St. John's Law Review

Volume 5, December 1930, Number 1 Article 27

Real Property--Right to Injunctive Relief Against Violation of Restrictive Covenant (Evangelical Lutheran Church of the Ascension v. Sahlem, 254 N.Y. 161 (1930))

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raises a reasonable doubt of its marketability or merely constitutes "a very improbable or remote contingency," is a matter for the discretion of the court, "to be carefully and guardedly exercised," [5] and no more rigid rule or formula can in all justice be applied.[6] Contingencies which have been held to constitute an encumbrance which will render the title unmarketable have been the possibility of the appearance of an heir after silence and search for sixty years; [7] the likelihood of a claim to be made by a dissolute young man, proved to be very ill at the time of his disappearance seventeen years before,[8] and some few others. The Court in the instant case has employed the careful discretion required of it by the rule laid down in the cases and has furnished us with yet another instance of its just application.

L. G. H.

REAL PROPERTY—RIGHT TO INJUNCTIVE RELIEF AGAINST VIOLATION OF RESTRICTIVE COVENANT.—Defendant was the owner of two lots upon which he had placed a private dwelling in which he made his home. The lots were part of a tract of land which was subjected to restrictive covenants whereby the only building to be erected on any of the lots of said tract was to be used only for private residential purposes. The covenant was to continue for a period of twenty years. Plaintiff, having knowledge of the covenant and being desirous of erecting a church edifice on the restricted tract, before purchasing its lots, upon application to the various lot owners, procured their consent to modify the covenant by permitting the church to be erected. Although the defendant refused to consent to the variance, plaintiff accepted a deed of conveyance reciting the restrictions and stating that title was conveyed subject thereto. The covenants had been in force for approximately five years at this time. Plaintiff proceeded with its plans and preliminary work. Upon defendant's repeated refusal to grant his consent, plaintiff brought this action to procure a declaratory judgment, adjudging that the aforesaid covenants were no longer in effect. The Appellate Division, affirming the decision at Special Term, held the covenants valid and subsisting and that defendant was not entitled to hinder the projected use by injunction and was limited to an action at law for damages. On appeal, *held,* reversed. Restrictive covenants will be enforced while the violation is prospective, unless the complaining owner's attitude is unconscionable or oppressive. Relief will not be withheld because the damage is unsubstantial. Evangelical Lutheran Church of the Ascension v. Sahlem, 254 N. Y. 161, 172 N. E. 455 (1930).

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[5] Cambrelleng v. Purton, 125 N. Y. 610, 616, 26 N. E. 907, 908 (1891).

[6] Ferry v. Sampson, 112 N. Y. 415, 418, 20 N. E. 387, 389 (1899).

[7] *Supra* Note 4.

[8] *Supra* Note 5.

Where a tract or estate is sold in lots or parcels, and covenants exacted from the several purchasers imposing restrictions or limitations upon the use of the lots sold in pursuance of a general plan for the mutual advantage of all the parcels, such covenants run with the land in respect of benefit and burden.[1] The covenant, in such cases, is enforceable by any grantee as against any other upon the theory that there is a mutuality of covenant and consideration which binds each, and gives to each the appropriate remedy.[2] Equity will refuse relief when it is no longer possible to accomplish the purpose of the restriction or when through change of character of the neighborhood the enforcement of the covenant would be a burden without conferring a benefit.[3] If, however, the change does not conflict with the essential purpose of the covenant and the benefit therefrom remains unimpaired, a violation will be enjoined;[4] the covenant will be enforced by preventive remedies even though the violation is still in prospect, unless the attitude of the complaining owner in standing on his covenant is unconscionable or oppressive.[5] The amount of damages, and even the fact that the plaintiff has sustained any pecuniary damages, is wholly immaterial.[6] It is sufficient to justify the court interfering if there has been a breach of the covenant. It is not for the court, but the plaintiffs, to estimate the amount of damages that arises from the injury inflicted upon them. The moment the court finds that there has been a breach of the covenant, that is an injury, and the court has no right to measure it, and no right to refuse to the plaintiff the specific performance of his contract, although his remedy is injunction.[7] One who purchases property with notice of an equity attached thereto can stand in no different position than that of the party from whom he purchased.[8] He is bound by the covenant and will be compelled in equity either to specifically execute it or will be restrained from violating it.[9] The defendant in the principal case shared the right to assert the restriction with his neighbors and they could not by themselves release the land from the burden of the

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[1] Bristol v. Woodward, 251 N. Y. 275, 167 N. E. 441 (1929).

[2] Korn v. Campbell, 192 N. Y. 490, 495, 85 N. E. 687 (1908); Neidlinger v. New York Association, 121 Misc. 276, 200 N. Y. Supp. 852 (1923); Todd v. North Avenue Holding Corp., 121 Misc. 301, 201 N. Y. Supp. 31 (1923), *aff'd* 208 App. Div. 854, 204 N. Y. Supp. 953 (1924).

[3] Forstmann v. Joray Holding Co., Inc., 244 N. Y. 22, 154 N. E. 652 (1926); Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691 (1892); McArthur v. Hood Rubber Co., 221 Mass. 372, 109 N. E. 162 (1915).

[4] Sanford v. Keer, 80 N. J. Eq. 240, 83 Atl. 225, 40 L. R. A. (N. S.) 1090 (1912).

[5] Evangelical Lutheran Church of the Ascension v. Sahlem, at 166.

[6] Trustees of Columbia College v. Lynch, 70 N. Y. 440, 453, 26 Am. Rep. 615 (1877); Trustees of Columbia College v. Thacher, 87 N. Y. 311, 316, 41 Am. Rep. 365 (1882); Rowland v. Miller, 139 N. Y. 93, 103, 34 N. E. 765 (1893); Forstmann v. Joray Holding Co., Inc., 244 N. Y. 22, 31, 154 N. E. 652 (1926).

[7] Sir George Jessel, in Leech v. Schweder, L. R. 9. ch. 463, 465.

[8] 2 Pomeroy, Eq. Jur. (4th ed., 1918), sec. 689.

[9] 3 Pomeroy, Eq. Jur. (4th ed., 1918), sec. 1295.

restriction to his detriment. The fact that others may have violated the restriction and no action was brought to enjoin and restrain such violations is immaterial.[10] The enforcement of the restriction does not involve great hardship or inequitable consequences to the plaintiff as the building contemplated was a mere plan. In determining whether an injunction shall issue to restrain the violation of restrictions, the conduct of the parties, the character of the district and all circumstances must be considered in the light of equitable rules and principles.

R. L.

RECEIVERS—ACTION BY RECEIVER OF CORPORATION FOR POSSESSION OF FUNDS ON DEPOSIT IN A FOREIGN JURISDICTION.—Plaintiffs, as receivers of a Michigan corporation, brought an action to recover funds, originally placed in a New York bank in the name of a corporation, but later transferred to the individual account of its president, defendant Brown. Defendants moved to dismiss the complaint on the ground that plaintiffs had no legal right to sue in this jurisdiction, their appointment in a foreign state having no extra-territorial effect. *Held,* motion denied. While the action may not be maintained as of right, it is permitted under principles of comity, this though the foreign state does not act reciprocally in this respect. Union Guardian Trust Co. v. Broadway Nat. Bank, 138 Misc. 16, 245 N. Y. Supp. 2 (1930).

A receiver appointed by a Chancery court to function merely as an officer of the court to conserve the assets of a corporation is not permitted as a matter of legal right to sue in another jurisdiction from the one of appointment.[1] This rule has no application where the receiver is created by force of statute,[2] since in that instance he succeeds to the title of the corporate assets by the law of the sovereignty which has the power to clothe him with such a right.[3] The Federal rule denies to a chancery receiver a right to maintain such an action outside the state of appointment, even on principles of comity.[4] This rule is qualified so that it has no application where the receiver

[10] McCain Realty Co. v. Aylesworth, 128 Misc. 408, 219 N. Y. Supp. 59 (1926).

[1] Mabon v. Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805 (1908); Ross Lumber Co. v. Daniel Clark & Son, Inc., 211 App. Div. 591, 207 N. Y. Supp. 391 (4th Dept., 1925); McNelus v. Stillman, 172 App. Div. 307, 158 N. Y. Supp. 428 (1st Dept., 1916).

[2] Howarth v. Angle. 162 N. Y. 179, 56 N. E. 489 (1900); Martyne v. American Union Fire Ins. Co. of Philadelphia, 216 N. Y. 183, 110 N. E. 502 (1915).

[3] Sinnott v. Hanan, 214 N. Y. 454, 108 N. E. 858 (1915).

[4] Booth v. Clark, 17 How. 322, 15 L. ed. 164 (U. S., 1848); Great Western Mining & Mfg. Co. v. Harris, 198 U. S. 561, 25 Sup. Ct. 770 (1905); Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77, 43 Sup. Ct. 480 (1923).