

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION**

JAMES FARANO and	:	
CHRISTINE MAYERNIK,	:	
Plaintiffs	:	
	:	
vs.	:	No. 14-2808
	:	
C&D TROUT PONDS, INC.	:	
	:	
Defendant	:	
Kim R. Roberti, Esquire		Counsel for Plaintiffs
Joel B. Wiener, Esquire		Counsel for Defendant

DECISION AND VERDICT

Serfass, J. - December , 2016

On December 10, 2014, Plaintiffs, James Farano and Christine Mayernik (hereinafter "Plaintiffs"), filed a complaint against Defendant, C&D Trout Ponds, Inc. (hereinafter "Defendant") seeking recognition of an implied restriction of use for Defendant's property. Plaintiffs aver that they are the owners of Lots 61 and 78, respectively, of the Saw Mill Run Development in Franklin Township, Carbon County, Pennsylvania.

On January 15, 2015, Defendant filed an Answer and New Matter which avers that Defendant's property is not subject to the restrictions stated in Plaintiffs' respective deeds because Defendant's deed does not expressly state any restrictions of use and the property was previously used for commercial purposes.

Following a non-jury trial held before this Court on June 2, 2016, counsel for the parties submitted proposed Findings of Fact and Conclusions of Law on July 29, 2016. Upon review of counsels' submissions and careful consideration of the evidence presented at trial, we make the following:

FINDINGS OF FACT

1. Plaintiffs, James P. Farano and Ann E. Farano, are husband and wife and reside at 635 Mill Run, Lehighton, (Franklin Township), Carbon County, Pennsylvania;

2. The Faranos are the owners of real property now or formerly known as Lot sixty-one (61), Section 3A of the Saw Mill Run Development in Franklin Township, Carbon County, Pennsylvania, consisting of approximately one (1) acre of land;

3. The Faranos purchased Lot sixty-one (61) on July 25, 1998 from Kriss Pines Corporation, the original subdivider of the property;

4. The deed to the Farano property was recorded in Carbon County Deed Book Volume 504 at page 540;

5. Plaintiffs, Michael F. Mayernik and Christine Mayernik, are husband and wife and reside at 670 Mill Run, Lehighton, (Franklin Township), Carbon County, Pennsylvania.

6. The Mayerniks are the owners of real property now or formerly known as Lot seventy-eight (78), Section 3A of the Saw

Mill Run Development in Franklin Township, Carbon County, Pennsylvania, consisting of approximately one (1) acre of land;

7. The Mayerniks purchased lot seventy-eight (78) on May 1, 1998 from Kriss Pines Corporation, the original subdivider of the property;

8. The deed to the Mayernik property was recorded in Carbon County Deed Book Volume 767 at page 283;

9. Defendant, C&D Trout Ponds, Inc., is a Pennsylvania corporation with a business address of 1868 Long Run Road, Lehighton, Pennsylvania, and is the sole owner of Lot one hundred (100), Section 3A, of the Saw Mill Run Development in Franklin Township, Carbon County, Pennsylvania, (hereafter "Lot 100"), consisting of approximately twenty-nine (29) acres of land;

10. Defendant purchased Lot 100 on July 24, 2014 pursuant to a Carbon County Tax Claim Bureau repository sale for a purchase price of eight hundred forty-eight dollars (\$848.00);

11. The deed to Lot 100 was recorded in Carbon County Deed Book Volume 2119 at page 825;

12. Although the deed to Lot 100 reflects a conveyance to Defendant from the Tax Claim Bureau of the County of Carbon, Kriss Pines Corporation is the common grantor of both Plaintiff and Defendant.

13. Plaintiff, James Farano, and Plaintiff, Michael Mayernik, both testified at trial that since purchasing their respective properties, they and their families have freely used Lot 100 as recreational space;

14. Plaintiff, James Farano, testified at trial that he has witnessed other families also use Lot 100 to take walks, play by the creek, and observe wildlife;

15. Both of Plaintiffs' deeds contain an identical attachment titled "Exceptions/Restrictions" which, in relevant part, states:

6. No purchaser shall clear his lot of brush, trees, or anything else of an inflammable nature except after having first obtained the approval of the Seller in writing;
7. No building or structure shall be started, constructed, or erected upon the premises hereby conveyed without first obtaining the approval in writing of the developer or authorized successor association as to location, elevation, plan or design;
9. The portions of lands of subdivision shown on the map as open spaces shall remain open space and no structure may ever be built upon this land whether dedicated to the public or held by the developer or an association formed by the developer; and
12. It is further mutually agreed that the aforesaid conditions and restrictions shall run with the land, and...In keeping with the purposes of these restrictions to maintain a desirable residential neighborhood, developer hereof reserves the right to alter, add or delete from time to time, any restrictions to the remaining properties of which the above described is a part.

16. Defendant's deed does not explicitly include any of the aforementioned restrictions;

17. The developer and original grantor of the lots within the Saw Mill Run Development, Kriss Pines Corporation, recorded five (5) subdivision plot plans recorded in the following map books at the Office of the Carbon County Recorder of Deeds:

Map Book 2, Page 156, recorded September 6, 1989;
Map Book 2, Page 697, recorded June 1, 1995;
Map Book 2, Page 886, recorded June 2, 1997;
Map Book 3, Page 72, recorded February 8, 1999; and
Map Book 3, Page 181, recorded on November 8, 1999.

18. All of the foregoing subdivision plot plans designate Defendant's Property, Lot 100, as "Open Space";

19. On May 23, 1989, at a public meeting of the Franklin Township Board of Supervisors, Frederick W. Sherrerd, III, an authorized agent of Kriss Pines Corporation, requested that the Board of Supervisors approve the Preliminary Plans for the Saw Mill Run Development based on his representation that Lot 100 would remain open space to be used for more passive recreation such as walking, observation of nature, and fishing;

20. Since Defendant purchased Lot 100, Saw Mill Run residents have been excluded from using Lot 100 for recreational purposes;

21. Subsequent to purchasing Lot 100, Defendant testified that he walked the breadth of said lot;

22. On his inspection walk, Defendant testified that he found several structures including a locked gate, fish locks, a cabin-type "hatch-house", trees that had grown around the barbed wire that had once been wrapped around them, and the foundation to a former structure which was partially covered with moss;

23. Defendant also testified that each of these structures had been located on Lot 100 prior to 1988;

24. Defendant further testified that he discovered Kriss Pines' "No Trespassing" signs attached to several trees on Lot 100, which trees were approximately ten (10) to twelve (12) feet high; and

25. Following his purchase of Lot 100, Defendant began to clear brush and trees on Lot 100 which created the impetus for the current action.

DISCUSSION

The disposition of this case turns on whether the restrictions in Plaintiffs' deeds may create a restriction of use for Defendant's property. The issue before this Court then becomes whether an implied restriction of use exists concerning the permitted uses of Lot 100. Pennsylvania courts have continuously held that restrictions may arise (1) by express covenant; (2) by implication; (3) from language of the deeds; or (4) from the conduct of the parties indicating their existence. See Witt v. Steinwehr Development Corporation, 162 A.2d 191, 193

(Pa. S.Ct. 1960); McCandless v. Burns, 104 A.2d 123, 126 (Pa. S.Ct. 1954); and Baederwood, Inc. v. Moyer, 87 A.2d 246, 248 (Pa. S.Ct. 1952).

Defendant pertinaciously but correctly asserts that his deed does not contain express covenants that restrict his use of the property in the manner which Plaintiffs contend. Yet, a valid restriction may be created by instruments other than express covenant.

A restriction may be created by implication through language of the deeds, or from the conduct of the parties. The legal basis for determining that an implied restriction exists based on the language of the deeds is uncertain, at best. The few court decisions that have addressed this issue have done so in passing and none were presented with facts sufficiently similar to the instant case. An implied restriction based on the conduct of the parties, however, has been adequately explored by previous Pennsylvania courts. To determine whether an implied restriction based on the conduct of the parties exists this Court must determine (1) a definite plan for real estate development or common scheme was created; (2) multiple deeds within the development contain uniform deed restrictions; (3) the restriction does not contain a provision for their release; and (4) all parties have notice of the restriction prior to the purchase of their respective property. See Steinwehr Development

Corporation, 162 A.2d 191 at 193; Moyer, 87 A.2d 246 at 248; Price v. Anderson, 56 A.2d 215, 219 (Pa. S.Ct. 1948); Ladner v. Siegel, 144 A. 271, 273 (Pa. S.Ct. 1928); and King v. J. C. Hess Ford, Inc., 46 Pa. D. & C.2d 1, 9 (Pa. Com. Pl. 1968). These same courts have each determined that Plaintiff bears the burden of proving that an implied restriction exists.

Under the aforementioned four (4) factor test, we conclude that Plaintiffs have satisfied their burden and have proven the existence of an implied restriction which governs the permitted uses of Lot 100. Plaintiffs have proffered sufficient evidence of the first factor, proving that a common scheme existed when the Saw Mill Run Development was created and that it still exists to this day. The common scheme was created by the developer of the Saw Mill Run Development, Kriss Pines Corporation. To evidence the common scheme, the Kriss Pines Corporation sent a representative, Frederick W. Sherrerd, III, to a public meeting of the Franklin Township Board of Supervisors on May 23, 1989 to inform the board that instead of creating a recreational area, as mandated by local ordinance, Kriss Pines Corporation would leave Lot 100 as open space intended for passive recreational use. See Exhibit P-4. Kriss Pines Corporation also recorded five (5) maps with the Carbon County Recorder of Deeds. Each of these maps shows a final plan for different sections of the Saw Mill Run Development and

designates Lot 100 as "Open Space". In addition, Plaintiffs testified that up until the time Defendant purchased Lot 100, their respective families and other families in the neighborhood have used Lot 100 for recreational purposes. Plaintiffs further testified at trial that they believed they were allowed to use Lot 100 as a recreational space based on paragraph ten (10) of the "Exception/Restrictions" attachment included in each of their deeds. Unlike, J.C. Hess Ford, Inc. where a Court of Common Pleas determined a common scheme did not exist in part because the plaintiffs' deeds did not reference any remaining land held by the grantor, here, the Plaintiffs' deeds specifically note that open spaces within the development are to remain unencumbered by any structure. See J.C. Hess Ford, Inc. at pg. 6.

Plaintiffs have also met their burden of proof with regard to the second factor because they have established that at least two (2) of the deeds in the Saw Mill Run Development contain identical restrictions. The fact that Plaintiffs' deeds each include uniform property restrictions suggests that Kriss Pines Corporation used the same two-page attachment to list the restricted uses for each of the lots sold in the Saw Mill Run Development.

Pennsylvania courts have previously determined that when a grantor reserves the right to revoke a restriction by written

notice alone, Plaintiff cannot meet its burden of proof with regard to the third factor because such evidence negates the existence of a general scheme. J.C. Hess Ford, Inc., 46 Pa. D. & C.2d 1 at 11-12. However, the facts of in J.C. Hess Ford, Inc. are sufficiently distinguishable from those of the instant case. Rather than having carte blanche authority to abrogate a given restriction, Kriss Pines Corporation conditioned its ability to revoke a restriction upon a showing that the revocation was performed to maintain a desirable residential neighborhood. By conditioning its ability to add, alter, or rescind restrictions in this manner, Kriss Pines Corporation made a conscious effort to prevent itself, and its assigns and successors, from destroying the common scheme that it created. As a result, the conditioned ability to abrogate a restriction included in paragraph twelve (12) of the "Exceptions/Restrictions" attachment is additional evidence of the existence of a common scheme.

The final factor to be considered is whether the parties had notice of the common scheme at the time of their respective purchases. It is readily apparent that Plaintiffs had actual notice of the common scheme at the time they purchased their respective properties because the restriction preserving Lot 100 as open space for recreation was an express covenant within their deeds. The same, however, cannot be said of Defendant.

Rather, Defendant had constructive notice of the common scheme when he purchased Lot 100 because Kriss Pines Corporation recorded at least five (5) maps from 1989 to 1999 which designate Lot 100 as "Open Space".

Plaintiff has produced ample evidence to prove the existence of an implied restriction of use for Lot 100. Kriss Pines Corporation created a common scheme for the Saw Mill Run Development as evidenced by Mr. Sherrerd's remarks to the Franklin Township Board of Supervisors, the recorded maps designating Lot 100 as "Open Space", the uniform deed restrictions in plaintiffs' respective deeds, and the grantor's conditioned ability to add, alter, or revoke any restriction, moreover, we find that Defendant had constructive notice of this common scheme when he purchased Lot 100.

It is important to note Defendant's argument that the existence of structures on Lot 100, not consistent with the common scheme, negates any evidence of a common scheme. Yet, Defendant testified that he had personal knowledge that each of these structures existed on the property prior to 1988 when Kriss Pines Corporation purchased the property. There is no evidence supporting Defendant's notion that structures previously installed on a property destroy a common scheme created by a subsequent purchaser who does not remove these structures.

Based upon our Findings of Fact and analysis of the relevant legal authority as set forth hereinabove, we reach the following:

CONCLUSIONS OF LAW

1. To find that a property restriction exists on a given parcel of property there must be clear and definite evidence of the restriction. Clancy v. Recker, 316 A.2d 898 (Pa. S.Ct. 1974);

2. Not all restrictions of use for property are expressly written in the deed for that property; rather, property restrictions may be derived from the conduct of the parties. King v. J. C. Hess Ford, Inc., 46 Pa. D. & C.2d 1, 9 (Pa. Com. Pl. 1968);

3. Plaintiffs have provided sufficient evidence to prove that an implied restriction governs the permissible uses of Lot 100;

4. Plaintiffs have shown that: a. a common scheme was created for the Saw Mill Run Development which currently remains in place; b. uniform deed restrictions exist on surrounding properties; c. these restrictions were not freely abrogable; and d. Defendant had notice of these restrictions at the time of purchasing Lot 100.

5. The combination of a recorded map and uniform deed restrictions create a presumption that a common scheme exists. Price v. Anderson, 56 A.2d 215, 219 (Pa. S.Ct. 1948);

6. Defendant has not put forth any evidence to rebut the existence of a common scheme;

7. Plaintiffs have uniform deed restrictions;

8. While the deed restrictions are revocable by the grantor, Kriss Pines, Corporation, or its assigns and successors, any revocation must be made for the purpose of maintaining a desirable residential neighborhood;

9. The instant case is distinguishable from similar cases in which the courts of this Commonwealth have declined to acknowledge the existence of a property restriction because the grantor was able to revoke a property restriction by merely providing the grantee with written notice. J.C. Hess Ford, Inc. 46 Pa. D. & C.2d 1 at 11;

10. Defendant had constructive notice that Lot 100 was to remain "open space" based on the aforementioned maps that were recorded in the Office of the Carbon County Recorder of Deeds;

11. For the forgoing reasons, an implied restriction can be determined to control Defendant's use of his property;

12. Lot 100 is not cleansed of any restriction merely because the property was purchased at a tax sale. Locust Lake

Village Property Owners Ass'n v. Wengerd, 899 A.2d 1193, (Pa. Com. Pl. 2006);

13. Defendant testified that all of the structures he found on Lot 100 were installed prior to 1988, but he has not cited any case law, and this Court has found none, that suggests that structures of this type previously erected on a parcel of property control restrictions created by subsequent purchasers of the same property;

14. The existence of Kriss Pines "no trespassing" signs alone are insufficient to prove that the developer intended to exclude Saw Mill Run residents in light of Plaintiffs' testimony that they never observed these signs, that residents used Lot 100 for recreational purposes and the fact that there was and continues to be a common scheme that designates Lot 100 as open space; and

15. Since Plaintiffs have proven that an implied restriction exists by clear and definite evidence, Defendant is required to comport with the common scheme created by Kriss Pines, Corporation, and is, therefore, barred from removing and/or clearing brush and trees from Lot 100, constructing any structure on Lot 100, and from violating the "Exceptions/Restrictions" included in Plaintiffs' deeds.

Upon careful consideration of the above Findings of Fact and Conclusions of Law, we enter the following:

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JAMES FARANO and	:	
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Plaintiffs	:	
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C&D TROUT PONDS	:	
Defendants	:	

Kim R. Roberti, Esquire	Counsel for Plaintiffs
Joel B. Wiener, Esquire	Counsel for Defendant

VERDICT

AND NOW, to wit, this day of December, 2016, this matter having come before the undersigned for a non-jury trial, our verdict is as follows:

1. Defendant's property, Lot 100, is a lot within Saw Mill Run Development, and, therefore, is subject to the restrictions common to other lots within the development as set forth in Plaintiff's deeds, Carbon County Deed Book 767, page 283, and Carbon County Deed Book 795, page 716;

2. Defendant's property, Lot 100, is open space that is open and available to all owners within Saw Mill Run Development for the enjoyment of nature and general recreational purposes;

3. Defendant is prohibited from erecting any structure upon Lot 100 as stated in the filed subdivision plan and deeds for Saw Mill Run Development;

4. Because restriction no. 3 contained in the deeds prohibits the clearing of lots except when done in connection with the construction of a home, and because restriction no. 10 prohibits erecting any structure upon the open space, Defendant is prohibited from clearing any trees from Lot 100;

5. Defendant may access and utilize any currently existing structure which was erected and situated upon Lot 100 as of July 24, 2014;

6. Defendant may exercise the rights of ownership of Lot 100 in any manner not inconsistent with this Decision and Verdict; and

7. Pursuant to Pa.R.C.P. No. 227.4, the Prothonotary shall, upon praecipe, enter judgment on this Decision and mark the verdict as final if no motion for post-trial relief has been filed under Pa.R.C.P. 227.1 within ten (10) days after notice of the filing of this Decision and Verdict.

BY THE COURT:

Steven R. Serfass, J.