive notice of the restrictive covenants. The Court was neither called upon to rule nor did it in fact rule that the Respondent had no notice of the provisions of the restrictive covenants, but rather ruled that the notice given to and received by the Respondent constituted notice that the restrictive covenants would not be enforced as to violations or attempted violations occurring after May 12, 1972, and therefore, that the restrictions were enforceable against the Respondent only to the extent of the notice given and received and therefore, that the same were not enforceable after May 12, 1972.

The Appellants further contend that restrictive covenants are enforceable without an express grant of authority, that it is not necessary that the covenants specifically set forth an enforcement clause and therefore, that the subject covenants are enforceable notwithstanding the provisions of Section XIV. However, the question presented is not the effect and enforceability of covenants in the absence of an enforcement clause, but whether the specific provisions of an existant clause are to be ignored and whether the subsequent Grantee shall have constructive notice that such a clause is not to be construed to mean that which it does specifically provide.

It is further argued that Section XIV of the restrictive covenants is only a "surplus paragraph" and has no effect or bearing on the balance of the restrictions. However, the provisions of said

paragraph are as concisely and specifically stated as are the other paragraphs of the restrictions and any subsequent Grantee acquiring property in the subdivision with constructive notice of those restrictions is entitled to take in reliance upon the specific provisions of that paragraph.

The Appellants contend that those who drafted and executed the restrictions over 29 years ago did not intend the limitation which they clearly set forth in paragraph XIV. They request the Court to presume that those initially executing and recording the same did not intend the subject limitation on enforcement and therefore, that neither the Respondent nor any other person so situated, is entitled to reply on the clear and concise language of that limitation.

At 20 Am Jur 2d, Covenants, Section 185, the author therein writes:

"Rules governing the construction of covenants imposing restrictions on the use of land are generally 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."

In Freeman v. Gee, 18 Utah 2d 339, 423 P2d 155, this

Court held as follows:

". . . . whatever language is employed in stating a restriction, such language is to be taken in its ordinary and generally understood and popular sense, and is not to be subjected to technical refinement nor the words torn

The Appellants stress that it is necessary to determine the time frame that the original makers of the restrictive covenants intended at the time of the execution and filing of said covenants on May 12, 1947. In that regard, it is claimed that since a majority of the land owners in the subdivision did not vote to terminate the covenants prior to May 12, 1972, that the same were automatically extended to date of May 12, 1982. It is asserted that this fact alone made the covenants enforceable against violations committed after May 12, 1972, regardless of the specific enforcement provisions as contained in Section XIV of the covenants. Appellants point to the fact that similar covenants containing a similar enforcement clause were upheld by this Court in Freeman v. Gee, Supra. However, that case is to be distinguished, since the violations sought to be enjoined were attempted prior to the expiration of the initial 25 year period as specified in the enforcement clause.

Although there is neither an ambiguity nor uncertainty in the language of the limitation, nevertheless the Appellants request the Court to find an ambiguity in order to venture beyond the clear language of the document and to presume a meaning contrary to what is specifically stated. However, even if the subject limitation is considered as unclear or ambiguous, uniformly adopted rules of construction

would dictate that the subject restrictions are not now enforceable against this Respondent.

The Courts have uniformly held that where because of the ambiguous language of a covenant or restriction, it is necessary to apply rules of construction, such restrictions are strictly construed against limitations upon the use of real property and that any doubt will be resolved in favor of the unrestricted use of the property. 20 Am Jur 2d Covenants, Section 187. In Parrish v. Richards, 8 U2d 419, 336 P2d 122 our Court determined:

"The trial court followed the correct doctrine that in the construction of uncertain or ambiguous restrictions the Courts will resolve all doubt in favor of the free and unrestricted use of property. . . ." 336 P2d 123

The petition of the Appellants for the enforcement of the restrictive covenants constitutes a prayer for specific performance thereby requiring the application of the principals of equity inherent in any specific performance action. This Court, following the unanimous position of the Courts of other jurisdictions, has refused to make or modify agreements between the parties standing before it and has decreed specific performance only where the terms of the agreement are clear. In Eckard v. Smith, (Utah 1974) 527 P2d 660, the Court held:

"Specific performance cannot be granted unless the terms are clear, and that clarity must be found from the language used in the document." 527 P2d 662

The same principal was manifest by the Court in Pitcher v. Lauritzen, 18 U2d 368, 423 P2d 491, wherein the Court in quoting from 29 Am Jur Specific Performance, Section 22, stated:

"the contract must be free from doubt, vagueness, and ambiguity, so as to leave nothing to conjecture or to be supplied by the Court." 423 P2d 493

The Respondent respectfully submits that paragraph XIV of the restrictive covenants provided clear and concise notice to the Respondent and to all other parties similarly situated that said restrictive covenants were to be enforced only as against violations or attempted violations of the restrictions committed prior to May 12, 1972, that this Respondent took title to her property in Loganview Subdivision with notice that said restrictions were not enforceable after May 12, 1972, and that the same are not enforceable against her to enjoin her use of the property undertaken after date of May 12, 1972.

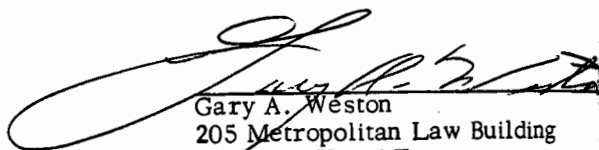
CONCLUSION

In order for the lower court to have determined that the restrictive covenants are enforceable after May 12, 1972, it would have been required to have presumed that the original parties executing and recording the restrictive covenants did not intend that which was specifically and clearly stated and that the Respondent was responsible to have known the unexpressed intent entertained over 29 years ago by those original parties. In determining the restrictions to be unenforceable,

the Court was not required to entertain any presumption or apply a rule of construction, but rather to only accept what the restrictions clearly and concisely provided.

The Respondent respectfully submits that this Court should sustain the order of the lower court determining that the restrictive covenants of Loganview Subdivision are not enforceable after May 12, 1972.

Respectfully submitted,

A large, stylized handwritten signature in black ink, which appears to read "Gary A. Weston". The signature is written over the printed name and address.

Gary A. Weston
205 Metropolitan Law Building
431 South Third East
Salt Lake City, Utah 84111
Attorney for Respondent