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Pollack v. 217 Indian Avenue, L.L.C., 222 A.3d 478 (2019)

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Property Law. *Pollack v. 217 Indian Avenue, L.L.C.*, 222 A.3d 478 (2019). A Rhode Island court will not grant specific performance to implement a restrictive land covenant, even when the covenant is violated, if such injunctive relief would be futile. Although the Rhode Island Supreme Court affirmed its earlier decisions granting seemingly harsh injunctive relief in order to enforce property servitudes, the Court will not grant injunctive relief when such relief would result in no benefit to the plaintiff and force the defendant to demolish a house only to rebuild it.

FACTS AND TRAVEL

In the winter of 2017, the defendants, Jane and James Moore, knocked down their one-story, oceanfront home in Portsmouth, Rhode Island, and began constructing a new three-story structure without gaining approval from their subdivision’s committee.¹ The Moore’s property was part of a 1960 subdivision plan that included a restrictive land covenant.² The covenant provided that “[n]o building or buildings should be erected, placed or altered on any lot until construction plans and specifications, and the plans showing the location of the structure have been approved in writing by a committee” in order to ensure “quality of workmanship and materials” and to protect the “harmony of external design with existing structures.”³

The subdivision’s committee was composed of the nine subdivision property owners, and a simple majority was sufficient to approve new construction plans.⁴ However, the defendants did not seek committee approval prior to commencing construction, so the plaintiff, Bruce Pollack, notified the defendants of their violation and demanded they cease and desist construction.⁵ When

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1. *Pollack v. 217 Indian Ave., L.L.C.*, 222 A.3d 478, 480 (R.I. 2019).
 2. *Id.* at 480.
 3. *Id.* at 480, 483.
 4. *Id.* at 480.
 5. *Id.*

the defendants failed to stop, the plaintiffs filed suit against Jane and James Moore and their real estate L.L.C. in Newport County Superior Court seeking a temporary restraining order and a preliminary injunction to stop construction.⁶ The plaintiffs also sought damages for the defendant's violation of the covenant of quiet enjoyment.⁷

In June, the defendants gained retroactive approval of their construction plans with a committee vote of 8–1 and consequently moved for summary judgment.⁸ The plaintiff filed a cross-motion for summary judgment arguing that the restrictive covenant requires prior approval and urging the court to recognize the Restatement Third of Property: Servitudes § 6.10, which states that a committee does not have the power to amend a restrictive covenant without the approval of the adversely affected property holder when the amendment does not apply uniformly.⁹ In a bench trial, the Superior Court granted the defendant's motion for summary judgment, holding that the restrictive covenant did not require prior approval but rather was flexible enough to allow committee approval at any point up to the completion of construction.¹⁰ The defendants appealed to the Rhode Island Supreme Court, and the Court returned the case to the regular calendar for full argument after determining that the plaintiff had shown cause that the case should not be summarily dismissed.¹¹

6. *Id.*

7. *Id.*

8. *Id.* at 480–481.

9. *Id.* at 480 (citing RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.10 (AM. LAW INST. 2000)). The plaintiffs also urged the Court to recognize § 6.13 of the Third Restatement Property: Servitudes, which states that the committee owes subdivision members a duty of good faith and fair dealing. *Id.* at 481 (citing RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.13). Thus, the plaintiff argued that he should have been given notice and the opportunity to object to the construction, but because he did not name the committee members as defendants, the Court treated the issue as waived. *Id.* 481 n.4.

10. *Pollack*, 222 A.3d at 480–81. The defendants also filed a motion to dismiss themselves as defendants in their personal capacities that the hearing judge ruled was moot when he granted their motion for summary judgment. *Id.*

11. *Id.* at 481.

ANALYSIS AND HOLDING

On review, the Court sought to resolve two issues: whether the land covenant created an express or implied right to gain approval for construction plans and design specifications retroactively, and, if the covenant did not create such a right, whether equitable relief was appropriate.¹² Recognizing that restrictive land covenants should be interpreted *both* by giving words their “plain and ordinary meaning” and by balancing the competing objectives of maintaining the free alienability of land and respecting the purposes for which the restriction was established, the Court determined that the language of the covenant required approval *prior* to commencing construction.¹³ Thus, the Court disagreed with the hearing justice who had concluded that the covenant allowed approval in the middle of construction; however, the Court affirmed the ruling of the trial court after determining that equitable relief was not appropriate in this case.¹⁴

The Court declined to grant equitable relief because such relief would be futile.¹⁵ The Court noted that a court of equity may refuse to grant specific performance when the result would provide the plaintiff with no benefit, yet impose substantial inconvenience and expense on the defendant.¹⁶ In order to enforce the land covenant, the Court would have to order the demolition of a house that the defendants could simply rebuild because they have since gained the committee’s approval for their construction plans.¹⁷ The plaintiff would gain no relief because the structure he seeks to demolish can be rebuilt, and the defendants would face substantial costs and inconvenience to demolish the home they have already built, only to rebuild another identical house in its place.¹⁸ As such,

12. *Id.* at 480, 482 n.6. Although the plaintiff included a plea for damages in his complaint and reasserted the plea at oral arguments, the Court did not consider his claim for damages because he cited no law or claim of error in his briefings that would entitle him to such relief. *Id.* at 482 n.6.

13. *Id.* at 483 (quoting *Gregory v. State Dep’t of Mental Health*, 495 A.2d 997, 1001 (R.I. 1985)).

14. *Id.* at 482–83.

15. *Id.* at 484.

16. *Id.* at 483.

17. *Id.*

18. *Id.*

the Court decided to exercise its discretion and denied specific performance.¹⁹

The Court proceeded to distinguish the case from *Cullen v. Tarini*²⁰ and *Rose Nulman Park Foundation v. Four Twenty Corporation*²¹: two cases in which the Court ordered harsh equitable relief in order to enforce property servitudes.²² The Court noted that, in *Cullen* and *Nulman*, equitable relief was harsh, but not futile.²³ The *Cullen* remedy was not futile because the restrictive covenant detailed *specific* building requirements.²⁴ Thus, when the *Cullen* Court ordered the defendants to renovate and bring their house in compliance with the covenant, the defendants could not simply revert to their old specifications by getting the old design approved like the defendants here.²⁵ The Court also noted that the purpose of the *Cullen* covenant was fulfilled by ordering equitable relief because the covenant was created to preserve the plaintiff's view, whereas the covenant here was created to ensure quality materials and aesthetics.²⁶ Thus, the purpose of the covenant here was fulfilled by the committee's retroactive approval of the design plans even though the defendants failed to obtain approval and begin construction in the correct order.²⁷ Similarly, the Court's order in *Nulman* to remove a \$1.8 million house that was encroaching on the neighboring property was harsh but not futile because once the encroachment was removed, the land boundaries were once again respected.²⁸

As such, the Court granted the defendant's motion for summary judgment because the requested relief would not merely be harsh but also futile. Since the homeowners ultimately obtained

19. *Id.*

20. *Cullen v. Tarini*, 15 A.3d 968, 983 (R.I. 2011).

21. *Rose Nulman Park Found. v. Four Twenty Corp.*, 93 A.3d 25, 33 (R.I. 2014).

22. *Pollack*, 222 A.3d at 483–84.

23. *See id.* (citing *Nulman Park Found.*, 93 A.3d at 28; *Cullen*, 15 A.3d at 975, 980).

24. *Id.* at 483 (citing *Cullen*, 15 A.3d at 975).

25. *Id.* at 483–84.

26. *Id.* at 484 (citing *Cullen*, 15 A.3d at 975).

27. *Id.*

28. *Id.* (citing *Nulman Park Found.*, 93 A.3d at 26–28).

approval for their construction, they could rebuild their home in the exact specifications even if the Court granted equitable relief.²⁹

COMMENTARY

The Rhode Island Supreme Court displayed that their harsh line on enforcing property servitudes is not without limit. The equitable remedies in *Cullen* and *Nulman* were no less extreme than the proposed relief here, but because the plaintiff would not receive *any* benefit from the destruction of the Moore's home other than pure vindication, the Court determined that equitable relief was inappropriate.³⁰ At first glance, the result seems to leave the plaintiff remediless even though the defendants clearly violated the restrictive land covenant. The plaintiff was not protected by the covenant in the way he may have anticipated when buying his property. The plaintiff's next-door neighbors were able to replace an unobtrusive one-story house with a three-story structure without affording the plaintiff the opportunity to object to the construction before it was too late.³¹ However, the plaintiff's lack of remedy seems to reflect the plaintiff's error rather than the Court's stance on enforcing restrictive land covenants. The Court noted that it would not consider the plaintiff's claim for damages because he cited no support for his claim.³² The Court also declined to consider adopting § 6.13 of the Restatement Third Property and hold the committee accountable for breaching their duty of good faith to the plaintiff because the plaintiff failed to name the committee members in his complaint.³³ Consequently, the Court was left to consider a rather irrational request for equitable relief. Therefore, the Court's denial of any relief here does not appear to reflect the Court's opinion on the severity of violating restrictive land covenants, but rather the plaintiff's own errors in arguing and requesting relief.

29. *Id.*

30. *Id.* at 483–84.

31. By the time the committee approved of the plans, the house had been under construction for six months. *Id.* at 480. We can only speculate what may have happened if the defendants had followed the proper protocols, but perhaps the other neighbors would have been more responsive to the plaintiff's objections had the house not already been half-built.

32. *Id.* at 482 n.6.

33. *See id.* at 481 n.4.

Despite considering two issues on appeal, the Court focused the majority of its opinion on determining if equitable relief was appropriate and devoted almost no time to explaining why the language of the covenant required prior approval. The Court states, without further explanation, “we agree with the plaintiff that . . . the restrictive covenant provides that a landowner must obtain the committee’s written approval prior to erecting a structure on a lot.”³⁴ And, although the language of the covenant does seem rather clear, the covenant provides that “[n]o building or buildings shall be erected . . . *until* construction plans . . . have been approved,”³⁵ the hearing justice determined that the language was ambiguous enough to create a “fluid process where approval may be gained in the middle of construction.”³⁶ Consequently, it is unclear why the Court disagreed with the hearing justice’s interpretation of the land covenant because the Court determined that the request for equitable relief here was so absurd that the defendants were entitled to summary judgment anyway.

CONCLUSION

The Rhode Island Supreme Court held that enforcing the Indian Avenue restrictive land covenant through equitable relief was not appropriate because granting such relief would be futile. Although the defendants violated the restrictive land covenant, if the Court granted equitable relief and ordered the destruction of the house, the defendants could simply rebuild the house afterwards. Such an order would grant the plaintiff no real relief, and the defendants would face substantial costs; therefore, equitable relief was inappropriate.

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34. *Id.* at 482.

35. *Id.* at 480 (emphasis added).

36. *Id.* at 481.