

1980

Robert L. Crimmins And Rose Crimmins v. Michael Simonds And Barbara Simonds : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

ROBERT L. CRIMMINS and
ROSE CRIMMINS,

Plaintiffs-Respondents,

vs.

Case No. 17186

MICHAEL SIMONDS and
BARBARA SIMONDS,

Defendants-Appellants.

BRIEF OF APPELLANTS

APPEAL FROM A JUDGMENT
OF THE THIRD JUDICIAL
DISTRICT COURT OF TOOELE
COUNTY, THE HONORABLE
HOMER F. WILKINSON, PRESIDING

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BARBARA SIMONDS,

Defendants-Appellants.

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

Respondents filed an action for a permanent injunction to enjoin the operation of a beauty parlor by appellants, basing their claim upon a restrictive covenant.

DISPOSITION IN LOWER COURT

After a bench trial, the District Court granted judgment in favor of respondents permanently enjoining the operation of appellants' beauty parlor on appellants' premises.

RELIEF SOUGHT ON APPEAL

Appellants' seek a reversal of the trial court's judgment and a ruling that the restrictive covenant is void and unenforceable.

STATEMENT OF FACTS

On or about November 12, 1962, Ivon R. Wall and Janice B. Wall, then owners of Upland Terrace Subdivision Plat "C" in

Tooele County, Utah, executed a Restrictive Covenants Agreement (Exh. 5) which was recorded on November 14, 1962, with the Tooele County Recorder.

The agreement contained a provision restricting the use of the lots in question to residential purposes and excluded them from the conduct of any trade or business. The term of the covenant agreement was 25 years, subject to automatic extensions for additional successive ten-year periods unless a majority of the current owners were to record an agreement modifying the original covenant.

Appellants and respondents subsequently purchased adjacent lots within the area subject to the restrictive covenant agreement. The parties stipulated at trial (Tr., p. 45) that appellants commenced operation of a beauty salon within their residence at 697 Upland Drive, Tooele, Utah, sometime in October of 1979. Respondents subsequently filed the instant case seeking injunctive relief.

On or about September 26, 1979, prior to commencing operation of the salon, appellants, in conjunction with a majority of the lot owners in Upland Terrace Subdivision, Plat "C", executed an Agreement to Modify Restrictive Covenants (Exh. 3) seeking to change the existing covenants so as to allow a business to be conducted within the confines of an existing single family residence and which complied with zoning regulations and did not constitute a nuisance to the neighborhood. Said agreement was recorded on October 5, 1979.

At trial, appellants produced a number of witnesses who testified to having operated businesses within their residence.

in the area affected by the restrictive covenants. One George Buzianis testified to having operated a real estate office for several years from his residence in the immediate vicinity of plaintiffs' house. He further testified that 4 or 5 businesses were in operation within the subdivision close to plaintiffs' residence. (Tr., pp. 113-116)

On cross-examination, plaintiff Rose Crimmins testified that she had her hair styled by defendant Barbara Simonds several times prior to commencement of the instant suit. Further, her hair was done in defendants' home and plaintiff paid defendant or compensated her by exchanging services, such as babysitting, for defendant's services. (Tr., pp. 144-148)

On direct examination, defendant Barbara Simonds testified that she had no actual knowledge of the restrictive covenants prior to being notified of them by Mrs. Crimmins. She also testified that she and her husband incurred approximately \$7,000.00 in expenses in setting up the salon in their home prior to notification of the existence of the restrictions. Mrs. Simonds then related having circulated the modification agreement prior to actually opening for business in her home. (Tr., pp. 154-160)

ARGUMENT
POINT I

THE TRIAL COURT ERRED IN REFUSING
TO VOID THE COVENANT IN QUESTION
AND IN REFUSING TO VALIDATE THE
MODIFICATION AGREEMENT

Appellants assert that the judgment of the trial court enforcing the restrictive covenant and granting an injunction was

clearly against the weight of the evidence presented at trial. Therefore, since this case is one in equity, this Court may review all of the evidence presented and make its own determination as to the validity of the trial court's decision. Metropolitan Investment Co. v. Sine, 14 Utah 2d 36, 376 P.2d 940 (1962).

The Supreme Court of Utah in Metropolitan Investment Co., v Sine supra, considered the validity of a restrictive covenant against erection of a motel on the subject property. On the question of the enforceability of such provisions, the Court stated:

We agree that there is no reason for continuing the restriction unless there is a benefit to be realized by the defendants. Restrictive covenants will not be enforced where enforcement is no longer of general usefulness, nor capable of serving purposes for which restriction was imposed, or reason of restriction has ceased. 376 P.2d at 944.

Appellants herein assert that the restriction against conducting a business is incapable of enforcement for just those reasons. In the first instance, respondents showed no damage resulting from the conduct of appellants' beauty salon and can therefore show no benefit from its continued enforcement.

Further, it is apparent that the restriction is no longer generally useful inasmuch as a significant majority of the landowners in the area joined in the execution of the agreement modifying the covenant. In addition, a number of witnesses testified to having operated various businesses from their homes within the immediate neighborhood surrounding respondents.

of a residential subdivision is entitled to enforcement only when it is generally accepted by all of those who are parties in interest. Hayes v. Gibbs, 169 P.2d 781 (Utah 1946)

Quite to the contrary, the willingness of a majority of landowners in the area to rescind the restriction and allow a limited use of residences for business purposes indicates that the restrictive covenants herein have been rejected, not accepted, by those affected.

Appellants contend that the neighborhood herein has changed in character sufficiently to warrant rescission of the covenant on business use and enforcement of the modification. The non-forum case of Hecht v. Stephens, 204 Kan. 559, 464 P.2d 258 (1970), set forth the factors to be considered in determining whether a neighborhood has changed sufficiently to warrant voiding a restrictive covenant.

In Hecht, the Supreme Court of Kansas dealt with restrictive covenants against use of property for any but residential purposes and specifically excluding mobile homes from the neighborhood.

The Court found that at least four businesses were operating in the restricted area and that a number of trailer houses and buildings in violation of the covenants were already within the area. The Court deduced therefrom that the residents of the area had evidenced an intent to abandon the restrictions and the area had changed in character sufficiently to warrant affirmance of the trial court's refusal to grant an injunction.

In support of its affirmance, the Court stated:

Whether injunctive relief against violation of a restriction will be granted or withheld because of a change in the character of the neighborhood depends upon a number of factors, among which are the purpose for which the restriction was imposed, the location of the changed condition in relation to the restricted area, the type of change that has taken place, and to some extent, the unexpired term of the restriction. 464 P.2d at 263.

Appellants herein assert that the purpose for the business restriction is not significantly impaired under the modification, that a number of businesses already are in existence in the area and the restrictions are nearing the end of the 25-year term in any case. These circumstances, coupled with the clear intent of the residents to modify the covenant, justify, as in the Hecht case, a judgment against the granting of an injunction.

POINT II

APPELLANTS ARE ENTITLED
TO A REVERSAL UNDER THE
DOCTRINE OF BALANCING OF
THE EQUITIES

In the case of Papanikolas Brothers Enterprises v. Sugarhouse Shopping Center Associates, 535 P.2d 1256 (Utah, 1975) the Utah Supreme Court considered the application of the balancing of the equities, or "balance of injury" test, with regard to restrictive covenants. Under the doctrine, a court may reject injunctive relief, even where it may otherwise be applicable,

when the granting of an injunction would work an undue hardship on one party without any significant benefit to the other party.

In the instant case, the application of such a balancing test would clearly favor appellants. Appellants showed an out-of-pocket expense of some \$7,000.00 for remodeling and supplies prior to receiving actual notice of the restriction. Thus, appellants would suffer an immediate and substantial economic loss from the granting of the injunction as well as a prospective loss of business profits.

On the other side, respondents are unable to prove any damage, from operation of appellants' salon and, thus, can show no benefit to be derived from granting of the injunction.

The trial court's findings (R., pp. 31-33) affirm appellants' contention that the respondents suffered no damage and that appellants would sustain significant damage.

Appellants are entitled to the benefit of the balance of injury test inasmuch as their violation of the restrictive covenant was not venal. Mrs. Simonds testified to having styled hair for money in her home without actual notice of the restriction until respondents informed her of the existence of the covenants.

Mrs. Crimmins, on the other hand, can hardly claim the benefit of equity when she testified to having had her hair styled by Mrs. Simonds in appellants' home for consideration prior to commencing the instant action.

Appellants assert that the trial court erred in granting an injunction in spite of the relative hardship on appellants.

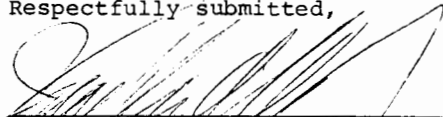
The court itself recognized its duty to balance the equities (Supplemental transcript, p. 5, l. 11-19) and yet, ruled in respondents' favor despite the hardship to appellants.

CONCLUSION

Appellants respectfully request the Court to reverse the judgment of the trial court, vacate the injunction and void the restrictive covenant against the use of the subject property for business purposes.

DATED this 17th day of November, 1980.

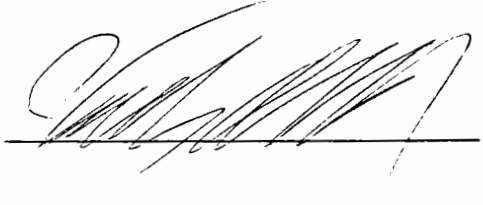
Respectfully submitted,



J. FRANKLIN ALLRED
Attorney for Appellants

MAILING CERTIFICATE

I hereby certify that I mailed ^{2 copies} ~~2 copies~~ of the foregoing Brief of Appellants to Robert L. Crimmins and Rose Crimmins by placing the same in the United States Mail in an envelope addressed to them at 709 Upland Drive, Tooele, Utah 84074, this _____ day of November, 1980.

A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to be the name of the certifier.