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Real Property--Residential Parks--Streets--Easements (Erit Realty Corporation v. Sea Gate Association, 249 N.Y. 52 (1928))

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REAL PROPERTY—RESIDENTIAL PARKS—STREETS—EASEMENTS. —Plaintiff is the owner of land in a residential park, known as Sea Gate and asks the Court to enjoin the defendant from maintaining a fence that interferes with his ingress and egress. The defendant, a land development company, has title to all private streets in Sea Gate. Years before, in order to insure privacy and protect the property rights of the residents, it erected a high fence around said property and stationed a guard at the gate to prevent disinterested parties from entering. This was the only entrance and exit to the public street. A map, fully describing this property and picturing it as now laid out, was deposited in the Clerk's office of Kings County. Plaintiff, for some reason manifestly opposed to its interest as a proprietor, objected to the fence, claiming that it was deprived thereby of access to the *public* street. Thereupon the defendant removed the section of the fence bordering on the plaintiff's property but further constructed the fence so as to preclude the plaintiff from access to the *private* streets. *Held,* defendant has the right to maintain existing fences to exclude the plaintiff's property from the protected area, or, at the option of the plaintiff the re-erection of the old fence, thereby to include the plaintiff's lots within the area. Erit Realty Corporation v. Sea Gate Association, 249 N. Y. 52 (1928).

This decision is consistent with the law of our State and others.[1] It has been held that, in the case of express grants of easements in existing ways, which are obstructed by fences and gates then physically present upon the ground, the enjoyment of the easement granted is made subject to the right of the grantor reasonably to limit access and egress by maintaining the obstruction.[2]

If this be the correct doctrine, its application to easements resting in implication must be all the more apparent. In such case the intention of the grantor is gathered from the pictorial representation of the streets. If the map portrayed fences and gates erected across them, the obstructions depicted would undoubtedly enter into the implication to limit the rights impliedly granted. Here the fences are actually present on the ground to obstruct the user.

The obstructions do not tend to vary or qualify the express words of a grant, since none have been employed to make it. Sound reasoning compels us to believe that plaintiff took its easement in the streets of Sea Gate subject to the right of the grantor or its successor, this defendant, reasonably to limit its use by means of this fence, since it was actually present at the time the grant was made. This conclusion is in accordance with sound principles of law as evidenced by the case of Drabinsky v. Seagate Asso.[3]

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[1] Connery v. Brooke, 73 Penn. St. 80 (1873); Boyd v. Bloom, 152 Ind. 152, 52 N. E. 751 (1898); Garland v. Furber, 47 N. H. 301 (1867); Brill v. Brill, 108 N. Y. 511, 15 N. E. 538 (1888).

[2] *Ibid.*

[3] 239 N. Y. 321, 146 N. E. 614 (1925).

In that case a conveyance of lots in the Sea Gate tract with reference to the field map, was under consideration. The Court said,[4] "* * * at the time this original grantee took title the defendant already maintained a fence * * * and 'guard * * * and it enforced regulations for admission through the entrance gate of only persons known to be property owners or persons * * * having business with property owners.' It must, therefore, have been clear to the grantee that his grantor did not intend to grant him a right to use the street except in the manner that a street in such a private residential colony would be used."

The essential facts are the same as those provided here. The decision is conclusive upon the right of the defendant to maintain a fence to reasonably regulate admission to the community. The plaintiff is protected in all the rights to which it is entitled by this judgment. Injunction properly denied.

REAL PROPERTY—LANDLORD AND TENANT—RETENTION OF SECURITY AFTER EVICTION GOVERNED BY TERMS OF THE LEASE.—Plaintiff's assignors deposited $6,000. with defendant Aaron as security on a lease for ten years. The lease provided that the money should be retained by the landlord until the expiration of the term when it was to be returned with interest unless the tenants had forfeited it by a violation of the covenants or conditions of the lease. In the event that the landlord re-entered for breach by tenants of these provisions, he was to have the right to terminate or relet as tenants' agents. Thereafter the landlord sold the premises and the lease to defendant Mazer, transferring at the same time, the deposit, upon the latter's agreement to indemnify him against any claim therefor by the tenants. Subsequently, Mazer brought dispossess proceedings against the tenants and obtained a final order in summary proceedings against them. Plaintiff thereupon brought this action to recover the deposit upon the ground that the lease was terminated. *Held,* for the defendant. The action was prematurely brought. Rosenfeld v. Aaron, 248 N. Y. 437 (1928).

The conveyance of the property to Mazer did not terminate the tenants' obligation under the lease.[1] Where the deposit is not transferred to the grantee the security agreement is a mere collateral covenant not running with the land.[2] Here the grantee received the deposit and agreed to indemnify the original landlord. The covenant to return passed to the grantee subject to the terms of the lease. Though no warrant to dispossess was issued [3] the removal of the tenants after the issuance and service of the precept cancelled and

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[4] *Ibid.,* 327.

[1] Kottler v. N. Y. Bargain House, 242 N. Y. 28, 150 N. E. 591 (1926).

[2] Fallert Brewing Co., Ltd. v. Blass, 119 A. D. 53, 103 N. Y. S. 865 (2nd Dept. 1907).

[3] C. P. A., Sec. 1434.