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Lowell V. Parrish et al v. Harlow G. Richards : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

LOWELL V. PARRISH, EMILY
L. PARRISH, his wife, VADAL
PETERSON, and MELVA
PETERSON, his wife,

Plaintiffs and Appellants,

— vs. —

HARLOW G. RICHARDS and MRS.
HARLOW G. RICHARDS,
Defendants and Respondents.

FILED
NOV 1 1957
Clerk, Supreme Court, Utah

Case
No. 8690

APPELLANTS' BRIEF

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STATEMENT OF FACTS

This was an action to enjoin maintenance of a structure and fence built in violation of a real property restrictive covenant and a Salt Lake City ordinance (R. 1-4). From a judgment of dismissal, no cause of action (R. 204), plaintiffs appeal (R. 211).

The parties are owners of real property located within Northerest Subdivision, an exclusive residential

area located high in the avenues of Salt Lake City. The properties owned by the parties are contiguous and are located in the 600 block of "I" Street. Plaintiffs Peterson's own property is located at 671 "I" Street; defendants' property is located immediately to the north at 685 "I" Street; and the property of the plaintiffs Parrish is immediately to the north of that, at 699 "I" Street. Immediately to the west of defendants' Northcrest property is a strip of land 15.2 feet wide located outside the Northcrest subdivision (Findings No. 2 and 3, R. 195-196).

The subdivider of Northcrest, prior to acquisition of the properties by the parties to this action, had recorded a restrictive covenant relating to the uses to which properties in the subdivision might be put (Exhibit 2). The covenant contained the following paragraph:

"USE OF LAND: Each lot in said subdivision is hereby designated as a residential lot, and none of the said lots shall be improved, used or occupied for other than private single family residence purposes, and no flat or apartment house intended for residence purposes shall be erected thereon, and no structure shall be erected or placed on any of said lots other than a one, two, or three car garage, and one single family dwelling, not to exceed one story in height, except that on those lots where the finished ground elevation is at least one story lower on one side of the dwelling than on the opposite side, the dwelling may extend two stories above the finished ground elevation on such lower side."

The "Restriction Agreement" also contained provisions regulating the width of front and side lots; prohibiting further subdivision, conduct of trade or business, nuisances, existence of temporary buildings, and the keeping of certain animals or fowls; establishing minimum floor space; and conferring upon owners of the various lots the right to enforce the agreement.

The Salt Lake City Revised Ordinances of 1955 contain a provision regulating the height of fences. Section 51-4-4 reads as follows:

"No fence or wall or other similar structure shall be erected in any required front yard as defined herein to a height in excess of four (4) feet; nor shall any fence or wall or other similar structure be erected in any side or rear yard to a height in excess of six (6) feet. Where there is a difference in the grade of the properties on either side of the fence or wall, the height of the fence or wall shall be measured from the average grade of the adjoining properties."

On about February 18, 1954, defendants were considering building a tennis court upon their lot. They discussed the building restrictions with Lynn S. Richards, Willard R. Smith and Mr. and Mrs. Vincent Rees; a few days later they discussed the project with plaintiffs (Interrogatory No. 10, R. 16, 18). The plaintiffs protested construction of the tennis court. On March 22, 1954, they sent a letter to Dr. Richards outlining their reasons for opposing construction of the tennis court and enclosing an opinion from the Salt Lake City law firm of Dickson, Ellis, Parsons & McCrea that con-

struction of the tennis court would violate the restrictive covenant and would require a permit for construction of a fence more than six feet in height (Exhibit 15).

Although nothing was done immediately about building the tennis court, the plan apparently remained. On about July 20, 1955, construction of the tennis court began (Interrogatory No. 9, R. 16, 18). On August 2, 1955, counsel for the plaintiffs wrote to the defendants, telling them that the plaintiffs intended to take every possible step to prevent construction of the tennis court (Exhibit 14).

The tennis court was located in the southwest corner of the defendants' properties just inside the south and west boundaries (Interrogatory No. 13, R. 16, 19). The dimensions of the court are 78 by 36 feet, surrounded by a fence having dimensions of 100 by 50 feet (Interrogatory Nos. 12, 15, R. 16, 19). Prior to construction of the tennis court the defendants had changed the contours of their property, raising the property level various distances from 6 inches at the west end to 36 inches at a point approximately 45 feet west of the east boundary. A retaining wall was constructed a few feet north of, and exceeding the height of a retaining wall already existing on the Peterson boundary (Interrogatory No. 18, R. 16, 19; R. 141). Atop the retaining wall the defendants erected a six-foot high chain link fence (Interrogatory No. 15, R. 16, 19). The tennis court and fence rise above the Peterson property; they separate the Parrish property from the valley below (Exhibits 8 and 9).

The properties of the parties are located on hilly terrain which slopes downward from North to South. Prior to construction a certain amount of leveling was necessary (R. 139, 140). The top of the defendants' present retaining wall is somewhat above the "natural" grade. The evidence, with reference to the present grade, shows that the top of defendants' retaining wall is approximately four feet above the Peterson lawn (R. 108) and about two and one-half feet above the Peterson retaining wall at one point (R. 149). The six foot chain link fence is located upon the retaining wall (R. 104). Existence of the tennis court and fence diminishes the value of plaintiffs' properties (R. 110, 130-133).

Defendants were permitted to show that certain other owners within Northcrest Subdivision had constructed swimming pools and high fences (R. 167-178), but there is no evidence that the character of the neighborhood has been changed by the swimming pools or fences. Mr. Richards didn't know how many houses there were in Northcrest Subdivision (R. 178). It was shown, also, that the Petersons, together with their neighbor to the west, erected a temporary chain link fence which, together with the retaining wall, exceeds the height of six feet (R. 118-119); and that Parrish, with the consent of the neighbor to the north, has a short length of fence which may exceed six feet in height above the present grade (R. 144, 185-186). The trial court held that these facts were sufficient to estop the plaintiffs from asserting that the defendants' fence violates the Salt Lake City

ordinance and that the defendants' structure violates the restriction agreement (R. 201).

STATEMENT OF POINTS

1. The defendants' tennis court is prohibited by the restriction agreement for Northcrest Subdivision.

2. The defendants' chain link fence is prohibited by the Salt Lake City Revised Ordinances of 1955, Section 51-4-4.

3. The court erred in applying the doctrine of estoppel as against the plaintiffs.

ARGUMENT

I.

THE DEFENDANTS' TENNIS COURT IS PROHIBITED BY THE RESTRICTION AGREEMENT FOR NORTHCREST SUBDIVISION.

There is no dispute as to the language of the covenant. It provides that "no flat or apartment" and "no structure shall be erected or placed on any of said lots" other than one garage and a single-family dwelling. The court below took the view that the tennis court constructed and maintained by the defendants is not a "structure", and, that if it is, the Parrish high board fence is, too (Conclusions 6 and 7, R. 202, 203).

There is no doubt that the grantor meant to prohibit *something*. Did he mean only to prohibit things

“like apartments”? Or did he mean to permit only houses with garages?

Cases construing the word “building” have found it broad enough to include many things besides houses. We submit that the word “structure” has a broader meaning than the word “building” and that certain things which are not properly “buildings” may be “structures” within the usually accepted meaning, and within the meaning of the grantors involved in this case. *Katsoff v. Lucertini* (1954), 141 Conn. 74, 103 A. 2d 812, 814. The cases construing the meaning of the word “building” are, therefore, relevant but not controlling. In construing the meaning of the words used in a restrictive covenant the apparent meaning of the word “user” must be considered. *Katsoff v. Lucertini*, *Supra*.

In the present case the following appear to be important: The subdivision is an exclusive residential area; buildings must be set back at least twenty-five feet from the front line and eight feet from the side lot line; nothing may be done on the lots “which may be or become an annoyance or a nuisance to the neighborhood; the lots are only moderate in size; and the restrictions were meant to enhance the value of the properties. It was apparently meant to enhance the value of *all* the properties; admittedly a structure in violation of the covenant might enhance the value of the offending property while causing depreciation in the value of the other properties.

There are many cases applying various types of restrictions to various types of structures. While none have been found which are on all fours with the present case, many are enlightening.

In *Hulett v. Borough of Sea Girt* (1930), 150 Atl. 202, 106 N. J. Eq. 118, it was held that the word "structure" as used in a deed should be taken to mean something that will interfere with the use of the street or will obstruct the view.

And in *Kararek v. Peier* (1900), 22 Wash. 419, 61 Pac. 33, 50 L.R.A. 345, it was held that a structure "is any production or piece of work artificially built up or composed of parts joined together in some definite manner and in such a sense a fence is a structure." In construing a zoning ordinance the Supreme Court of Michigan held that a structure is "any production or piece of work artificially built up or composed of parts joined together in some definite manner." *C. K. Eddy, et al. v. Tierney, et. al.* (1936), 276 Mich. 233, 267 N.W. 852, 855; *Detroit Trust Co. v. Austin* 1939, 291 Mich. 523, 289 N.W. 239.

A number of cases construing restrictive covenants as relating to fences and walls are found in an annotation in 23 A.L.R. 2d 937 et seq.; and an annotation on covenants relating to "buildings" is found in 49 A.L.R. 1364 et seq.

In this case the defendants have constructed a massive concrete structure. It is bounded on three sides

by substantial retaining walls. On the north the retaining walls protrude upward from the court. On the west and south they support the court. Connected to these massive retaining walls is a large apron of concrete. Attached to that are steel posts and a chain link fence on some sides and a concrete wall on others. The structure as constructed has a foundation, retaining walls, and certainly goes beyond merely an apron of concrete. The nature of what has been constructed is best described by reference to the various photographs which were in evidence. We respectfully submit that the "thing" constructed is a structure within the meaning of the restrictive covenant.

There is a very recent Utah case, *Hargraves v. Young* (1956), 3 Utah 2d 175, 280 P. 2d 974, which was concerned with a definition of structures. The court there held that a canopy was a structure within the meaning of certain city ordinances. A picture of the canopy is reported with the case, and we submit that the "thing" constructed by the defendants as shown by the pictures in evidence in this case is a structure within the meaning of *Hargraves v. Young*.

II

THE DEFENDANTS' CHAIN LINK FENCE IS PROHIBITED BY THE SALT LAKE CITY REVISED ORDINANCES OF 1955, SECTION 51-4-4.

It is undisputed that the chain link fence erected by defendants is six feet in height—exclusive of the retain-

ing wall upon which it stands. The evidence also establishes that the retaining wall, at some points, is as much as thirty-six inches higher than the natural grade of the land; and that the retaining wall of defendants is about four feet high when measured from the Peterson lawn (R. 108, Exhibits 3 through 10); it is also about four feet higher than the sidewalk it intersects.

Section 51-4-4 of the 1955 ordinances of Salt Lake City provides that side yard fences shall not exceed the height of six feet. It also provides that "where there is a difference in the grade of the properties on either side of the fence" the height of the fence "shall be measured from the average grade of the adjoining properties." The ordinance does not define "average grade"—but it is reasonable to construe it to mean the average between the two *immediately* adjacent parcels of property, that is, the grade within a few feet of the fence. So construed the ordinance is purposeful; if construed to mean that the average is determined by adding together all elevations present in the neighboring parcels and dividing them by the number of elevations, the ordinance is not only unworkable but serves no purpose. The average grade is important when one property is immediately downhill from another. Without an average grade provision one property owner could be completely dominated by what measures out as a six foot fence. Unless average grade is taken to refer to the immediate difference in the adjoining properties, a property owner would be able to use high land on the north of his property as a basis for con-

structing a fifteen or twenty foot fence on the south of his property. The ordinance would then become—as defendants would have us believe it is—an absurdity offering no protection to downhill owners.

The record, with its devotion to testimony about natural grades and cuts and fills, tends to obscure a very real fact about the defendants' property and their fence. The retaining wall rises about four feet above the Peterson lawn; and the six foot fence sits atop the wall. The Petersons thus encounter what is, from their point of view, a ten foot fence. For them it has all the characteristics of a ten foot fence.

We believe the ordinance was meant to protect a downhill owner, and to protect him against fences built upon property the way it exists at the time the fence is built. But even if the natural grade is considered important, the testimony of defendants' own witness, Georgius Y. Cannon, shows that the fence rises more than six feet above the natural grade.

The defendants' retaining wall is higher than the sidewalk at a point where an extension of the retaining wall would meet the sidewalk. We believe the sidewalk represents, roughly, the "average grade" between the two properties. An earlier Salt Lake City Ordinance, Section 6713 of the Revised Ordinances of 1944, seems to bear this out. This section defines the terms "established grade" and "grade" to mean "the elevation of the sidewalk at the center of that wall adjoining the street."

Under the evidence the court erred in failing to find that the defendants' fence is more than six feet above the average grade of the adjoining properties, and that it violates the ordinances of Salt Lake City.

III

THE COURT ERRED IN APPLYING THE DOCTRINE OF ESTOPPEL AS AGAINST THE PLAINTIFFS.

The trial court ruled that the existence of a high board fence on the Parrish property, and a high link fence on the rear of the Peterson property, estopped the plaintiffs from asserting that the defendants' fence violates the zoning ordinance (R. 201). The court also ruled that if the tennis court was a "structure", so was the high board fence maintained by plaintiff Parrish, and that all the plaintiffs, because of the high board fence, are estopped from asserting that the tennis court violates the restriction agreement for Northcrest Subdivision (R. 202).

If applied by the court below, the doctrine of estoppel would become a scattergun doctrine. The court has taken conduct not attributable to some of the plaintiffs, combined it with other conduct which has invaded no one's rights, and used it as a complete bar to enforcement of rights the plaintiffs thought they had.

The evidence is undisputed that the Parrish fence is on the downhill (not the uphill) side of the adjoining property; it is a short fence used more as a decoration

than anything else (Exhibit 17); it was built with the concurrence of the uphill neighbor and partly as a concession to him.

The chain link fence at the rear of the Peterson property was built by Peterson and the adjoining landowner as a cooperative project. The fence was temporary and for the purpose of keeping small children from being hurt (R. 118-119). It was to be removed as soon as the adjoining landowner was able to build a house on his now vacant property.

How can these facts estop the plaintiffs? Assuming the plaintiffs' fences violate the Salt Lake City ordinance, who has been harmed by them? The only persons who might have a right to complain have acquiesced and joined in construction and maintenance of the fences. The fences do not harm defendants, indeed are far removed from the defendants' property. Defendants have not even claimed to have been adversely affected by the fences.

It has long been held the private property owners may use the injunction as a means of enforcing zoning ordinances. The basis of the right, however, is that some special damage, by way of diminution in value of his property has been or will be suffered by him as a result of the violation of the particular zoning ordinance. See annotation, "Injunction as a Remedy for Violation of a Zoning Ordinance," 54 A.L.R. 366, and 129 A.L.R. 885; 2 Metzenbaum's Law of Zoning (2nd Ed.) 1020; 2 Yok-

ley's Zoning Law and Practice (2nd Ed.) 7; and 58 Am. Jur., Zoning § 189 et seq.

The basis of the right to enforce zoning ordinances is important because of the basis for applying the doctrine of estoppel. It is well established that in order to apply the doctrine of estoppel a wrong "must have been done to the defendant himself and not to some third party." 2 Pomeroy's Equity Jurisprudence § 399, p. 99; 4 A.L.R. 58 (Annotation). If the right to enforce a zoning ordinance were based upon the plaintiff's status as a political member of the community, rather than upon his status as a wronged property owner, it would probably be true that any similar violation of the zoning ordinance would bar him from maintaining an action to enjoin a violation by another. But the right is one based upon protection from special damages arising out of violation of the ordinance. The plaintiffs have proved special damages. There is testimony that the value of their properties has been diminished because of the existence of the tennis court and fence.

With reference to the fences maintained by plaintiffs, there is no similar testimony. The evidence, in fact, tends to show that the fences tend to enhance the values of the adjoining property and have been placed there with the advice and consent of the other owners. Defendants have claimed no damage.

The court's ruling that the parties are estopped from asserting that the tennis court is a "structure" within the

meaning of the restrictive covenant is erroneous on yet another ground. The estoppel in this instance is based upon the fact that the plaintiffs Parrish have maintained a high board fence connected to his house, and that the fence is a "structure" if the tennis court is. There is no similar finding with respect to anything done or maintained by the Petersons. How can the Parrish fence estop the Petersons? There is no community of interest, though the action was properly brought because arising out of the same transaction or occurrence. Thus, while the Parrish structure might estop the Parrishes it should not estop the Petersons. There is no evidence that defendants were misled. The restriction agreement expressly provides that failure to take action in event of a violation shall not be a waiver of the right to enforce as against future violations (Exhibit 2, p. 3). From the beginning, plaintiffs made known to defendants their opposition to the structure.

CONCLUSION

Construction of the covenant and ordinance are matters of law, not fact. The tennis court and fence maintained by defendants violates both the Northcrest Subdivision restriction agreement and the Salt Lake City ordinances. The structure was erected and is maintained over the strong protests of the defendants neighbors.

Moreover, the existence of the structure has depreciated the value of the real properties owned by the plaintiffs. The estoppel found by the trial court is "estoppel in the air" and is contrary to the doctrine of estoppel as traditionally applied.

The judgment of the trial court should be reversed and the court directed to enter a decree enjoining defendants from maintaining the tennis court and the fence.

Respectfully submitted,

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