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1. Brief of Appellant

Contact J. Barden for copy

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SUPREME COURT OF VIRGINIA
SEP 22 1977

IN THE

Supreme Court of Virginia

AT RICHMOND

770510

VILLAGE GATE HOMEOWNERS ASSOCIATION,

APPELLANT

v.

CAROLE NIXON HALES,

APPELLEE

APPENDIX TO BRIEF

John P. Milligan, Jr., Esquire
SMILEY, LEAR & MILLIGAN
718 Jefferson Street - P.O. Box 943
Alexandria, Virginia 22313

Counsel for Appellant

Dennis D. Duffy, Esquire
DUFFY & BROOKS
3976 Chain Bridge Road
Fairfax, Virginia 22030

Counsel for Appellee

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BILL OF COMPLAINT

COMES NOW your complainant, VILLAGE GATE HOMEOWNERS ASSOCIATION, and respectfully represents as follows:

1. That complainant is a Virginia non-stock corporation charged with the enforcement of certain Covenants, Conditions and Restrictions recorded among the Prince William County land records in Deed Book 581, at page 491.

2. That defendant is the record owner of Lot Eighty-Two (82), VILLAGE GATE, Section Two (2), having acquired title by deed recorded among the Prince William County land records in Deed Book 688, at page 94, which property is subject to the aforesaid Covenants, Conditions and Restrictions.

3. That Article VI of the aforesaid Covenants, Conditions and Restrictions prohibits "front or side yard fence, wall or walls, or other similar type structures..."

4. That, in violation of the aforesaid Covenants, Conditions and Restrictions, defendant has erected a front yard wall or fence.

5. That complainant has requested of defendant the removal of the aforesaid wall or fence, all to no avail.

WHEREFORE, complainant prays that this Court order and direct the defendant to forthwith remove the front yard wall or fence which

constitutes a violation of the Covenants, Conditions and Restrictions of Village Gate Subdivision.

VILLAGE GATE HOMEOWNERS ASSOCIATION

By _____
President

BENDHEIM, RATNER & MILLIGAN
718 Jefferson Street - P.O. Box 156
Alexandria, Virginia 22313

By: _____
John P. Milligan, Jr.
Counsel for Complainant

A N S W E R

COMES NOW your Defendant, by Counsel, and in answer to the Bill of Complaint filed herein, states as follows:

1. THAT there is insufficient information relative to paragraph 1 of the Bill of Complaint filed herein, and neither admits nor denies the allegations and demands strict proof thereof.

2. ADMITS the allegations contained in paragraph 2 of the Bill of Complaint filed herein.

3. NEITHER admits nor denies the allegations contained in paragraph 3 of the Bill of Complaint filed herein and demands strict proof thereof.

4. DENIES the allegations contained in paragraphs 4 and 5 of the Bill of Complaint filed herein and demands strict proof thereof.

WHEREFORE, your Defendant having fully answered, respectfully requests that the Bill of Complaint filed herein be dismissed with her costs expended.

CAROLE NIXON HALES

DENNIS D. DUFFY
Counsel for Defendant
3976 Chain Bridge Road
Fairfax, Virginia 22030

September 1, 1976

The Honorable Percy Thornton, Jr.
Judge, Circuit Court of Fairfax
Courthouse
Fairfax, Virginia 22030

Re: Village Gate Homeowners Association
-vs-
Carole Nixon Hales

Dear Judge Thornton:

Pursuant to your request, please find enclosed the Points and Authorities which reflect our position in the above matter.

A copy of this document is being forwarded to Mr. John Milligan, Counsel for the Complainant. With best wishes, I remain

Very truly yours,

DENNIS D. DUFFY

DDD/caw
enc.
cc - Mr. John Milligan

POINTS AND AUTHORITIES

Under the facts and circumstances presented to the court in this case the Plaintiff is estopped from enforcing the covenant "No front or side yard fences, wall or walls, or other similar type structures shall be allowed except those constructed by or on behalf of declarant".

Submitted to the court during trial was a copy of Plaintiff's written statement of policy specifically waiving this covenant to the extent that it applied to side yard fences and walls. However, the side and front yards are linked irrevocably by the clear and unmodified conjunction "or". There can be no doubt as to the meaning of this phrase "no front or side yard fences, wall or walls" and even if such doubt should be advanced the principles of equity demant that "...such restrictive covenants be strictly construed," Reardon v. Hale, 215 Va. 638 at page 641 (1975)" and the burden is on one who seeks to enforce them to show that they are applicable to the acts of which he complains". The above cited policy promulgated by the Plaintiff's waiving the side yard prohibition constitutes conduct precluding the Plaintiffs from maintaining such burden and, by such conduct also prevents the Plaintiff from asserting any right to enforce the asserted breach of convenant. "Undoubtedly,

a person by his conduct may be estopped from asserting a right to enforce a covenant" 36 ALR 2nd at page 869, Section 8.

Further, when Plaintiff waives the Grantor's restrictive covenant, they can be said to have committed a violation of Grantor's overall scheme or original purpose of the covenant. "As Tulk v. Markay, 2 PH 774, 41 Eng. Rep. 1143 (1848) [the first case applying equitable doctrines to covenants running with the land] is an equitable doctrince, the principle that one must come into court with clean hands is applicable. Accordinly, one owner can not enforce a covenant against another owner where the former has committed substantial violations of the same restrictions, citing Ballard v. Citchen," 128 S. Va., 161, Virginia Law Review, Vol. 39, p. 703 at page 715. As a waiver of the covenant accomplishes the same effect and serves the same end as a violation of the covenant, Plaintiff should not be allowed to enforce the covenant now after waiver in this arbitary and discriminatory manner.

It is clear that a great doubt must lay as to the specific enforcement of this covenant by equitable remedies under the circumstances here present and where such doubt exists such enforcement would not be forthcoming. "Equity does not aid one to restrict another in the use to which he may put his land unless the right to such aid is clear and, when there is doubt as to the

right, equitable relief will be denied" Wichwire v. Church, 59 A 2nd 416, (1948), at page 419.

In the West Virginia case of Ballard v. Citchen, 36 SE 2nd 390 (1945), the court notes at page 394, "Though there may be come authority to the contary, we are of the opinion that one who violates a covenant in one particulat can not be heard to complain that another has violated the same covenant in another particular, where the covenant as a whole seeks a common purpose, as in the case before us." In applying this doctrine to the circumstances now before this court it can clearly be seen that the Plaintiffs should not now be heard to complain that the Defendant's erection of the front yard fence or wall violates the same covenant. The waiver of the covenant on the part of the Plaintiff undermines and destroys the purpose of the covenant, foreclosing any claim to serious hardship and injustice by breach of the covenant by the Plaintiff. "It is familiar law, too familiar to need the citation of authority that the Decree of Chancery is of grace, not of right, and that he is not bound to make a Decree which would do far more mischief and work far more injury, than the wrong which he is asked to redress. Equitable relief by way of a mandatory injunction is and for the most obvious reason should be, granted only in a situation where it is so clearly called for as to make its refusal work real and serious hardship and

injustice" Schwarts v. Holy Cross, 149 NE, 699 at page 701 (1925). To enforce the covenant against the Defendant here does indeed work a serious hardship on the Defendant (a flooded basement when it rains), but no hardship can be shown by Plaintiff as they have waived the restrictive covenant before Defendant's actions took place and the general purpose of the covenant lapsed with the abandonment by the Plaintiffs of the original purpose of the Grantor, such abandonment being set forth in the Plaintiff's policy statement.

REPLY TO DEFENDANT'S POINTS AND AUTHORITIES

The question in issue is whether complainant is estopped from enforcing a covenant prohibiting front yard fences. Some evidence has been submitted by defendant in an attempt to show that complainant has not enforced a similar covenant prohibiting side yard fences. Nevertheless, the evidence is clear that complainant has, in the past, repeatedly taken action to enforce the covenant prohibiting front yard fences, and, in fact, defendant's fence or wall is the only such front yard structure in the entire subdivision in violation of the covenants.

The covenants themselves provide, in Article X, Section One, that failure to enforce a covenant shall not be deemed a waiver of the right to do so thereafter. By simple logic, if the covenants provide that a failure to enforce the side yard fence restriction will not be deemed a waiver of the right to enforce such side yard restrictions in thr future, it would be unreasonable to contend that a failure to enforce the side yard restrictions would be deemed a waiver of the right to enforce the front yard fence restrictions.

Furthermore, Article X, Section Two of the covenants provides that invalidation of any one of the covenants shall not affect the remaining covenants. Had a side yard violation been involved here in addition to the front yard violation, and had the Court, notwithstanding the waiver

provisions in the covenants, invalidated the side yard restrictions, the front yard restrictions would still remain unaffected by such invalidation.

At this point, a practical point should be raised. The covenants provide that power to enforce the covenants is vested not only in the Association, but in each individual owner in the subdivision. Therefore, even if the Court decided that the Association was estopped to enforce the front yard restrictions, any individual owner could, in a subsequent suit, enforce the restriction against defendant since the matter would not be res adjudicata (Michie's Juris. Vol. 8, Former Adjudication and Res Adjudicata § 14) and the individual owners would not be estopped by the previous actions of the Association in which they had no part. (Dietrick v. Leadbetter, 8 S.E. 2d 276).

Getting now to the heart of the issue, defendant, in her brief, contends that the side and front yards are "linked irrevocably" in the covenants. The Court's attention is directed, however, to the case of Romig v. Modest, 142 N.E. 2d 555 in which the applicable restriction barred all fences without regard to location. At least 14 out of a plat of 53 lots had erected rear lot fences. Although holding that plaintiffs were thereby barred from enforcing the prohibition against fences as to rear lot line fences, the Court held that such waiver did not operate to prevent the injunction against side line fences. This was in spite of the fact that a few side line fences existed without objection (a situation which does not exist in our case since there are no front yard fences other than the defendant's). The Court's reasoning was that the waiver regarding the rear

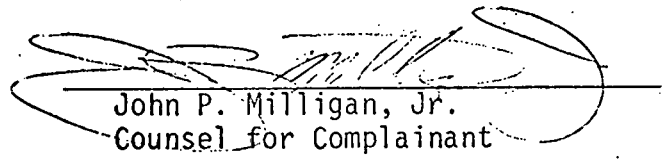
fences did not change the character of the neighborhood with regard to side yard fences and that the plaintiffs' failure to object to rear fences did not, therefore, deprive them of the right to object to side yard fences. Similar reasoning has been used in other cases (see: Wallace v. St. Clair, 127 S.E. 2d 742; Traylor v. Holloway, 142 S.E. 2d 521; and Dietrick v. Leadbetter, supra) to the effect that covenants should be enforced unless the entire architectural scheme or the condition of the neighborhood has changed to the extent that the covenants have been abandoned. Here, the presence of side yard fences cannot be construed as a waiver of the prohibition against front yard fences. As to such fences, there has been no abandonment of the general scheme. "A person entitled to the benefit of restrictions may, at his option, enforce any one or more of them without enforcing the others (26 C.J.S. Deeds § 169, Note 50)."

Defendant, in her brief, citing the case of Ballard v. Kitchen, contends that complainants cannot complain of her fence, because they have violated the restrictions in another particular. To begin with, complainants have not violated any restrictions, they have merely declined enforcement of a particular part of a covenant. Secondly, even if complainants had violated the covenants in one particular (side yard fences), it is the defendant who cannot be heard to complain under the Ballard case.

In conclusion, it is defendant's burden to show a waiver on the part of the complainant (Romig v. Modest, supra). This she has not done

and complainant respectfully requests that the injunction be awarded.

Respectfully submitted,



John P. Milligan, Jr.
Counsel for Complainant

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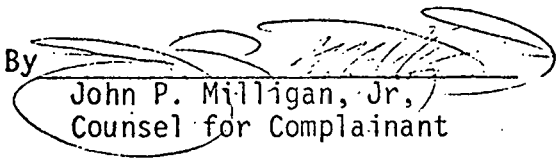
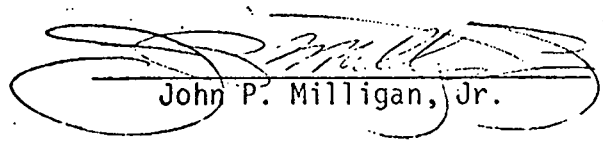
By 

John P. Milligan, Jr.,
Counsel for Complainant

Certificate

I hereby certify that a copy of the foregoing was mailed, postage prepaid, to Dennis D. Duffy, Esquire, Counsel for Defendant, 3976 Chain Bridge Road, Fairfax, Virginia 22030 on this the 16th day of September, 1976.



John P. Milligan, Jr.

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA
FAIRFAX AND PRINCE WILLIAM COUNTIES

October 4, 1976

ARTHUR W. SINCLAIR
BARNARD F. JENNINGS
JAMES KEITH
WILLIAM G. PLUMMER
LEWIS D. MORRIS
PERCY THORNTON, JR.
BURCH MILLSAP
JAMES C. CACHERIS
THOMAS J. MIDDLETON
RICHARD J. JAMBORSKY
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CIRCUIT COURT CHAMBERS
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FAIRFAX COUNTY COURTHOUSE
4000 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

DENNIS D. DUFFY, Esquire
Attorney at Law
3976 Chain Bridge Road
Fairfax, Virginia 22030

JOHN MILLIGAN, Esquire
Attorney at Law
P. O. Box 156
Alexandria, Virginia 22313

RE: Village Gate Homeowners Association vs.
Carole Nixon Hales

Gentlemen:

It is my decision to deny the relief sought by the complainant by reasons, to-wit:

1. The Association has by actions and declaration waived the covenant on side yard fences; such fences as appear in the pictures can be seen from the streets of the development and clearly have an impact upon the appearance of the neighborhood.

2. Appearance or aesthetic view is in the eyes of the beholder; however, comparison of the defendant's home as shown in Exhibit G, without the fence, with the same home as shown in Exhibit 4 after fence was erected clearly shows a vast improvement in the view; it would indeed be difficult to find detraction to the neighborhood from such fence. If side yard fences, as declared by the Association, do not detract from the appearance of the neighborhood, then the same logic and reasoning should be applied to front yard fences as both were specifically prohibited by the covenant, Article VI, Exhibit 2.

3. Restrictive covenants can be legally waived or abandoned dependent upon the circumstances involved and when so done it would be inequitable to sustain a prohibition against any person within the common design or purpose of such covenants.

In view of the circumstances and as a practicable matter, the Association should implement or declare a design or specifications for

all future front-yard fences.

Mr. Duffy is requested to prepare an order in accordance with the above decision.

Sincerely yours,

PERCY THORNTON, JR.

PTJr.:dra

DECREE

THIS MATTER came on for hearing before the Court on the 13th day of July, 1976 upon the Bill of Complaint filed by the Complaintant, the Answer of the Defendant, Interrogatories and Anwers thereto, there being present representatives of the Complaintant and their Counsel, the Defendant and her Counsel and was argued to the Court with presentation of witnesses and the submission of documentary evidence; and

IT APPEARING TO THE COURT that the Association has by actions and declaration waived the covenant on side yard fences; such fences as appear in the pictures can be seen from the streets of the development and clearly have an impact upon the appearance of the neighborhood; and

IT FURTHER APPEARING TO THE COURT that appearance of aesthetic view is in the eyes of the beholder; however, comparison of the defendant's home as shown in Exhibit G, without the fence, with the same home as shown in Exhibit 4 after fence was erected clearly shows a vast improvement in the view; it would indeed be difficult to find detraction to the neighborhood from such fence. If side yard fences, as declared by the Association, do not detract from the appearance of the neighborhood, then the same logic and reasoning should be applied to front yard fences as both were specifically prohibited by the covenant, Article VI, Exhibit 2; and

IT FURTHER APPEARING TO THE COURT that restrictive covenants can be legally waived or abandoned dependent upon the circumstances involved and when so done it would be inequitable to sustain a prohibition against any person within the common design and purpose of such covenants; and it is

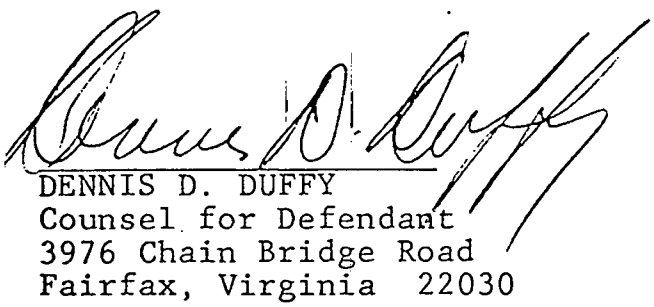
ORDERED AND ADJUDGED that the relief sought by the Complaintant in the Bill of Complaint filed herein is hereby denied and the Bill of Complaint is dismissed with prejudice.

ENTERED this _____ day of _____ 1976.

_____
PERCY THORNTON, JR., JUDGE

I ASK FOR THIS:

DUFFY & BROOKS



DENNIS D. DUFFY
Counsel for Defendant
3976 Chain Bridge Road
Fairfax, Virginia 22030

SEEN AND EXCEPTED TO:

_____
JOHN P. MILLIGAN
Counsel for Complaintant
RATNER & MILLIGAN
718 Jefferson Street
Alexandria, Virginia

STATEMENT OF FACTS

Trial of this matter was held before the Court sitting without a jury on July 13, 1976, before Judge Percy Thornton, Jr.

Complainant's evidence, through its three witnesses and five exhibits, was as follows:

1. Complainant is a homeowners association in the subdivision of Village Gate, Prince William County, Virginia, in which subdivision the defendant resides in a townhouse owned by her in fee simple.

2. The defendant is subject to the covenants introduced, the pertinent parts of which read:

> "No front or side yard fence, wall or walls, or other similar type of structures shall be allowed except those constructed by or on behalf of the Declarant."

3. The covenants may be enforced either by the Homeowners Association, or by any owner of a lot in the subdivision.

4. That defendant, around June of 1975, erected a brick fence or wall enclosing the front yard of her property.

5. That during construction of the fence or wall defendant was advised, by a representative of the Homeowners Association, that such a structure was in violation of the subdivision covenants.

6. In July of 1975, the complainant, through counsel, demanded that the fence or wall be removed, and when this demand was not met, the complainant, in August of 1975, filed this suit.

7. Evidence was introduced that two other owners had, at one time, erected front yard rope fences but that they had, at the request of the Homeowners Association, been removed and at the time of the trial defendant's was the only front yard fence or wall in the subdivision in violation of the covenants.

The defendant's evidence, through it's one witness, and through exhibits introduced both through it's witness and on cross-examination of complainant's witnesses, was as follows:

1. That defendant requested permission to erect a fence or wall from the Architectural Control Committee of the Homeowners Association, which request was not formally refused until some three months after the wall was erected.

2. That the fence or wall erected by the defendant was an attractive, well-built brick structure which was compatible in color and texture to her townhouse.

3. Evidence was produced which showed the existence of several side-yard fences in the subdivision, which side-yard fences violate the covenants. Evidence produced on cross-examination of complainant's witnesses showed that not only had complainant not requested the removal of such side-yard fences but they had, by letter introduced from the Architectural Control Committee of the Association, stated that no action would be taken against harmonizing side yard fences.

Signed pursuant to the Rules of the
Supreme Court of Virginia, Rule 5:9

_____
Percy Thornton, Judge

ASSIGNMENTS OF ERROR

1. That the Court erred in holding that Complainant had, by actions and declaration, waived the covenant on side yard fences.

2. That the Court erred in holding that Defendant's fence was aesthetically pleasing and was therefore in the same category as side yard fences.

3. That the Court erred in holding that Complainant had waived or abandoned the restriction against front yard fences.

4. That the Court erred in holding, or inferring, that the Complainant could, in the future, regulate the appearance of front yard fences.

* * * *

No front or side yard fence, wall or walls, or other similar type structures shall be allowed except those constructed by or on behalf of Declarant.

* * * *

ARTICLE X.

GENERAL PROVISIONS

Section 1. Enforcement. The Association, or any Owner, shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration. Failure by the Association or by any Owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter.

* * * *

CERTIFICATE

I, John P. Milligan, Jr., do hereby certify that I mailed twenty-five (25) copies of the foregoing Appendix to Brief to the Supreme Court of Virginia on the 20th day of September, 1977, and three (3) copies of same to Dennis D. Duffy, Esquire, Attorney at Law, DUFFY & BROOKS, 3976 Chain Bridge Road, Fairfax, Virginia 22030, Counsel for Appellee.

John P. Milligan, Jr.