

2002

George Weinstein v. Ronald Popiel and Jamie Popiel : Brief of Appellant

Utah Court of Appeals

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THE UTAH COURT OF APPEALS

George Weinstein,)
)
Plaintiff/Appellant,)
)
vs.)
)
Ronald Popiel and Jamie Popiel,)
)
Defendants/Appellees)

Case No. 20020486 –CA

APPELLANT’S BRIEF

Appeal from the Third District Court, Summit County, Judge Hilder

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Paulette Stagg
Clerk of the Court

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction by virtue of this appeal being transferred from the Supreme Court. Utah Code, 1953, Title 78, Sec. 78-2a-3(2)(j)

STATEMENT OF ISSUES

Did the district court err:

- I. (a) In initially declining to grant the appellant's cross-motion for summary judgment on the undisputed facts?
- (b) In interposing an implied covenant of "good faith and fair dealing"?
- (c) In rewriting the contract to contain a term that permission cannot

be “unreasonably” withheld?

II. (a) In failing to grant a mandatory injunction as the only adequate remedy for the continuing nuisance?

(b) In denying relief for a lack of perceived damages?

III. Assuming arguendo, damages were appropriate, in awarding nominal damages without giving appellant the opportunity to introduce evidence of actual damages?

IV. In failing to direct reimbursement of appellant’s legal fees and expenses?

STANDARDS OF REVIEW

The standard of review for motions for summary judgment, whereby the court views the facts and all reasonable inferences drawn therefrom in a light most favorable to the non-moving party, would be applicable to both parties as each cross-moved for such relief and the district court found in part for each. As both represented to the court no triable material issues of fact existed, no inference or favoritism should be granted either.

The issue being one of law, the relevant language of the contract not being ambiguous, this court reviews it for correctness, giving the trial courts construction and findings no particular weight or deference. *Cooper State Leasing v. Blacker*

770 P.2d 88 (Utah 1989); Nielsen V. Neilsen 780 P.2d 1264 (Utah 1989);Holladay Duplex v. Howells 47 P.3d 104 (UT App. 2002).

Had the district court applied controlling law and found for the appellant, its failure to award attorney's fees is to be reviewed on the standard of an abuse of discretion.

STATEMENT OF CASE

This is an appeal from a decision of the District Court, on cross-motions for summary judgment. The issues involve enforcement of the Covenants, Conditions & Restrictions (CC&Rs) of a community in which both parties reside on adjoining lots. The controlling CC&R regarding "FENCES" requires the prior permission of all adjoining property owners, of which the appellant is one. Appellees erected a fence, on the common property lines, without the requisite consent. This action was brought to enforce the applicable CC&R, requesting abatement of the nuisance by the removal of the fence. The district court found in the alternative for each party but essentially denied appellant injunctive relief or actual damages.

STATEMENT OF FACTS

Subsequent to the appellant's submission of the original memorandum in opposition to appellees' motion for summary judgment and in support of his cross-motion, with typographical errors (R. 123-126), appellant submitted a corrected set of papers, essentially the same (R. 180-221). In this brief, all references will be made to the corrected second set.

Each party expressly stated there are no material facts that are in dispute.

These facts are:

Appellant, appellees, and the Martins were contiguous neighbors in the residential community of Ranch Place, Utah (R.2, 178). Ranch Place adopted and filed CC&Rs, one of which governs “Fencing” (Sec. 7.5) (R.2). The final sentence of said section makes permission from adjacent owners, prior to the installation of a fence along common lot lines, mandatory (R.182).

The appellees met the first requirement by obtaining approval of the fence design from the Architectural Committee of the HOA (R.95). Appellees failed to comply with the second requirement, viz.; they did not obtain permission from two of four adjacent lot owners, both of whom objected to the fence as built (R.2, 178-179,181,183).

Appellees not only had constructive notice of the CC&Rs (R.185), but had actual knowledge that consent of adjoining neighbors was required, prior to installing their fence (R.186-187, 256,257).

In appellant’s four day absence and without prior notice (R.168 para. 6, 174), appellees erected a 300 ft. long, 3 tier log fence, over four feet high, completely sided with wire mesh, enclosing a rear area of approximately 7700 sq. ft. (R. 4, 168, 183). The fence virtually closed off the remaining open side of appellant’s triangular rear yard, (R.169).

There are no fences at any other homes on appellant's street or in the vicinity of appellees' home (R. 170). The fence is much less than fifty feet from appellant's dwelling (R. 168). Allegation 22 of the complaint, that the fence was erected and existed in violation of the CC&Rs (R. 4) was admitted in paragraph 1 of appellees' Answer (R. 13).

The permission requirement is not ambiguous and is unconditional (R. 185). It was never waived (R.189). The requirement of permission from adjoining neighbors is presently being expressly set forth in all design approvals of the Architectural Committee (R.192, 212).

Regarding other existing fences further away in Ranch Place, it has to be concluded that they were erected with permission of adjacent neighbors, as no objections to them were made (R.188). The testimony of the vice president of the HOA (now president), Mr. Johnson, was that he knew of only one incident in the community where a fence was erected without seeking the permission of the adjoining owners (R.257 para. 15, 112-113), and no one objected thereto.

Appellees, after the fact, in an attempt to excuse their violation, invoked a "Variance" procedure. Such procedure was inapplicable as it is expressly limited to issues of "design", CC&R 3.3 (R.183), which issue was not present (R.186, Decision R.283). Appellant also noted additional legal objections fatal to such "Variance" meeting, (R.192-193, 254-255,259). These were filed with the HOA

counsel prior to the meeting (R. 214-215). At the “Variance” meeting 64 members voted in favor of the variance. No one voted in opposition, as urged by the appellant, in protest to the illegitimate meeting, although appellant, Martin, and many others were present. Neighbors also knew no vote at all, amounted to a vote against, as appellees had the burden of getting sufficient votes (R. 254).

Even if the procedure were available, there are 228 lot owners in Ranch Place and a vote of 64 in favor out of a membership of 228 (R.183, 253-254) did not achieve the required majority of 115 (R.191, 254).

Additionally, appellees violated the maximum height provisions set forth in Sec. 7.5 (R.185, 95). Every one of the 43 fence posts exceeds four feet (R.265).

A violation of the CC&Rs is expressly deemed a nuisance and subject to abatement by any other owner. (CC&R 10.1 (R.189).

DISTRICT COURT DECISION

The court essentially made three distinct rulings. First, the court found in favor of the appellees based on its evaluation of the reasonableness of the appellant’s objection. It stated it may have ruled for appellant had it found the reasons for appellant’s aesthetic objections were more to its liking. Second, it held the permission requirement was not a “design” element, which would be subject to the variance procedure. Without any evidence in the record as to the actual measurements of any other fences, appellees represented six (of the 228 home sites

in Ranch Place) were over four feet (R.251 para. 3). Based on this, the district court concluded there was a waiver by the HOA and a majority of its members of the height restriction.

In its third and final ruling, the district court found in the alternative, that if its first two theories upon which it based its opinion were incorrect, appellant was entitled to damages of one dollar. It denied counsel fees.

Significantly, the lower court (Decision R.282-284) did make the following findings:

- A. Few **properties** in the parties' immediate neighborhood are fenced.
- B. It acknowledged appellant's claim "...he would never have bought his property if he believed his neighbors could erect an adjoining fence over his objection." (R. 283). [The Court failed to note that **appellant and his architect** also relied on the fact that the rear yard could not be fenced off without his permission, in deciding the type of house he would build (a rambler) and its location on the lot (R.169)].
- C. Appellant had no notice of the construction of the fence until after it was completed.

COMMENTS ON DISTRICT COURT'S DECISION

The appellees' application for the fence stated it was to contain their newly-acquired puppy (R.94). Besides their initial **application**, on several other occasions

thereafter (R.83, 194-195, 230) appellees gave as their reason for the installation of the fence, the protection of their newly acquired puppy. Their statement that appellant wanted to use the appellees' property to exercise his dog was only belatedly asserted by the appellees after appellant objected to their fence. This accusation was denied by appellant (R.194). In any event, such subjective excuse was not a reason to violate the CC&Rs, as a matter of law. Appellees claimed motivation for the fence is no more relevant than appellant's or the Martins subjective reason for objecting to it.

If indeed there was any merit to appellees' contention that appellant's dog trespassed on their rear lawn, they had other more appropriate remedies available to them, both civil and criminal, none of which were pursued, i.e., action for declaratory judgment, nuisance, injunction, trespass, etc. It is not justification, as a matter of law, to violate the CC&Rs.

The court created issues where none existed and then made findings thereof to try and justify its desired resolution, ignored non-disputed facts, and speculated as to the result of situations that might occur in the future. It ignored that a person's home being unique, monetary damages were not adequate and on its own determined, there was no diminution in value of appellant's real estate, without any evidence before it or the opportunity given to the appellant to introduce such evidence.

The court conjectured about the applicability of proxies. There never were any proxies although appellees labeled them as such. They were more like petitions obtained by appellees ringing doorbells throughout the neighborhood, pitching their cause, without opportunity of appellant to be present or respond, and asking residents to sign a paper long before a “Variance” meeting was ever called, or notice of the meeting sent out with the issue to be voted upon defined (R.214(8)). The record is devoid of any statement that proxies were counted, their tally ever announced and by what vote it favored one party or the other. Further, the “Variance” vote could only count those present. Unlike other sections of the CC&Rs, voting by proxy was not authorized (R.190-191, 254 para. 9).

The district court’s subsequent statement that it would not be unreasonable to withhold permission for valid aesthetic reasons or when the enjoyment of one’s property is impaired by the installation of the fence, ignored appellant’s claim and the Martins’ affidavit (R.179 para. 10). The district court necessarily and erroneously found that the closing in of appellant’s relatively small triangular rear yard (R.169) with a 7,700 square foot pen close to his home and deck, was not an interference with his enjoyment and value of his property, as a matter of law.

The finding of “a dispute” as to whether the Martins gave permission is inexplicable as appellees acknowledged they never sought nor obtained the Martins’ permission and the Martins’ affidavit expressly states they did not (R.179,

para. 7). The district court questioned the reasonableness of appellant's failure to give permission but never addressed the reasonableness of the Martins' objection.

SUMMARY OF ARGUMENT

A controlling CC&R in the community where appellant and appellees reside was knowingly violated by appellees. The district court, interjecting an implied condition of "fair dealings and good faith", accepted a disputed subjective excuse for the violation. Such implied condition is inapplicable to the case at bar.

Although conflicting conclusions in a decision are abhorrent to the law, in the alternative the court found that the appellant may have been entitled to a summary judgment but erred in failing to grant injunctive relief to remedy the continuing nuisance.

ARGUMENT

Point I A

THE DISTRICT COURT, IN THE ALTERNATIVE, PROPERLY GRANTED APPELLANT SUMMARY JUDGMENT

Restricting covenants constitute a binding and enforceable contract (Brighton v. Ward 31 P.3d 594 (Utah 2002)) (Decision R.283).

If the restricting covenant is not ambiguous, the court's duty is only to make application thereof to the evidence:

Holladay Duplex v. Howells 2002 UT App. 125, 47 P.3d 104

Swenson v. Erickson 2000 UT 16, 998 P.2d 807

Freeman v. Gee 18 UT 2d. 339, 351, 423 P.2d 155

Hayes v. Gibbs 110 UT 54, 169 P.2d 781 (1946)

“Generally, unambiguous restrictive covenants should be enforced as written...” Swenson, (supra, para. 11)... “It is [this] court’s duty to enforce the intentions of the parties as expressed in the plain language of the covenants, See Freeman v. Gee (citation)” supra, para. 19.... “Property owners who purchase land in such developments have a right to enforce such covenants against other owners who violate them.” (See Crimmins v. Simonds 636 P. 2d 478, 479 (Utah Sup 1981)

“Where a purchaser has notice of the restriction . . .he is chargeable with knowledge of the purpose for which the restriction was made.” 66 CJ 1128, Sec. 962. Adopted in Utah in Hayes v. Gibbs (supra, 784).

“Persons who own property in a neighborhood subject to restrictive covenants are entitled to rely on the covenants according to their terms, even if some of the neighbors no longer desire their enforcement.” Crimmins v. Simonds (supra, 481). See also Swenson v. Erickson (supra)

There is no issue that appellees constructed a substantial perimeter fence without the requisite permission after constructive and actual knowledge of its controlling CC&R 7.5 requirement (R.186-187, 256-257).

Point I B

**THE PRINCIPLE OF GOOD FAITH AND FAIR DEALING WAS
MISAPPLIED.**

The district court erroneously interjected a theory of an implied covenant of “good faith and fair dealing”. Under the facts of the case at bar, such principle is inapplicable. It is foreign to the fundamental law of contracts that their terms can be rewritten under the guise of applying such theory. This principle is summed up on Corpus Juris at 17A CJS Sec. 346, pages 378-9 as follows.

“...where a contract is clear and seemingly complete, the courts will not and cannot revise, extend, or enlarge it by implication...Furthermore, the covenant of good faith and fair dealing cannot be used to imply an obligation which would completely obliterate a right expressly provided by the written contract; stated otherwise, the obligation of good faith and fair dealing cannot be constructed so broadly as to effectively nullify other express terms of the contract. Accordingly, the implied covenant of good faith and fair dealing does not impose any duty that is contrary to the express terms of the contract. A term which the parties have not expressed is not to be implied merely because the court thinks it is a reasonable term, or because the contract is advantageous to one party and unjust to the other; and a person may not be required to do what he did not promise, merely because what he did promise was not sufficient to meet the requirements of some real or supposed public policy.”

Where there are no express covenants or promises in a contract, compelling a party to act in a particular manner, “...there can be no implied covenants or promises to do the same.” *Seare v. University of Utah* 882 P. 2d 673 (1994). See: *Olympus Hills Shopping Center v. Smith’s Food* 889 P.2d 445 (Utah 1994).

A court, by interposing theories of implied covenants of good faith and fair dealing in a contract, has the potential of distorting well established principles of contract law, which are not sustainable. *Berube v. Fashion Center* 771 P.2d 1033 (Sup. Utah 1989), relating to termination of employment; *Beck v. Farmers Insurance Exchange* 701 P.2d 795 (Sup. Utah 1985), relating to insurer's duty to settle claims.

In *Cunningham v. Cunningham* 690 P.2d 549 (Sup. Utah 1984), relating to a contract for real property in Ogden, the Court held:

“...the court's equity powers do not permit it to fashion a remedy without reference to the terms of the underlying transaction....”

Although we sympathize with the trial judge's effort to do equity, that effort must fail for several reasons...

A court does not have *carte blanche* to reform any transaction to include terms that it believes are fair. Its discretion is narrowly bounded. Reformation may be appropriate where both parties were mistaken as to a term of the contract, or where one party is mistaken and the other party is guilty of inequitable conduct...”

The covenant of good faith does not “...establish new independent rights or duties not agreed upon by the parties, nor may the covenant be used to nullify a right granted by a contract to one of the parties, *Brihany* 812 P.2d at 55.”

(Referring to *Brihany v. Nordstrom* 812 P.2d 49 Sup. Utah 1991) *Wood v. Utah Farm Bureau* 19 P.3d 392 (Ct. of App. 2001); See also *Rio Algom Corp. v. Jimco*

Ltd., 618 P.2d 497 (Sup. Utah 1980); Malibu Investment v. Sparks 2000 Utah 30, 996 P.2d 1043; Howe v. Professional Maninvest, 829 P.2d 160,163 (Utah 1992).

Express covenants relating to a specific contract right exclude the possibility of an implied covenant of a different or contradictory nature, Ted R. Brown v. Carnes 753 P.2d 964. (Utah Ct. of App. 1988)

In order to find bad faith and unfair dealings in a contractual relationship, there must be circumstances to establish that one party did something substantial to prevent the other party from performing its obligations (Zions Properties, Inc. v. Holt 538 P.2d 1319 (Utah Sup. 1975). As a matter of law, appellant cannot be held to have prevented appellees from obtaining the requisite permission that was never even requested of him or the Martins. Had the appellees made such a request, there was a likelihood that something could have been worked out.

It appears the district court strained to apply the theory of good faith and fair dealing to try and arrive at what it perceived to be the popular position reflected in the abortive variance vote. This was the result of false publicity and door-to-door personal canvassing by appellees around the neighborhood, which depicted appellant as the villain for his reliance upon the CC&Rs. This influenced many residents of the neighborhood, the great majority of whom were unaffected by the fence.

On the subject of interpretation of language as creating conditions or

promises, the following is stated in Williston on Contracts, Fourth edition, Sec. 38:13, pg 427.

“...However, an **interpretation** cannot be employed as a means of reducing the risk of forfeiture under a **contract** if the occurrence of the event as a condition is expressed in unmistakable language. The parties are entitled to the benefit of their bargain, and the mere fact it turns out to have been a bad bargain for one of the parties does not justify, through artful interpretation, changing the clear meaning of the parties’ words.”

The district court’s decision makes no reference to any breach by appellant of any specific contractual obligation. It cannot be said appellant did anything or failed to do anything regarding the fence except fail to give his permission for its installation along the remaining open side of his triangular rear **property line**, the other side already having been previously obstructed by a raised thick berm of trees and plantings (R.169). As a matter of law, withholding consent under such circumstances, which appellant had the legal right to do, did not amount to unfair dealings or lack of good faith.

“ A duty of good faith does not mean that a party vested with a clear right is obligated to exercise that right to its own detriment for the purpose of benefiting another party to the contract. A court will not enforce asserted rights that are not supported by the contract itself (citation)” Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Sup. Ct. Utah 1980)

Utah’s position is in keeping with the majority of jurisdictions, which decline to find a breach of an implied covenant of good faith and fair dealing absent a breach of an express term of a contract. Burger King v. Weaver 169 F.3d

1310, 11th Circuit 1999, applying Florida law, (Cert. dismissed), 528 U.S. 948; Griffith v. Levi Straus 85 F.3d 185, 5th Circuit 1996 (applying Texas law); Amoco Oil v. Ervin 908 P.2d 493 (Colorado 1995). The duty of the Court is to declare the meaning of what is written in the instrument and not what it feels the language should have been. It is settled law when, without fraud or mistake, the written contract expresses the obligations of the parties. Such writing is not only the best but the only evidence of their agreement. Hicks v. Mid-Kansas Oil & Gas Co. 182 Oklahoma 61, 76 P.2d 269 (Sup. 1938); Shiver v. Liberty Building-Loan Assn. 16 Cal 2d 296, 106 P.2d 4 (Sup. 1940).

It cannot be questioned that appellant was given the right to withhold his consent. Appellant had no contractual obligation to do or perform anything regarding the appellees' fence other than approve or disapprove it, if and when he was asked to give permission.

“We will not interpret the covenant of good faith and fair dealing to make a better contract for the parties than they made for themselves, Rio Algom v Jimco (supra)...” Brown v. Moore 973 P.2d 950 (Sup. Utah 1998)

See also U. S. Pipe and Foundry v. American Arbitration Association, 67 N.J. (Sup. Ct. 384, 170 A.2d 505 (New Jersey 1961)

Point I C

**THE DISTRICT COURT IMPERMISSIBLY REWROTE
THE TERMS OF THE CONTRACT**

Based upon its erroneous conclusion that the covenant of good faith and fair dealing is applicable, the court leapfrogged to reword the contract between the parties. After the term, "...permission for the fencing shall be obtained from the adjacent Owner prior to installation", it altered the clear language by in effect adding, "Such permission cannot be unreasonably withheld."

No wording or provisions of the CC&Rs allow an exception to the requirement of an adjoining neighbor's consent. The court cannot rewrite the unambiguous contract between the parties to condition the times when permission can be withheld and when it cannot. An example of this is when the district court engaged in evaluating the extent of aesthetic interference and the reasonableness of appellant's objection.

A provision of a contract which is clear and unambiguous is not open to construction even if giving effect to its literal terms will work a hardship on one of the parties, would be unwise or even operate unjustly. *Chemical Construction Corp v. Continental Engineering* 407 F.2d 989 (CA Ala); *Conservative Federal Savings & Loan Assn. v. Warnecke*, Mo. App., 324 S.W.2d 471, 479, 480; *Cook v. Little Caesar* 210 F.3d 653 (6th Cir. 2000); *Glass v. Mancuso* 444 S.W. 2d 467, 478 (Sup. MO 1969).

"Hence, in order that an unexpressed term may be implied, the implication must arise from the language employed in the instrument or be indispensable to effectuate the intention of the parties..."

Accordingly, there can be no implication as against the express terms of the contract; and the courts will be careful not to imply a term, where the subject matter is completely covered by the contract or as to which the contract is intentionally silent.”
17 A CJS Sec. 34, pg. 378-9

Where language is clear, “(t)he policy favoring freedom of contract requires that, within broad limits, the agreement of the parties should be honored, even though forfeiture results.” *Oppenheimer & Co., v. Oppenheim*, Appel 86 N.Y. 2d 865, 660 N.E. 2d 415, 636 NYS 2d 734 (Court of Appeals-New York 1995); Restatement (Second) of Contracts 229, page 185, comment A.

“We also disagree with the trial judge’s conclusion that plaintiff breached an implied covenant of the lease by unreasonably withholding its consent to defendant’s use of the washing machine. Initially we note that the record does not contain any indication that defendant sought such permission. If authorization was not requested then it could not have been unreasonably withheld. Moreover, a covenant in a lease can arise by implication only from some specific language of the lease or because it is indispensable to carry into effect the purpose of the lease. *Marini v. Ireland*, 56 N.J. 130, 143, 265 A.2d 526 (1970). The language of the subject lease is not ambiguous and thus does not give rise to any implication because of a required construction. It clearly and simply says that no washing machines may be installed by the tenant without the advance authorization of the landlord. To interpret such provision as meaning the landlord’s permission would not be unreasonably withheld would amount to an impermissible rewriting of the lease agreement.

See *Brower v. Glen Wild Lake Co.*, 86 N.J. Super. 341, 346 (App. Div. 1965), certif. den. 44 N.J. 399 (1965).”

Housing Auth. Of City of E. Orange v. Mishoe, 493 A.2d 56, 201 N.J. Super. 352 (1985) (Appellate Division).

Point II A

THE DISTRICT COURT SHOULD HAVE EXERCISED ITS EQUITABLE POWERS TO RESTORE THE PARTIES TO STATUS QUO

The violation was in fact and was deemed a continuing nuisance, CC&R 10.1 (R.207). Abatement thereof by a mandatory injunction was the only adequate remedy. *Stergios v. Forest Place HOA* 651 S.W. 2d 396 (Tex. Ct. Appl. 1983).

The courts of Utah uniformly enforce violations of restrictive covenants in subdivisions by permanent injunction. *Crimmins v. Simonds*, 636 P.2d 478 (Utah 1981); *Schick v. Perry*, 12 Utah 2d 173, 364 P.2d 116 (1961); *Leaver v. Grose*, 610 P.2d 1262 (Utah 1980).

The breach of a restrictive covenant is an irreparable injury for which damages are estimated only by conjecture. The unique nature of a person's home, the interests of other lot owners in the subdivision and the integrity of the CC&Rs demonstrate the inadequacy of money damages. In such cases, courts of this state hold an injunction to be the only appropriate remedy to enforce covenants.

“Enforcement of real covenants has virtually been subsumed by the modern practice of treating all covenants respecting land as equitable servitudes. The reasons for this transformation are the appropriateness of injunction remedies for the enforcement of property restrictions. ... The real basis for the enforcement of equitable servitudes is the doctrine that one who takes land with notice of a restriction thereon cannot in equity and good conscience be permitted to violate that restriction. ... Equitable relief in the form of an injunction is the usual means of enforcing an equitable servitude...”

Thomas & Backman on Utah Real Property Law Sec. 1205 p. 546

In *Utah County v. Baxter* 635 P.2d 61 (Sup. Utah 1981) dealing with a zoning violation, the court held that a plaintiff need not make a showing of irreparable injury to obtain an injunction. Violation of a community CC&R should be treated no differently.

“As a general proposition, property owners who have purchased land in a subdivision, subject to a recorded set of restrictive covenants and conditions, have the right to enforce such restrictions through equitable relief against property owners who do not comply with the stated restrictions. See *Crimmins v. Simonds*, 636 P.2d 478, 480 (Utah 1981) 5 Williston on Contracts, 669 at 154 3 ed.

The appellees have no standing to ask the court not to order removal of the fence as it was not erected in good faith. They installed the fence after actual knowledge that permission of all adjoining neighbors was required (R.186-7,256-7) never even requested the required permission of appellant and Martin and erected it during the only few days appellant was out of town that summer (R.168).

“The defendant with full knowledge of the restriction deliberately attempted to override them...He took his chances as to the effect of his conduct with eyes open to the results which might ensue...

Entrenchments behind considerable expenditures of money cannot shield premeditated efforts to evade or circumvent legal obligations from the salutary remedies of equity.”

Armstrong v. Leverone 136 A. 71,75-76 (Conn.1927)

Real estate being unique, courts will restore the parties to status quo before the breach by directing the removal of the fence. The benefit of the doctrine of balancing the equities or relative hardship is reserved for the innocent defendant who proceeds without knowledge that he is violating the covenants. Where the

encroachment is deliberate and constitutes a willful interference with another's property rights, equity will require restoration to the prior status quo "...without regard to the relative inconvenience or hardship that might result from its removal." Papanikolas Bros. Enters v. Sugarhouse Shopping Center Assoc. 535 P.2d 1256, 1259 (3) (Sup. Utah 1975).

Point II B

IN ENFORCING RESTRICTIVE COVENANTS, INJUNCTIVE RELIEF IS NOT WITHHELD FOR LACK OF PERCEIVED DAMAGES

This issue was specifically addressed in a decision of the Supreme Court of Connecticut in the case of Hartford Electric Light Co. v. Levitz, 173 Conn. 15, 376 A.2D 381 (Sup. Ct. Conn. 1977). Therein the defendant objected to injunctive relief unless there was substantial and irreparable injury.

After acknowledging the long line of authority supporting the general rule that ordinarily irreparable and substantial injury must be threatened before an injunction is issued, the court stated:

"These and many other similar cases have been examined, and in none of them was an injunction which was sought to enforce a restrictive covenant refused for the lack of a threat of substantial irreparable injury. Cases involving enforcement of restrictive covenants show that in those actions a different standard is applied to the request for an injunction.

"In Armstrong v. Leverone, supra, this court found no error in the granting of an injunction against violation of a restrictive covenant against business

use of certain property. It stated (p. 472) that “proof of special damage is not necessary, and if the act of the defendant transgresses the restriction it is a violation of the rights of the plaintiffs which is not dependent upon the existence or amount of damage. *Berry on Restrictions on Use of Real Property*, 413; *Morrow v. Hasselman*, 69 N.J. Eq. 612, 61 A. 369; *Peck v. Conway*, 119 Mass. 546.”

The Connecticut court also held that the defendant’s substantial expenditures did not make injunctive relief inequitable, because they were made willfully after knowledge that he was violating the restrictions, to wit:

“When one has gone on wrongfully in a willful invasion of another’s rights in real property, the latter is entitled to have his property restored to its original condition even though the wrongdoer would thereby suffer great loss. It has been said that the result of denying a mandatory injunction in such a case would be to ‘allow the wrongdoer to compel innocent persons to sell their rights at a valuation (citation).’ ”

“The fact that the damage suffered by plaintiffs as a consequence of defendants’ covenant violation was monetarily minimal does not preclude plaintiff from obtaining an injunction in view of plaintiffs’ protectable interest in the residential integrity of their neighborhood and the enforceability of the covenants that help to sustain it. *Liu v. Dunnigan*, 25 Md. App. 178, 333 A.2d 338 (1975); *Pavia v. Medcalfe*, 45 Misc.2d 597, 257 N.Y.S. 2d 447 (1965), *aff’d* 26 A.D.2d 621, 272 N.Y.S. 2d 716 (1966) [FN2]” See *Crimmins v. Simonds* 636 P.2d 478, *480 (Utah, 1981).

In the case at bar, the court below indicated that it may have ruled in appellant’s favor if it found appellant’s aesthetic reasons more to its liking or was more impressed with appellant’s claim of interference with his enjoyment of his home. The cases hold it is not the court’s prerogative to weigh the extent of the perceived damage.

In *Fink v. Miller* 896 P.2d 649 (Utah 1995), this court in discussing the need for a showing of damages and the appropriateness of injunctive relief stated at 655, FN8.f

“We also note that the trial court showed undue concern about the issue of ‘irreparable harm’. While the element of harm must be met when considering the necessity for a temporary restraining order, see Utah R. Civ.P. 65A(b) (1), it is not essential to the court’s decision to grant a permanent injunction to enforce a restrictive covenant. Property owners have a protectable interest in enforcing restrictive covenants through injunctive relief without a showing of harm. See *Crimmins v. Simonds* (supra) at 480, *Hagemann v. Worth*, 56 Wash. App. 85, 782 P.2d 1072, 1074 (1989); *Morris v. Kadrmas*, 812 P.2d 549, 554 (Wyo. 1991).”

Point II C

ASSUMING ARGUENDO, DAMAGES WERE APPROPRIATE, NO OPPORTUNITY WAS AFFORDED APPELLANT TO ESTABLISH THEM.

This matter involves cross motions for summary judgment. As is invariably the case on motions for summary judgment, both sides directed their attention to issues of liability. Damages were not addressed. It seems too fundamental to require argument that if damages were the proper remedy, appellant should have had an opportunity to introduce evidence of the same. This is not to suggest in the case at bar that damages are adequate. The foregoing authorities establish, in cases of restrictive covenants, injunctive relief is appropriate. If however, liability was found and damages were to be awarded, a hearing should have been directed.

The record established that appellees built this imposing corral fence along appellant's rear property (R.183), closing off the only open remaining side of his rear triangular yard (R.169). The lower court nevertheless held that there was no damage, or diminution of the value of appellant's home, as a matter of law. In alternatively granting appellant summary judgment, it determined, without any hearing, nominal damages of \$1.00 to be fair compensation.

“...Thus, the Campbells are entitled to an opportunity to prove that State Farm acted in bad faith and that, as a result, they suffered damages...” Campbell v. State Farm 840 P2d 130,142. See also Williams v. Barber 765 P.2d 887, 889. Hayes et al. v. Gibbs, et al., 110 Utah 54 (1946), 169 P.2d 781.

Point III

ATTORNEYS' FEES AND LEGAL EXPENSES

Appellant's complaint requested legal fees. Based upon the district court's erroneous conclusions, referred to herein, it declined to award appellant attorney fees and disbursements. It is respectfully submitted that had the district court applied controlling principles of law, attorney's fees would have been appropriate as provided in CC&R Sec. 10.2 (R.4).

It is clear that it was a disregard by the appellees of the known CC&Rs that precipitated the events and proceedings culminating in this appeal. They chose not to discuss the contemplated fence with appellant or the Martins before erecting it and did it clandestinely in appellant's four day absence. The appellant did nothing

but exercise his right to object to this imposing fence after he was shocked to find it upon his return. In addition to his non-compensable time and effort, appellant has sustained thousands of dollars in legal fees and expenses seeking redress. To deny him reimbursement under such circumstances was an abuse of discretion.

“...However, the Utah Supreme Court has stated that ‘a court has inherent equitable power to award reasonable attorney fees when it deems appropriate in the interest of justice and equity.’”
Stewart v. Public Serv. Comm’n, 885 P.2d 759, 782 (Utah 1994).

Courts use their equitable power to award attorney fees where a party has acted in bad faith. Rohan v. Boseman 445 Utah Adv. Rep. 16, 2002 UT app 109 46 P.3d 753. See also Cafferty v. Hughes 445 Utah Adv. Rep. 3, 2002 UT app 105. In the case at bar the CC&Rs expressly provide for them.

CONCLUSION

The provision on “Fencing” was clear and known constructively and actually.

The related history of the provision, when being adopted, was a compromise between one faction who wanted no fencing and those who were in favor of unrestricted fencing. The resolution was that a homeowner could erect fencing around his rear lot if his immediate neighbors did not object.

If the community was of the opinion that a substantial fence could be erected on a common property line over the objection of an adjoining neighbor they could

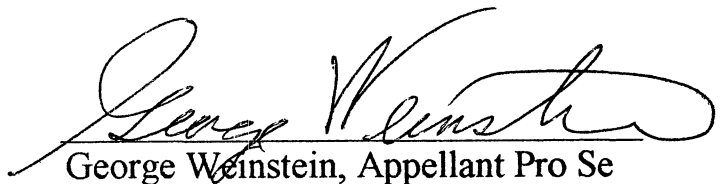
have amended Sec. 7.5. To date this has not been done or even attempted. The permission requirement is still in the CC&Rs and now set forth to in all fence design approvals of the architectural committee.

The appellees have furnished no legal reason why it should not be enforced. The subsequently claimed dog issue is irrelevant to the applicability of CC&R 7.5. On this appeal, it should be entitled to no recognition.

Under the foregoing circumstances, no triable issue of fact has been raised by the defendants that would warrant a protracted and costly trial. The blatant disregard of the known requirements should not be excused. It is also important, that the enforceability of unambiguous CC&Rs, whose integrity hundreds of communities, in Utah (and a multitude of other states), rely upon in governing the workings of their associations, be preserved.

As stated in the Swenson and Crimmins cases, persons who own property in a neighborhood subject to restrictive covenants are entitled to rely on them according to their terms even if some of the neighbors no longer desire their enforcement. CC&Rs constitute a contract and should be validated as such by the courts.

RESPECTFULLY SUBMITTED this 28th day of January, 2003


George Weinstein, Appellant Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January 2003, I did personally hand deliver two true and exact copies of the foregoing Apellant's Brief to Thomas Howard, Esq. Attorney for Appellees, at 1725 Sidewinder Drive, Park City, Utah 84060.

A handwritten signature in cursive script, appearing to read "George W. Smith", written over a horizontal line.

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

GEORGE WEINSTEIN,

Plaintiff,

RULING AND ORDER

vs.

**RONALD POPIEL and JAMIE
POPIEL,**

Civil No. 010600143

Defendants.

Judge Robert K. Hilder

The parties cross Motions for Summary Judgment were argued to the court on May 6, 2002. Mr. Joseph E. Tesch appeared for plaintiff, and Mr. Thomas L. Howard appeared for defendants. Following argument, the court took the matter under advisement. Now, having considered the memoranda, affidavits, the arguments of counsel and applicable law, the court rules as follows:

First, the court finds that the facts of the case have been fully developed, there are no genuine disputes about any material facts, and summary judgment is appropriate. In fact, any delay in resolving this matter would be a waste of the court's and the parties' resources, and it would unnecessarily prolong an already protracted neighborhood dispute.

The relevant and established facts that control the court's decision include the following: The parties live in the Ranch Place subdivision. Their properties adjoin each other, in part. All properties and homeowners in Ranch Place are subject to Covenants, Conditions and Restrictions ("CC&Rs") which were in place when both parties bought their respective properties, and at all times relevant to the dispute. Fencing of Ranch Place properties is subject to specific conditions in the CC&Rs. Until 2000, neither property was fenced. Many properties in Ranch Place are fenced, and many of the existing fences exceed the four foot height restriction. Few fences in the parties' immediate neighborhood are fenced, and before Popiels' fenced their property, approximately seven adjacent properties were unfenced and constituted *de facto* common ground between and around the houses. The Popiels' fence complies with neighborhood standards, was approved by the Homeowners' Association ("HOA"), but it exceeds the height restriction by approximately three to nine inches. The height is, however, consistent with the height of other fences in the subdivision.

Popiels fenced their property for at least two reasons: to restrain and protect their

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surviving dog, after one dog was killed by an automobile, and to prevent Mr. Weinstein from using their property to run his dog. Popiels did not obtain Mr. Weinstein's permission before they erected a fence that ran just inside their property line, where it adjoins Mr. Weinstein's property. The CC&Rs require that such permission be obtained. Mr. Weinstein withheld his permission for at least two reasons: first, he relied on the use of Popiels' property to extend his relatively small backyard to provide exercise and play for his dog, and he also cherished the "common" ground which he believes benefitted not just him, but all adjoining property owners. Mr. Weinstein claims he would never have bought his property if he had believed his neighbors could erect an adjoining fence over his objections. Two other adjoining property owners have given permission for the fence. There is a dispute whether Martins gave permission, but they have since sold their property, and they have never filed a formal complaint or joined this lawsuit. Popiels did receive pre-approval for the fence from the HOA, but the approval letter failed to refer to the need to obtain permission from neighbors, and Mr. Weinstein had no notice of the construction until after it was accomplished

When Mr. Weinstein pursued his objection with the HOA, after construction was complete, the HOA agreed that the approval letter lacked reference to the need for permission, but the officers of the HOA indicated that they believed the approval requirement was a courtesy provision, and not an absolute requirement. Because Mr. Weinstein persevered with his objections, the HOA then conducted a variance procedure to determine if the Association members were willing to grant a variance for the lack of permission. At the time of the meeting, Mr. Weinstein had never objected to the excessive height of the fence, and the height was not at issue. At the HOA meeting, homeowners in attendance voted 64 to zero in favor of the variance. That is not the required absolute majority of all homeowners, but unrebutted evidence establishes that when proxies were counted, the vote exceeded fifty percent. Neither party presented evidence that proxies are not valid with respect to a variance vote.

Based on the foregoing facts, and the conclusions of law set forth herein, the court finds for defendants on certain alternative bases. First, the court finds that the permission requirement is not a mere courtesy requirement, but is a condition of the contract between the Association and its members, and between the members themselves. Like all contractual conditions, obligations, or covenants, it is subject to the implied covenant of good faith and fair dealing. As applied to a restriction on a property owner's right to fence his or her property, the covenant requires that the necessary permission not be unreasonably withheld. It may not be unreasonable to withhold fencing permission when a view is substantially impaired, or for other valid aesthetic reasons, when the enjoyment of one's own property is impaired by the installation of a fence on a neighboring property, but it is unreasonable to withhold permission because the fence impairs the use one wishes to make *of the neighbors' property*. That is, a use to which he has no right in law or equity in the first place. The court is sympathetic to Mr. Weinstein's desire to maintain an open and community use, with all the social and practical benefits that use implies, but the Popiels' property is simply not common area.

Second, the court does not believe that the permission requirement is a design element which would be subject to the variance procedure, but if it is the variance vote was valid and the requirement will not be applied in this case. However, the variance procedure is important for

another reason. Mr. Weinstein did not object to the fence height until after the meeting, and the court finds that he has waived his objection to the height, but in the alternative, if that issue survives, the HOA vote, along with the existence of numerous fences that exceed the height restriction, is persuasive evidence that the HOA and a majority of its members, have waived the height requirement, both generally, and specifically as to the Popiels' fence.

Third, and the final alternative basis, the court finds that even if the permission requirement and the height restriction are absolute, have not been waived, and no variance has been validly granted, based on the clear evidence, no substantial right of Mr. Weinstein has been impaired. His cognizable damages, if any, resulting from the installation and continued presence of the fence are nominal; specifically, they amount to one dollar.

Based on the foregoing alternative determinations, both parties have prevailed to some degree. Accordingly, the court hereby ORDERS that the fence may remain as installed, Mr. Weinstein is awarded nominal damages of one dollar, and neither party is awarded attorney's fees or costs. This signed Ruling and Order shall be the Order of the court and no further Order is required.

DATED this 10th day of May, 2002.

By the Court:


Robert K. Hilder, District Court Judge

