IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PLANTATION PARK ASSOCIATION, INC. Plaintiff, v. CARLA DAWN HONAKER n/k/a DAWN NOBLE, Defendant.	)	C.A. No. 2279-S

MEMORANDUM OPINION

Date Submitted: February 11, 2005
Date Decided: February 16, 2005

William B. Wilgus, Esquire, WILLIAM B. WILGUS, Millsboro, Delaware, *Attorney for Plaintiff.*

Alix K. Robinson, Esquire, GRIFFIN & HACKETT, P.A., Georgetown, Delaware, *Attorney for Defendant.*

STRINE, Vice Chancellor

The plaintiff — Plantation Park Association, Inc. — brought this action alleging that defendant Carla Dawn Noble erected a fence on her property in violation of the following restrictive covenant:

> FENCES: No boundary fence or wall shall be constructed to a height of more than six (6) feet, of which the upper two (2) feet thereof shall be of fifty percent (50%) open construction. No boundary line hedge or shrubbery shall be permitted to a height of more than four (4) feet. No wall of any height shall be constructed upon any numbered lot in PLANTATION PARK until the height, design and location thereof have been approved by the Association, or its successors. The height or elevation of any fence, wall, hedge, or shrubbery shall be measured from the existing elevations of the property at or along the applicable points or lines.

As originally pled, the Association's complaint alleged that Noble's fence violated the restrictive covenant because it was more than six feet tall and was constructed without the necessary approval of the Association. After affidavits were filed establishing the height of the fence as 5.95 feet, Plantation Park abandoned its height related allegation and now premises its motion for summary judgment on two undisputed facts: 1) that the upper two feet of Noble's 5.95 foot fence is not comprised of 50% open construction; and 2) that Noble did not seek approve from the Association as to the height, design and location of the fence she erected.[1] Noble and the Association have filed cross-motions for summary judgment, arguing why, based on these undisputed facts, each believes it prevails.

[1] Noble has pointed out the changing nature of the Association's theory of breach. Nonetheless, she admits that she had the full opportunity to confront the Association's current arguments as to why the restrictive covenant was breached and at oral argument expressly waived any argument based on the Association's failure (if it be that) to amend the complaint. As a result, I address the theories that the parties actually dueled over in their competing summary judgment briefs.

In addressing these motions, I apply the familiar procedural standard of Rule 56. Under that standard, summary judgment must be granted to the moving party, if after construing the record in the manner most favorable to the non-moving party, there is no genuine issue of material fact that precludes the immediate entry of judgment for the moving party as a matter of law.[2] Here, the essential facts are undisputed and the question is the purely legal one of how the restrictive covenant applies.

In this interpretive exercise, this court applies certain contextually-appropriate principles. In particular, Delaware law has been chary about reading restrictive covenants broadly, lest the free use of land be unduly inhibited. For this reason, ambiguities in a restrictive covenant are read in favor of the landowner and against the party, such as the Association here, seeking to restrict the landowner's free use of her land.[3] At the same time, when a restrictive covenant is clear and obviously sets forth a legitimate, non-invidious constraint on the use of property, Delaware courts will enforce the covenant.[4]

Here, these principles point to a clear outcome. The Association's motion for summary judgment must be granted because one of its two arguments in support of its claim that Noble's fence breaches the restrictive covenant is, based on the undisputed facts, correct as a matter of law. The difference in how I assess the two arguments illustrates the practical importance of the relevant interpretive principles.

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[2] *E.g.*, *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002).
[3] *Bethany Village Owner's Assoc. Inc. v. Fontana*, 1997 WL 695570, at *2 (Del Ch. Oct. 9, 1997); *Point Farm Homeowner's Association, Inc. v. Evans*, 1993 WL 257404, at *2-3 (Del Ch. June 28, 1993).
[4] *Id.*

As to one of the Association's arguments — its contention that Noble was duty-bound to have her fence's height, design, and location approved by the Association before erection — the interpretive rules require a ruling in favor of Noble. By its plain terms, the restrictive covenant only requires Association approval of a "wall" and uses the words "fence" and "wall" independently. Ambiguity therefore arises from the restrictive covenant's unclear usage that must be resolved in favor of Noble's contention that she only had to seek Association approval if she wished to erect a wall and not if she, as she did, chose to install a fence.

By contrast, the other Association argument rests on a plainly reasonable reading of the restrictive covenant's unambiguous terms. Noble built a fence nearly six feet tall. The upper two feet of that fence are not made of 50% open construction. Her fence therefore breaches the plain language of the restrictive covenant, which clearly states that "[n]o . . . fence . . . shall be constructed to a height of more than six (6) feet, of which the upper two (2) feet thereof shall be of fifty percent (50%) open construction." Although Noble makes very strained arguments why this language might be ambiguous as to circumstances not before the court,[5] she has advanced no reasonable interpretation as to why the restrictive covenant is not absolutely clear as to a fence of the general height she erected. In this regard, it is notable that Noble built a fence of nearly the maximum height allowed (5.95 feet versus the full 6 feet, a difference probably attributable to safety or sinkage). In other words, she built the paradigmatic fence that the restrictive

[5] What if someone built a two foot fence, she asks? Would the entire two foot edifice have to be made of 50% open construction? Under the plain language of the restrictive covenant, an argument can be made that the answer would be yes.

covenant's 50% open construction requirement attempted to address by ensuring that maximally tall fences under the covenant would not result in a neighborhood where residents lived in stockaded enclaves behind six-foot-high opaque structures. By permitting up to six-foot-high fences, but with an open construction requirement for the upper two feet, the covenant clearly precluded the aesthetic and social consequences of a community whose members were walled off visually from each other. Notably, the restrictive covenant likewise restricts hedges and shrubbery to four feet, making this intention all the more obvious to any reasonable reader.

Finally, Noble's contention that the term "50% open construction" is ambiguous is unconvincing as the term obviously requires that the upper two feet of a fence be "open" in the sense that they lack enough solid material structure to permit humans and animals to peer through half of that part of the fence. She flouted that clear requirement by building an essentially six foot fence that had less than a foot of 50% open construction.

Having done so, she must live with the consequences, which is that she must now bear the expense of dismantling her fence, within 45 days after the entry of this opinion and final judgment. Alternatively, Noble may modify her fence, within 45 days, to comply with the covenant as interpreted by this opinion, if she wishes and assuming that modification of that kind is structurally feasible. For all these reasons, the Association's motion for summary judgment is granted, Noble's motion for summary judgment is denied, and Noble shall dismantle or modify her fence to comply with the covenant within 45 days. Each side shall bear its own costs. IT IS SO ORDERED.