Court Rulings

Supreme Court

Monroe County

Decision in Action for Declaratory Judgment and Injunction

Adelaide T. Thomson, 36 Corwin Road, Stella G. Strasenburgh, 10 Ramsey Park, F. Ward Marcellus and Elizabeth J. Marcellus, his wife, 280 Dorchester Road, Harry D. Sewell and Mary K. Sewell, his wife, 30 Ramsey Park, John A. Taylor and Mabel F. Taylor, his wife, 114 Windemere Road, Helen F. Argetsinger, 155 Corwin Road, Amy A. Manson, 373 Beresford Road, Raymond A. Lander and Elsa V. Lander, his wife, 200 Corwin Road, Mabelle W. Clark, 115 Corwin Road, William F. Stanton and Martha N. Stanton, his wife, 84 Windemere Road, Lot S. Wilder and Gladys D. Wilder, his wife, 19 Windemere Road, all of Rochester, New York, individually and in behalf of all other parties similarly situated, Plaintiffs, vs. Rochester Savings Bank, 47 Main Street West, Rochester, New York, Fred P. Bieger, Inc. and Fred P. Bieger, 829 Highland Avenue, Brighton, New York, Defendants.

Glenn L. Buck, attorney for plaintiffs.

Harris, Beach, Keating, Wilcox & Dale (Harlan F. Calkins and Edward Harris, Jr., of counsel) attorneys for defendant Rochester Savings Bank.

Fred Wiedman, attorney for defendants Fred Bieger, Inc., and Fred Bieger.

Van Voorhis, J.—The complaint alleges that the plaintiffs are owners of residential properties in a portion of the City of Rochester, New York, known as Browncroft, and that the defendants own or have some interest in vacant land in another portion of Browncroft on which plaintiffs seek to enjoin the erection of houses or other structures. If unsuccessful in obtaining that relief, plaintiffs apply for an adjudication determining what building restrictions are applicable to said area and for an injunction restraining defendants from violating such restrictions.

The Browncroft tract is a large residential subdivision shown by many filed maps comprising numerous city blocks. It is somewhat irregular in shape, the outside dimensions of the tract being roughly 2500 x 2000 feet. Development was begun about 1912. The area covered by the complaint consists of a rectangular space measuring about 600 x 330 feet in the western portion of Browncroft and lying along the easterly side of a public thoroughfare known as Winton Road North which bounds Browncroft on the west. The locus in quo is bounded on the east by a street called Ramsey Park, and on the north and south by Corwin Road and Dorchester Road respectively. The longer dimension of this rectangle is laid along Winton Road and Ramsey Park. It is now owned by the defendant Rochester Savings Bank as the result of a mortgage foreclosure and the Bank plans to sell this land to the defendant Fred Bieger, Inc., which proposes to develop it in accordance with a map recently prepared and filed in the Monroe County Clerk's office subdividing the area into 22 lots. Fred Bieger, Inc. has applied for a building permit to erect on one of these lots fronting on Winton Road a frame dwelling with built-in garage at an estimated cost of $5,500.00, the front wall to be 40 feet frfom the street.

This proposed house is inferior in quality to the homes that have been erected throughout the Browncroft tract and, if erected, will materially damage the nearer portions.

Brown Brothers Cmpany were primarily in the nursery business and the development of the Browncroft tract was doubtless aided by the rather elaborate landscaping not only of the area now proposed to be built upon but also of the spaces between the sidewalks and curbstones throughout the tract. The eastern portion merged into the country, which lent a suburban aspect. Winton Road on the west, where the premises in suit are located, had been settled at an earlier date and was more urban in character. Buildings along Winton Road outside of the Browncroft tract are less costly than residences in the tract, and stores and other commercial structures have been built and are in use on Winton Road. It is partly to form a

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buffer between Winton Road and their homes that plaintiffs desire to have the premises described in the complaint kept vacant even though allowed to grow wild as has been its condition for the past sixteen years.

Keeping Open the 'Park'

It is a long step from the circumstance that people may have been attracted to the subdivision many years ago by the natural beauty of this area to the conclusion that there is a negative covenant running with the land forever enjoining the construction of houses there. This action has been carefully and diligently prepared for trial by plaintiffs' counsel, yet in response to a direct question from the Court he has been unable to discover any map or plat on file in the Monroe County Clerk's office referred to in any of the deeds of conveyance which describes this section as a park or by any kind of designation indicating that it was to be set aside as a common for the enjoyment of the other lot owners; and still less have any conveyances been pointed out containing express covenants prohibiting building or language creating any such servitude upon this area for the benefit of plaintiffs or any lot owners in Browncroft. The plaintiffs might be entitled to have this land kept open if they were able to bring themselves within the rule reiterated by Rodenbeck, J., in Williamson vs. Salmon, 105 Misc. 485, aff'd. 195 App. Div. 992, 233 N. Y. 657, that "a party who sells a lot according to a map should be held to his implied covenant of an easement in all of the streets and parks shown on the map so far as their existence adds to the value of the property sold." A dozen maps of portions of Browncroft have been offered in evidence but upon all of them where this area is set forth, it is indicated merely as unsubdivided land without any designation to indicate that it was reserved for any purpose. On a few of these maps it is shown as partly subdivided into lots. Filing a subdivision map which leaves part of the area on it unsubdivided in no sense signifies a covenant that the unsubdivided portion shall always remain vacant. Any such ruling would cast a cloud upon the title to most of the houses in the tract since there is scarcely a portion of Browncroft which was not set forth at some time as unsubdivided upon a map filed to show the lot scheme for some other area. Probably Charles J. Brown and George J. Kaelber, who owned and managed the development companies, had in mind that the space surrounding their homes would be the last to be subdivided and that for an indefinite period of time they would keep it landscaped for the sake of their own homes and to help attract public attention to Browncroft. It is impossible that they may have considered that there was little need to enter into any engagement respecting the use of this area knowing that they harbored no present intention of doing anything else with it. That they had no such a thought may be surmised from the circumstance that no structures have been erected thereon for upwards of thirty years. On the other hand, absence of intention to build upon real property is not equivalent to a covenant not to build. The record establishes that there was no purpose to commit themselves to refrain from ever subdividing. In the [illegible] of title of some of the plaintiffs restrictive covenants fixing type and minimum cost of lots buildings fronting on the west Ramsey Park, which proves development of part of this "park" area was contemplated as a possibility. Not only does this fail to support the position of the plaintiffs with respect to keeping it vacant, but it is a positive indication that building upon the area was always in mind and is opposed to the existence of any agreement perpetually to refrain from doing so.

The rulings of the Court during the trial have been made upon the assumption (although without deciding) that if there were evidence to sustain such a contention a cause of action could be established to prohibit a defendant from building by estoppel or due to fraud in the absence of written covenants running with the land. It suffices to say not only that plaintiffs have failed in proving representations or conduct on the part of defendants or their predecessors in interest sufficient to create an estoppel or form a basis for a charge of fraud, but also that evidence is lacking to show that the plaintiffs had notice of anything of this kind or relied thereon in purchasing or building. Nor was it shown to have been brought home to the defendants. Even if the advertising literature and other sales propaganda which plaintiffs offered in evidence had been admitted, it would have fallen short of a promise to keep the so-called "park" land vacant, or of a representation that it would never be subdivided, nor would it have shown that it was relied on by the plaintiffs or brought to the attention of the defendants. The word "Park" shown upon the city plat book does not correspond to any map referred to in any deed or conveyance nor, if the plat book be assumed to be descriptive of the geography at the time when it was published, would that constitute a covenant or representation that this land would always remain in that condition. This would still be true if the plaintiffs had succeeded in proving that this page in the plat book was examined by the attorneys for defendant Rochester Savings Bank. Even if plaintiffs had testified that they were induced to buy as a result of their attention having been called to the landscaping in this portion of the tract that would not have given them the right to assume an undertaking by the tract developers that it would never be changed. The strongest evidence of this sort is the testimony of Linus S. Appleby, but even he did not say that anything more was represented to him than that the developers meant to keep this area open for an indefinite period of time, and this information was not shown to have been transmitted to either [illegible] plaintiffs or defendants. If it be assumed without proof that the parties hereto were familiar with whatever was done in the line of sales promotion, it would still not avail the plaintiffs since the existence of a mere plan or intention of the developers to keep this area open would not amount to a promise or undertaking on their part, nor would it be proof against a bona fide change in their plans in the course of time. There is no such thing as a fraudulent misrepresentation except of an existing fact. There is no question here of "promissory" fraud since to establish that there must have been the misstatement of a present intention or the representation of an intention or state of mind that does not exist. Adams vs. Gillig (199 N. Y. 314). Here this "park" space has remained open for over thirty years, no charge is presented that when the attention of prospective purchasers was directed to this "park" the tract developers had already conceived a plan to make some different use of it. Nevertheless they reserved the right to subdivide and build thereon as shown by the covenants in the deeds in plaintiffs' chains of title respecting the possible construction of houses on the west side of the street known as Ramsay Park, which is inconsistent with the area being set aside as a part. These covenants were brought home to plaintiffs on their abstracts of title and demonstrate that it was generally known that even if the developers did not plan to build in the "park" they were definitely not committing themselves to the contrary.

Plaintiffs' demand that this area bounded by Winton Road, Corwin Road, Ramsey Park and Dorchester Road be kept open and further building thereon be completely enjoined and prohibited is overruled. Likewise overruled for reasons stated under the next topic, is plaintiff's subordinate contention that if dwellings can be erected anywhere in this area they must be confined to the west side of Ramsey Park and not be constructed upon the east side of Winton Road.

Building Restrictions on the Land in the "Park"

If unsuccessful in their effort to keep the "park" vacant, plaintiffs assert that the proposed structure for the erection of which Fred P. Bieger, Inc., has obtained a building permit from the City of Rochester would violate other restrictive covenants The building permit calls for a $8,500.00 house fronting on Winton Road to be located 40 feet from the front lot line and 5 feet from the nearest side lot line, and to consist of a single family dwelling with attached garage. Plaintiffs contend under this point that the proposed structure violates building restrictions (1) in costing less than $10,000.00, (2) in costing less than $10,000.00, (2) in being located less than sixty feet from the front lot line, and (3) in being constructed with a built-in garage instead of having a separate garage in conformity with a requirement that garages shall be placed only on the rear line of the lot.

This contention of plaintiffs is overruled and their application for an injunction to prevent the erection on Winton Road of the house for which a building permit has been issued is denied for the reason that no restrictions have been imposed on the Winton Road frontage. It is true that the printed form of deed which was used by Browncroft Realty Corporation in conveying many lots, including those belonging to some of the plaintiffs, contains the following phraseology: "Should it ever be decided to subdivide that portion of the tract fronting on the west side of Ramsey Park, it shall be used for residence purposes only, and no double house, Boston flat nor apartment house shall ever be built upon any lot in such subdivision, also all dwellings are to face the west side of Ramsey Park.

"No dwelling shall be erected upon the west side of Ramsey Park costing less than $4,500.00 to build, the foundation of which shall be within 60 feet of the front lot line, nor within five feet of either of the side lot lines." As will be pointed out, this $4,500 minimum cost restriction was afterwards increased to $10,000. Nevertheless the language thus employed does not render these restrictions applicable to the frontage on the east side of Winton Road but only to "that portion of the tract fronting on the west side of Ramsey Park." Plaintiffs endeavor to have this language interpreted as though it referred to all of the land between Ramsey Park and Winton Road calls for an untenable construction. The method of creating restrictions in the Browncroft tract was to impose them on lots fronting on designated streets. Sometimes these were different on different streets, sometimes they were alike. Thus, for example, in the same instruments creating the restrictions applicable to the west side of Ramsey Park it is stated that "no dwelling shall be erected on the east side of Ramsey Park" except in similar manner to those on the west side. Plainly the latter covenant was not designed to cover all of the land extending from the east side of Ramsey Park to the west side of the street bounding the next block, any more than the corresponding covenant referring to the portion of the tract fronting on the west side of Ramsey Park was intended to apply to all of the land between the west side of Ramsey Park and the east side of Winton Road which is the westerly boundary of the tract. If this covenant had been designed to cover the frontage on the east side of Winton Road, it would have been easy to say so. If there could be any doubt upon the point, it would be removed by the clause that "all dwellings are to face the west side of Ramsey Park." If plaintiffs were correct in contending that this restrictive covenant applied to Winton Road,

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County Court

Filed December 27

Hilda Comfort et ano v Henry G Hrankowsky et ano, d/b/a Henry Electric Co et ano — Stipulation of discontinuance — Ben E Solin for plffs.

Rethig Realty Corp v Anthony Nero et al — Complaint for foreclosure of tax lien certificate, lot 17, Section 1, Wakelee Farm tr—Asher N Shapiro for plff.

Tri-County Realty Corp v Georgia Herman et al—Order discontinuing action and cancelling lis pendens — Asher N Shapiro for plff.

Associates Discount Corp v Edward Samson—Garnishee execution for $289.01—Thomas J Meagher for judgment creditor.

Union Trust Co v J Whitney Cooper — Garnishee execution for $180.90—Israel Schoenberg for judgment creditor.

Filed December 28

Gosnell Paint & Wallpaper Co Inc. v Harold Doran — Garnishee execution for $160.48 — Israel Schoenberg for judgment creditor

Surrogate's Court

Filed December 27

Petitions for Proof of Will

YOUNG, MARGARET M — Died Nov 28—No real prop; personal prop does not exceed $1,000—Nixon, H, M & D for pet.

WAGONER, JAMES H—Died Dec 5 Real prop estimated $5,000; personal prop estimated $6,000—Liebschutz, C & S for pet.

Wills Admitted to Probate

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then all houses to be erected thereon would need to be designed with their back doors toward the street. Plaintiffs' contention that this covenant implies that no structures are to be built on Winton Road merely adds one unfounded assumption to another. It presupposes, contrary to the language of the deeds, that these restrictions are intended to apply to Winton Road as well as to Ramsey Park, from which it is reasoned that since it would be incongruous to apply them to Winton Road unless the space between the two streets were subdivided into a single tier of lots extending from street to street, that must have been the purpose so that the houses could face Ramsey Park leaving their backyards vacant on Winton Road.

No such plan as this could have been in the minds of the tract developers. The distance between Winton Road and Ramsey Park is such as to allow room for two tiers of lots fully as deep as the usual depth of lots in the tract. In attaching these restrictions to property fronting on the west side of Ramsey Park, the Browncroft Realty Corporation was following the same method that had been adopted in attaching restrictions to lots according to the streets on which they front elsewhere throughout the tract.

The question of implied restrictions has been discussed at some length in the briefs, and the attention of the Court has been directed by both sides to the case of Bristol vs. Woodward, 251 N. Y. 275. Doubtless there are instances where reciprocal restrictions, even if unexpressed, will be implied on the part of a grantor, although it was stated in the case cited (p. 285): "If restrictions evidenced by covenant and binding in their terms upon the land of the grantee are to be read as meaning that the grantor imposes a like restriction upon any land retained by him, the inference may not be drawn without something to show that exact uniformity in respect of all restrictions was of the essence of the project." the whole point is one of intention. In the absence of the expression of a covenant that constituted an express covenant by Browncroft Realty Corporation to various purchasers, including directly or by means of conveyances plaintiffs Marcellus, Sewell, Argetsinger, Lander and Stanton, that the frontage on the west side of Ramsey Park would be used only in the manner stated. These covenants ran with the land. In the case of lots owned by Lander and Stanton the deeds from Browncroft Realty Corporation specify $10,000.00 instead of $4,300.00 as the minimum cost of construction for dwellings on the west side of Ramsey Park. The latter two deeds were given June 24, 1921 and July 10, 1922, respectively. At about this time Browncroft Realty Corporation decided to raise the minimum cost restriction to $10,000.00 on both sides of Ramsey Park and elsewhere in that vicinity, as appears from these and other deeds in evidence. No further discussion is required to show that these plaintiffs would be entitled to enforce these restrictions, including the $10,000.00 minimum, against the frontage on the west side of Ramsey Park, if Browncroft Realty Corporation had owned the "park" at the time these restrictions were created and had retained it until the present time. In truth and in fact Browncroft Realty Corporation did not obtain title to the "park" until 1930, and Brown Brothers Company was the owner when the deeds to plaintiffs or their predecessors in interest were given by Browncroft Realty Corporation. Defendant Rochester Savings Bank became owner of the "park" by foreclosure in 1932.

Nevertheless the Court is satisfied that these restrictions, including the $10,000.00 minimum construction cost, are enforceable against all lots on the west side of Ramsey Park. This results from the circumstances that when Browncroft Realty Corporation acquired title to the "park" in 1930, it became bound by estoppel to carry out the restrictive covenants which it had assumed to make respecting the west side of Ramsey Park while the latter was still owned by Brown Brothers Company. It will be pointed out later that at the time when the defendant Rochester Savings Bank acquired title in 1932, it had notice of the existence of these restrictions.

The Courts have occasionaly been called upon to deal with the situation which results where persons covenant with respect to after acquired property. Thus a grantor in a deed containing covenants of warranty or quiet enjoyment is estopped to deny that it did not pass title to property which he afterwards obtains. The same principle has been applied to negative covenants burdening real estate subsequently acquired by the covenantor or by another who takes title with notice of the covenants (Lewis vs. Collmer, 129 N. Y. 227; see also New York Phonograph Co. vs. Devaga, 127 App. Div. 222, 232). Even though the corporate entity of Browncroft Realty Corporation be not disregarded, it cannot escape the restrictions which it bargained to create against the frontage on the west side of Ramsey Park because in 1930 it acquired the west side of Ramsey Park.

The lien of the mortgage of the Rochester Savings Bank on the "park" given in 1915 was superior to these restrictions and they could have been cut off in the absence of cases concerning whether there is any limit to the length of time during which a corporation remains chargeable with notice thus acquired. If notice be once imputable to a corporation it has been stated that the subsequent severance of connection with the corporation of the agent of officer does not affect the force of the imputation of notice even if there has been no actual communication by him of the information (Fletcher, supra, Section 801). However this may be, it seems to the Court that a corporate mortgagee should be held to be conversant with facts ascertained in the making of a loan for at least as long as the loan is outstanding. These mortgages on parts of Lots 118 and 119 Windemere Road were taken by the Bank before it acquired the "park" land described in the complaint by referee's deed in 1932, and remained outstanding until they were discharged April 12, 1940. It does not matter that when the Bank took these mortgages in 1922 and 1928 the "park" was still owned by Brown Brothers Company. It was conveyed to Browncroft Realty Corporation in 1930 by a deed which was on the record and in the direct chain of title when it passed to the Bank by referee's deed in 1932.

The Rochester Savings Bank during this period also took mortgages upon other neighboring properties in whose chain of title the same restrictions are set forth.

Judgment may be entered dismissing the complaint in so far as it asks for an injunction restraining the construction of the house for which a building permit has been issued on Lot 19 of the Bieger subdivision fronting on Winton Road, and establishing the restrictions upon the lots fronting on the west side of Ramsey Park to be as above stated.

Dated: December 21, 1946.

Automobile Conditional Sales

Wolk Bros Co — George Murray and wife 46 DeSoto sed $1157.85; Fred Diesone 41 Plym spc $440.40.

Doyles Main Motors — Frank Slaymaker 39 Chev 4 door $570.84.

Cool Chevrolet Co—Bert Mehlenbecher 40 Chevrolet sed $494.25.

Judge Motor Corp—Richard Farden 126 Christian ave 46 Ford sed $798.90.

Schaufelberger Bros — Harold Smith 41 Hudson sed $828.48.

Mack Motors — Elmer Fahrer 40 Chevrolet station wagon $386.70.

LEGALS, FIRST INSERTION

NOTICE OF DISSOLUTION OF CORPORATION

STATE OF NEW YORK — Department of State, ss:

I Do Hereby Certify that a certificate of dissolution of J. C. Wilson Company has been filed in this department this day and that it appears therefrom that such corporation has complied with section one hundred and five of the Stock Corporation Law, and that it is dissolved.

Given in Duplicate under my hand and official seal of the Department of State, at the City of Albany, this twenty-sixth day of December, one thousand nine hundred and forty-six.

(Seal)

THOMAS J. CURRAN
Secretary of State

(Signed) By Edward D. Harper,
Deputy Secretary of State.

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