

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

AFFINITY ELMWOOD GATEWAY PROPERTIES LLC

Plaintiff

vs

Index No. I 2011/3883

AJC PROPERTIES, LLC, GORDON BALLARD, MURPHY L. BATTAGLIA, EVELYN BENCINICH, SARA E. BERNAT, CHRISTIAN DELISLE, CONGREGATION BETH ABRAHAM, SUSAN M. DAVIS, LORENZE M. WUSTINER, 1011 ELMWOOD AVE, INC, GLORIA FUCHS, STEVEN GATHERS, FRANK A. GENOVESE, ELIZABETH M. GILES, SANDRA GIARAGE, GRANCER LLC, DONALD J. LEONE, JENNY A MAZUR, SCOTT A JOHNSTON, BRUCE A MCCAUSLAND, CHARLES H. MILLER, IV, MICHAEL J. NEFF, KAREN LOKONIWESKI, MARK C PAGANO, SARAH A SCHNEIDER, DONALD T. SLEIGHT, LUCIA SLEIGHT, MARIE LOUSIE SMITH, DIANA S STAUB, DOMINIC ZANGHI, CHRISTINE ZANGHI, VIOLA BATTAGLIA, ANGELINE C. GENOVESE, JAMES R. NOWAK, JACQUILINE D. NOWAK, JOHN DOES, JANE DOE, DOE CORP.

Defendants

Appearances:

DENNIS VACCO, ESQ/
BRENDAN H. LITTLE, ESQ.
Attorney for Plaintiff

ARTHUR J. GIACALONE, ESQ.
Attorney for Defendants

MEMORANDUM OF DECISION

This Matter did proceed to a Non-Jury Trial on the following dates March 17, 18, 19, 20, 21, 24, 25, 26, 28 and 31, 2014. Several witnesses, were put forth by both Plaintiff and Defendants. While many of the Defense witnesses, i.e., Defendants, herein were called during Plaintiff's case - basically these witnesses were as follows, i.e., for the Plaintiffs: David Fedak; Sam Chasen; Jeffrey Birch; Louis Cannata; Jocelyn Gordon; Barbara Campagna; Howard Schultz; Carley Batton and William Sidell.

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Defense witnesses were as follows: Susan Davis; Lorenz Wustner; Andrew Lane; Sandra Girage; Steven Gathers; Evelyn Bencinich and Angeline C. Genovese.

Summations were had on Monday, March 31, 2014 and a Decision herein was rendered this on Friday, April 11, 2014.

This Court would note - for the record - that is, as far as this litigation - 1095, 1091 Elmwood Avenue are out - that is as to the chains of title descended - the Covenants thereon, are extinguished completely. Therefore again, there are no Restrictive Covenants as to these properties.

The Defendants have Counterclaimed for damages - in their Pleadings before the Court, that is, request of determination of damages from this Court if the Restrictive Covenants were extinguished. Obviously - the Defendants have been afforded the opportunity to present proof as to the damages they would suffer as a result of the extinguishment of the Restrictive Covenants. Notwithstanding, they have failed to establish damages in any quantifiable terms. Therefore, the Counterclaims for damages by the Defendants are dismissed at this time.

As previously noted - at Issue here. - - are Restrictive Covenants applying to certain pieces of Real Property...purchased by the Plaintiff with the intent to replace building and/or buildings thereon with new structures. The properties are located on the East side of Elmwood Avenue in the City of Buffalo. The Real Properties begin at the intersection of Elmwood and Forest and run south from that point.

The Plaintiff moves for Declaration of the Restrictive Covenants at issue are to be forever extinguished as they pertain to the "Affinity Property"; that the Affinity Property is wholly released and discharged from the deed restriction encumbering it; that Plaintiff and its Successors have the right to use said premises for business purposes; that Defendants' any and all successors in title to them be barred from asserting any claim against Plaintiffs or its successors in title with respect to the deed restriction in the Complaint as well as dismissing Defendants Counterclaims and Affirmative Defenses which contend that the Restrictive Covenants are enforceable.

The Restrictive Covenants arise from Deeds of 1892 from the James Granger Deed No. 1 and No. 2 and provides the following:

The purchaser his heirs and assigns and all persons claiming under, by or through this deed,

- Shall not Erect or build and building or structure nearer to Elmwood Avenue than a distance from the Easterly line thereof twenty-five feet
- Shall not erect or suffer to erect or be built any buildings which shall be used as a barn, stable, cow-shed or carriage house which shall be nearer to ..One hundred feet of the Easterly line of Elmwood or the Easterly or Westerly line of Granger Place than .. 100 feet
- Nor at any time erect or cause to be erected upon the premises or any part thereof, nay

buildings to be used as a livery or sale stable, liquor, wine or beer saloon or any business establishment whatsoever

- Nor at any time use or permit any building erected or any part of the same for the purpose of a sale or livery stable, liquor, wine or beer saloon, or for any business establishment whatsoever, and that any building or buildings erected at the Court east corner of Elmwood and Forest Avenue shall not project its rear toward the land abutting it on the south.

Affinity owns lots numbered 1095, 1101, 1105, 1109, 1111, 1113, 1115, 1119, 1121 Elmwood Avenue on the East side of the street; (with 1121 sitting on the corner of Elmwood and Forest), and adjacent properties at 605 and 607 Forest on the South Side of Forest. All agree that these properties originated from Granger Deeds containing these Restrictive Covenants.

All parties are in agreement that in order to extinguish a Restrictive Covenant the Court must look to RPAPL 1951 and the New York case law interpreting the same.

"RPAPL §1951 (2). ...provides:

"When relief against such a restriction is sought in an action to quiet title or to obtain a declaration with respect to enforceability of the restriction ... if the Court shall find that the restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason, it may adjudge that the restriction is not enforceable by injunction ..."

This statute must be read together with the Appellate Court interpretation of the same. In the Court's opinion the holding in *Board of Educ. V Doe*, 88 AD2d 108 (4th Dep't 1982), offers the best guidance in this matter.

"The problem is basically one of balancing the equities ... 'Equity may refuse to enforce a restrictive covenant upon the ground of change of conditions only where it is established that the change is such that the restriction has become valueless to the property'" of the party seeking to enforce it and onerous to the property to which the covenant applies.....

However, in *Orange & Rockland Utilities v Philwold Estates* (52 NY2d 253), the Court of Appeals emphasized that the determination of the enforceability of Restrictive Covenants involves a balancing of relative hardships. The Court stated (p 266), "The issue is not whether [the party seeking to enforce the covenant] obtains any benefit from the existence of the restriction but whether in a balancing of equities it can be said to be, in the wording of the statute, 'of no actual and substantial

benefit".

In light of the statutory language which authorizes extinguishing Covenants which are of "no actual and substantial benefit" and the recent clarification by the Court of Appeals to the effect that the test is not whether the party seeking enforcement receives any benefit, we cannot refuse to extinguish these Restrictive Covenants because they are not totally valueless to Defendants. We agree that if the restrictions are found to be valueless to the party seeking to enforce them, the restrictions should be extinguished. However, such a finding is not a prerequisite to extinguishing Restrictive Covenants. Furthermore, such an interpretation would negate the statutory provision for payment of damages to the party seeking to enforce the covenant to the extent that that party is harmed. If the valueless standard were applied in every instance, there would never be an award of damages and this statutory language would be superfluous.

Therefore, our inquiry entails a balancing of the equities and a determination of whether the Restrictive Covenants are of no actual and substantial value to Defendants.

The first and foremost factor to be considered is whether the property is capable of being put to the use required by the restrictions (see *Orange & Rockland Utilities v Philwold Estates, supra*)." *Board of Educ. V Doe, supra* at 113-115 (4th Dep't 1982).

Once more - as has been set out by both counsel, many times in one fashion or another - what this Trial comes down to is a balancing of equities, that is, whether the Restrictive Covenants can be fairly, reasonably, practically applied to the Real Property in question and again the determination of whether these Covenants are of actual or substantial value to the Defendants.

It is respectfully submitted, by the Court, a starting point - as to equities is with the obvious.

That is - the Real Property, the Affinity Properties are:

- A. Presently of Mixed Use; This use is significant and in context permanent.
- B. Further - - Historically - as far back - as long as there have been structures, i.e., that is buildings of any consequence and/or number - the Real Property again, the lots have been of mixed use; and of course
- C. Although Plaintiff's Counsel asserts its not necessarily relevant to a decision herein - the potential use of the property as has been discussed by Plaintiff's is that of mixed use - again of the same basic nature and character except in different structures, volume, size, etc.

- D. The Real Properties surrounding it, at least as to Elmwood Avenue, its nature and its character - is of mixed use.
- E. Just as obvious - the property of the Petitioners, i.e., Granger, Forest, etc., is clearly and absolutely residential which is also important - and as well as important is the desire and interest of the Parties, the residences thereon, i.e., the Defendants herein, that it remains so - and in context, permanently.
- F. Obviously also - and again undisputed - these Restrictive Covenants have never been utilized, i.e., enforced or applied, that is against any property on Elmwood Avenue, i.e., the Court making reference, for example, to the broadest restriction - no businesses whatsoever, i.e., again as applied - to the properties in question. And while,
- G. Certainly - as it has been stressed herein - this is no waiver, i.e., of the real property owners rights to object or attempt to apply the Restrictive Covenants, in the second and third instance - - it is certainly an interesting query - how the waiver issue applies - in equity to the fact that the predecessors of these owners and their predecessors, i.e., generations of them, have never attempted to apply the Restrictive Covenants to those properties on Elmwood Avenue..
- H. Also, readily apparent - the Restrictive Covenants do not go to the concept or the idea that the residents, i.e., those in the property line of the original Deeds, get to pick and choose to what extent the Covenants would do or can allow or tolerate mixed use.
- I. In the most basic, practical, pragmatic common sense - it would be impractical and unreasonable to apply the Restrictive Covenants - i.e., no business whatsoever, to those properties on Elmwood Avenue. At the same time,
- J. Those Restrictive Covenants are certainly applicable, vital and important to the property owners - as they exist, i.e., residential status on Granger Avenue, Forest Avenue, etc.
- K. The Defendants herein - do not have a problem with mixed use, i.e., commercial use as it exists today on Elmwood Avenue. However, they do have a problem with the extent of mix use as it is potentially proposed or has been fashioned or has been testified to by Plaintiff. And finally -
- L. It has been part of the Defense Case - noticeable more before Trial - but even indirectly at Trial - that their properties - the Defendants' properties - are worth more through the Restrictive Covenants on the Deed, i.e., Affinity Properties - their properties more saleable, more appealable or attractive or able to be protected.

While certainly the Court understands the Defendants' point of view and how they may come to view that - the Plaintiff has successfully, i.e., met its burden by putting substantial evidence before the Court to the contrary - but even again - more pragmatically - evidence put forth - is that the so called, incursion or encroachment, i.e., upon the Covenants has existed almost from the beginning, and/or at/about the same time as the existence of commercial institutions on the Westside of Elmwood Avenue. All this in the context of the reality - the majority of the other property owners affected in the chain of titles have not objected to this status of same.

As has been referred to - one of the questions before the Court is whether the real property in question, the "Affinity Property", as has been described here, is or are capable of being put to the use required or limited by the restrictions, i.e., the Restrictive Covenants. The Plaintiff has asserted by argument and by evidence, that by reason of the changed conditions of the Block of Elmwood Avenue where the Affinity Properties are located the purpose of Restrictive Covenants can no longer be accomplished, and therefore the Court may determine that the Restrictive Covenants are no longer enforceable.

However, the Court will even hasten to add - again as it has been referenced above - that almost from the beginning - the existence of structures on these properties - that the Covenants were not effective as to the properties on the Eastside of Elmwood Avenue.

As noted in the Summary Judgment Motions - Plaintiff cites *Uvanni v CMB Builders, Inc*, 41 AD2d 1019(4th Dep't 1973) - as being on point in this matter. That Court held that in the circumstances before the Court "that if there has been such a change in the character of the neighborhood and adjoining Black Rock Blvd. that enforcement of the Restrictive Covenant would be valueless to Plaintiffs' property, i.e., here residential owners and to the Defendants, i.e., here the Developers."

It is noted - in *Uvanni* case - at least partially - the Decision based upon evidence that the Developers lot was not suitable for residential purposes.

Regardless and once more - here the Plaintiffs have put forth a great deal of evidence in support of the Premise - that mixed use of the many properties has been in existence almost from the beginning, i.e., from the era shortly after the Granger Deeds.

Yet and certainly - at the same time- there is sufficient evidence that each of the structures there now - has and have residences, i.e., then again, part of the mixed use identification and certainly - Plaintiff has put before the Court - a good deal of information, i.e., proof, these properties could not and would not revert to residential only purposes - in any profitable fashion or reasonable fashion or be replaced by a building for residential purposes only. This proof has gone to great measure - to point up - that residential use only, i.e., enforcing Restrictive Covenants to their obvious definition and complete purpose - isn't practical from any view point.

Notwithstanding, while this Court does not feel it necessary to connect this to the Decision herein - it is noted - that before going into this Trial and at Trial - at several points - it has been mentioned - in support of Defendants' position - that the Defendants would have no objection to the real property in question being used for residential purposes only. Plaintiff's have responded to this - by argument and pointing to testimony - that it is really the type of project being discussed herein, i.e., its volume, its substance, height, and its effect - of same on Defendants' property that really concern the Defendant property owners. i.e., not exclusive residential use.

In that context, the Court believes, the Plaintiff's point is again well taken and relevant to the extent that based on the specific concerns set forth in detail before the Court, i.e., such things as architectural harmony, lighting, the height of the structures, pollution, noise pollution, bohemian nature of the community - if the Plaintiff's had proposed a high volume - multi floor affordable housing project and/or a high volume multi floor substantial collegiate housing project - ultimately many of the problems or concerns the Defendants have expressed - would still be before the Court or arbitrator of some sort.

In any event - this Court does make a finding the Plaintiff has shown and met its burden in proving that the real property isn't capable of being put to the required use by the Restrictive Covenants, i.e., again the Covenants in their definition and entirety.

Probably the most prominent issue before the Court as to balance of equities - is that of actual and/or substantial benefit to the Defendants under the Restrictive Covenants.

The Court citing *Chambers v. Old Stone Hill Rd. Assocs.*, 1 N.Y.3d 424, 433-434 (N.Y. 2004) "in *Orange & Rockland Utilities v Philwold Estates* - the issue is not whether the Parties seeking the enforcement of the restriction obtains any benefit from the existence of the restriction, but whether in the balancing of equities, it can be said to be in the wording of the statute of no actual substantial benefit"... Equally clear - is that the party claiming that a restriction is unenforceable bears the burden of proving it

As cited by Defense Counsel - and is noted in *Board of Education vs. Doe* - the burden of showing the covenant or conveyance is of no substantial value than the party attacking it and is not light one. In deed, the Plaintiffs have attempted by various means and processes to show that the Restrictive Covenants are of no substantial value to the Defendants.

As has been often pointed out - during the proceedings and is relevant - all the Defendants have testified that they have no objection to the current property's use, i.e., mixed use, even though it is in itself - is a violation of the Restrictive Covenants, i.e., any business whatsoever.

What is of value to the Defendants - - that is the Plaintiff's have put forth cannot be accomplished. It has been submitted, i.e., for example, the "setback" does not guarantee lawns or buildings being built... i.e., for example as far as structure, height, volume which are not in keeping with architectural styles of the homes, or what they describe as the flavor or harmony of the

neighborhood. Again, architectural harmony which has been voiced over and over, here, by the parties and their counsel, i.e., a benefit of the deterred affect or indirect or direct Restrict Covenants cannot be obtained by a mere setback as it does not dictate once more, size, scale, etc.

Plaintiff's have set forth - that the proof they have placed before the Court goes to directly or indirectly showing that there is no evidence present - that the Restrictive Covenants protect the property values of the Defendants or their quality of life, i.e., at least as it concerns the Affinity Properties.

The Elmwood Avenue area in question is already a "high traffic area" with the accompanying parking issues, noise, lighting and fumes - their Restrictive Covenants have not protected the residents from this. And indeed, as none of the Defendants live on Elmwood Avenue, they receive no benefit from the current grassy lawn set-backs or the Restrictive Covenants against alcohol establishments, and they concede it is not mere business that they object to. Once more - - what the majority of the Defendants object to is the size of the buildings proposed and the fact that they back up to the Granger residence yards or abut the Forest family residence. Plaintiff argues that as the Restrictive Covenants do not protect against this type of a building.

Plaintiff has demonstrated that the westside of Elmwood Avenue on the same block as the "Affinity Property" has many commercial venues, and establishments selling alcohol directly across the street. In fact, the majority of properties directly across from the Affinity Properties, i.e., on the street are at least in some fashion, commercial in nature, thus, Plaintiff argues - - yet again the intent of the Restrictions have already been rendered useless, as there are already businesses selling alcohol in the immediate vicinity of the Affinity Property.

As has been shown - Defendants point up - it is clear Plaintiff knew of the Restrictive Covenants prior to purchasing the property. As has already been mentioned - it has been also set out - there was some contemplation of student housing by Plaintiff which of course was not in violation of the Restrictive Covenants. Nevertheless, the Court finds - the Plaintiff has put sufficient proof before it - that explains in detail why student housing was not a practical or reasonable option going forward.

Plaintiff's witnesses, i.e., Mr. Chasen and Mr. Birch - point up reliance upon the lack of prior enforcement of the Restrictive Covenants. Further, and most important to the Court - on the issue of equities - the Plaintiff's have put forth sufficient evidence on the record to set out damage to the Plaintiff if the Restrictive Covenants were enforced, i.e., again per the language of same.

Defendants admit or at least their position must accede - that the Restrictive Covenants have not prevented commercial development of property on Elmwood Avenue and certainly - noone has attempted up to now to rely or utilize the Restrictive Covenants to prevent commercial use of property on the eastside of Elmwood Avenue. Nevertheless - the Defendants assert the Restrictive Covenants have acted as a deterrent as to the extent of commercial development on the eastside of Elmwood Avenue - and point to the obvious difference in the type of commercial uses and

developments on the eastside and westside of Elmwood Avenue.

Unfortunately or fortunately as the case may be, basically - either these Restrictive Covenants are enforced as they are written or they are not Further - although much has been said by the Defendants case as to same, there is really no proof, i.e., causation versus coalition between the existence of the Covenants and difference in development again from the eastside to the westside of Elmwood Avenue. Yet at the same time - there has been commercial use on the eastside of the property, almost from the beginning - and the Restrictive Covenants as they are written, i.e., business whatsoever, has never been a deterrent to commercial use on the eastside of Elmwood Avenue.

Returning for a moment to the idea - that the Restrictive Covenants have acted as a deterrent in context that is, in the evidence in this case as put before it by the Plaintiffs and in their burden - it appears that the concept of idea of Restrictive Covenant as deterrent is almost - again in context to be something of a reverse of prophesy to get the property to where it is today. i.e., no worse or better - by the instrument and effect of Restrictive Covenants. Again, hindsight to support the vision of these Defendants of their pastoral view of the property as it exists today and/or pastoral view of how history has proceeded once more correlation without causation. This Court again, sympathizes and empathizes with the position of the Defendants. One must respect their interest in maintaining their property, their neighborhood, etc., and having the courage to enter to fight to protect what they believe is vital to the neighborhood. Unfortunately, however again, what it comes down to - is attempts by modern interpretation of the Restrictive Covenants in comparison to the proof before the Court and how the law sets out how the Covenants must exist or apply, i.e., no business whatsoever.

Plaintiff's have put forth not just sufficient, but substantial evidence that the Defendants do realize that any real or actual benefit by the Covenants existence in their Deed specifically as it affects and/or exists on the properties on Elmwood Avenue.

As an aside - as it was asserted or least disputed between the parties in motions leading up to the trial - the Court does not believe anything has been put forth is of adequate nature - to consider or make ruling as to any inconsistencies between the zoning and/or Restrictive Covenants.

There also appears no further dispute from neither Plaintiff's or the Defense point of view that "Waiver" or "Laches" - in not applicable here by equity or otherwise. Again, it has been well established - the lack of prior enforcement does not legally prevent Defendants from seeking to enforce the Restrictive Covenants herein.

Nevertheless - Plaintiffs do make a valid point - and the proof has pointed up - enforcement of Covenants is just that, i.e., is not something we did part way, halfway or to some extent in the view acceptable to the Defendants, i.e., and residents at/or about Granger Avenue.

It has been asserted by Plaintiff's - that the consent/non-objection of approximately ninety percent (90%) of the property owners are subject to the Restrictive Covenants is evidence - the

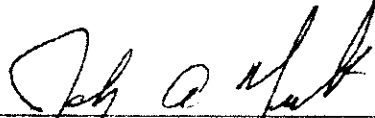
absence of actual substantial benefit of the Restrictive Covenants to the property owners. Again they have cited *Board of Education v Doe*. The Court recognizes it as being relevant but notes does not consider it controlling in its Decision herein.

Negotiations - it has been pointed up - by counsel - both sides - in their own turn - as to the negotiations that were held between representative of the Granger Residents and Plaintiff Representatives herein. There were meetings, many meetings, there were discussions back and forth, exchanges of information, etc. The Court wished to make it clear that in no way - that the efforts by the Granger Residents, i.e., Defendants, in trying to compromise in any way effected or hurt their position here at - at least as to the idea that they negotiated or attempted to negotiate good faith, etc.

Regardless, what occurred at those meetings and exchanges- this Court would point up is relevant - as to what is cited as the real concerns or among the real concerns of the residents concerning Plaintiff's purchase, Plaintiff's intentions, Plaintiff's development, etc. That is, the residents pragmatic concerns, fears, apprehensions as to volume, size, lighting, impact on parking, people, noise, etc.

Partial extinguishment has been discussed and argued before this Court, i.e., in pleadings, memorandum and in oral argument - this Court respectfully appreciates the position of the Defendants. As noted above, the Court has held the original restrictions are extinguished as far as the Plaintiffs lots are concerned. Notwithstanding, and pursuant to *Doe*, there is no evidence that the character of the residences, residential area and neighborhood east of these properties, i.e., the character of these properties, southeast of those lots has changed and this Decision is not to be interpreted as authority as further encroachment of the Covenants.

In any event and therefore - in case - the Court has not made it clear - in finality - this Court does note and stress that in the balancing of equities, it has made the determination the Restrictive Covenants, in Plaintiffs properties, have no actual or substantial value to Defendants. Further, the Court is making a finding that the real property is not capable of being put to the use required by the restrictions in the Restrictive Covenants and therefore again, are extinguished on the Plaintiff's properties.



HON. JOHN A. MICHALEK
Supreme Court Justice

DATED: April 11, 2014
Buffalo, New York