2014 IL App (4th) 140097-U

NO. 4-14-0097

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 12, 2014
Carla Bender
4th District Appellate
Court, IL

BISHOP HARDWARE AND SUPPLY, INC., d/b/a ACE HARDWARE, a Delaware Corporation, Plaintiff-Appellee, v. JEFFREY A. WANDELL and PRAIRIE GARDENS, INC., d/b/a JEFFREY ALANS, an Illinois Corporation, Defendants-Appellants.	))))))))	Appeal from Circuit Court of Sangamon County No. 13CH391 Honorable Rudolph M. Braud, Judge Presiding.

PRESIDING JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant's proposed use of his property did not violate the restrictive covenants set forth in the parties' easement agreement, the trial court erred in entering judgment on the pleadings and a permanent injunction in favor of plaintiff.

¶ 2 Defendants, Jeffrey A. Wandell and Prairie Gardens, Inc., d/b/a Jeffrey Alans (hereinafter referred to as a singular defendant) appeals from the trial court's order granting a judgment on the pleadings and a permanent injunction in favor of plaintiff, Bishop Hardware and Supply, Inc., d/b/a Ace Hardware. Plaintiff sought injunctive and declaratory relief, claiming defendant was in violation of the applicable restrictive covenants of their reciprocal easement and operating agreement (Agreement) when defendant began the arrangement of a temporary garden center in its portion of their shared parking lot. Because we find no violation of the restrictions set forth in the Agreement, we reverse the court's order granting plaintiff's motion for

judgment on the pleadings and vacate the court's entry of a permanent injunction in favor of plaintiff. We also reverse the court's order denying defendant's motion for judgment on the pleadings.

¶ 3 I. BACKGROUND

¶ 4 In 1986, plaintiff sold to defendant a parcel of land adjacent to where plaintiff operated its business known as Ace Hardware. Defendant purchased the property with the intent of building and operating a retail store known as Jeffrey Alan's. At the time of the transaction, the parties entered into an Agreement, which set forth their duties and obligations for the "common area." The parking lot that ran across the front of the entire span of both businesses to the north was referred to as the "common area." This was a misnomer, as ownership of the "common area" was split down the middle, so each party owned that portion of the parking lot in front of their respective business.

¶ 5 In general, the Agreement provided the parties with a nonexclusive perpetual easement over and through the "common area." This area would be used by both businesses for vehicular parking, ingress, and egress. The parties would share equally the expense of maintenance of the "common area." One of the sections of the Agreement at issue in this case, section 1.03, prohibited either party from erecting "signs, fences, hedges, curbings, barriers, walls[,] structures or other obstructions which would prohibit or interfere with the free flow of pedestrian or vehicular traffic between the Sites." Another section at issue, section 2.02(a), provided that each party may, "for a period no longer than 10 days at a time *** erect tents in said areas and conduct sales of goods and merchandise no more than 4 times per year."

¶ 6 On April 15, 2013, defendant began the arrangement of a temporary garden center in the "common area," using piled wooden pallets as a fence or boundary. Defendant intended to

erect a tent over the area to house the plants, flowers, and trees. On April 19, 2013, plaintiff filed a verified complaint seeking temporary, preliminary, and permanent injunctive and declaratory relief. Plaintiff alleged defendant's plan for the garden center included the tent, placing tables, cash registers, and other items in the tent as part of the sale. According to plaintiff, defendant intended the garden center to remain in business from April until June 30, 2013. Plaintiff claimed the garden center would obstruct access and interfere with the flow of pedestrian and vehicular traffic in violation of the Agreement. Plaintiff also alleged irreparable harm as a result of defendant's breach of the Agreement.

¶ 7 On the day the lawsuit was filed, April 19, 2013, the trial court conducted a hearing on plaintiff's motion for temporary restraining order (TRO) with notice to defendant. Upon an agreement between the parties, the court entered a TRO, ordering defendant to remove the pallet fence erected on the common area, and enjoining defendant from erecting any further structure until the matter could be fully litigated.

¶ 8 On April 25, 2013, the trial court entered an agreed preliminary injunction, finding plaintiff had demonstrated (1) a clearly ascertainable right in need of protection, (2) a likelihood that plaintiff would succeed on the merits, (3) plaintiff would likely suffer irreparable harm if an injunction was not granted, and (4) there was no adequate remedy at law. The court ordered the parties to comply with the Agreement, noting defendant was permitted to sell flowers, plants, and trees on the storefront sidewalk (as long as the garden center did not extend more than five feet from the building) between April 1, 2013, and June 30, 2013. The preliminary injunction was to remain in effect pending further order of the court.

¶ 9 In August 2013, defendant filed a motion for judgment on the pleadings. Citing the applicable sections in the Agreement, namely sections 2.02(a) and 2.02(b), defendant

claimed, even accepting plaintiff's allegations as true, defendant's actions did not violate the Agreement. Defendant insisted it had the right to erect a tent in the "common area" and sell plants, flowers, and trees therefrom in accordance with the Agreement.

¶ 10 In September 2013, plaintiff filed a cross-motion for judgment on the pleadings. Plaintiff, relying on sections 1.03, 1.09, and 3.01 of the Agreement, acknowledged defendant *was* allowed to sell flowers but such sale should not obstruct or interfere with traffic through the "common area," affect the total amount of parking in the area, or include the construction of a building or structure of any kind. Plaintiff claimed, if the parties had intended to allow defendant permission to erect a tent for all items necessary for the sale of flowers, they would have explicitly allowed the same in the Agreement. In section 2.02(a), the Agreement authorizes plaintiff to "display[] not more than 4 small sheds, approximately 10' x 10' in size each, more or less, in the southeast corner of said north parking lot." The parties did not include such authorization for defendant's tent sale.

¶ 11 On November 19, 2013, the trial court conducted a hearing on the pending motions. After considering the parties' arguments, the court took the matter under advisement. On December 10, 2013, the court entered a permanent injunction in favor of plaintiff. The court found (1) plaintiff had shown it had a clearly ascertainable right in need of protection, (2) the allegations in the complaint established a *prima facie* claim for injunctive relief, (3) plaintiff had demonstrated it would suffer irreparable harm without a permanent injunction, and (4) there existed no adequate remedy at law. The court entered the following orders: (1) plaintiff's cross-motion for judgment on the pleadings was granted; (2) defendant's motion for judgment on the pleadings was denied; and (3) defendant was enjoined from erecting "fences, curbings, barriers, walls, structures or other obstructions on the Common Area."

¶ 12 Defendant filed a motion to reconsider. On February 4, 2014, the court entered a subsequent order denying defendant's motion to reconsider, reiterating its entry of a permanent injunction, and making a specific finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), noting there was no just reason to delay enforcement or appeal despite the fact defendant had filed a counterclaim, which remained pending. This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Defendant challenges the entry of the trial court's judgment on the pleadings in favor of plaintiff. Specifically, defendant contends (1) the Agreement expressly authorized defendant to use the common area as it had planned for selling flowers during the spring season without violating the restrictive covenants in the Agreement, and (2) plaintiff failed to establish the elements necessary for granting injunctive relief.

> "Judgment on the pleadings is properly entered in instances where no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. [Citation.] Only those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record may be considered. Moreover all well-pleaded facts and all reasonable inferences from those facts are taken as true. [Citation.] On appeal, the reviewing court must determine whether any issues of material fact exist and, if not, whether the movant was, in fact, entitled to judgment as a matter of law. [Citation.]" *H&M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 209 Ill. 2d 52, 56-57 (2004).

With this standard in mind, we address the issue of whether the Agreement prohibited defendant's planned garden center and activity of temporarily selling plants, flowers, and trees in the shared parking lot.

¶ 15 In determining which activities are prohibited and which are allowed, we must interpret each applicable section or clause of the Agreement in an attempt to ascertain the parties' intent at the time the Agreement was entered. We must also determine whether the Agreement contains any ambiguities.

> "Whether a restrictive covenant is ambiguous is a question of law because that determination necessarily involves a construction of the restriction. [Citation.] The paramount rule for the interpretation of covenants is to expound them so as to give effect to the actual intent of the parties as of the time the covenant was made and as collected from the whole document construed in connection with the circumstances surrounding its execution. [Citations.] When the language of a covenant is unambiguous, clear and specific, no room is left for interpretation or construction. [Citation.]
>
> Restrictions should be given the effect which the express language of the covenant authorizes. [Citation.] While doubts and ambiguities in the covenant should be resolved in favor of natural rights and against restrictions [citation], this generalization cannot be used to ignore or override the specific language of a restrictive covenant. [Citations.] Moreover, a person in whose favor a

> restrictive covenant runs is *prima facie* entitled to its enforcement [citations], and the mere breach of a covenant is sufficient grounds to enjoin the violation [citation]." *Fick v. Weedon*, 244 Ill. App. 3d 413, 416-17 (1993).

¶ 16 "A court will not interpret a contract in a manner that would nullify or render provisions meaningless, or in a way that is contrary to the plain and obvious meaning of the language used. [Citation.] Further, when parties agree to and insert language into a contract, it is presumed that it was done purposefully, so that the language employed is to be given effect." *Thompson v. Gordon*, 241 Ill. 2d 428, 442 (2011). Because the resolution of this issue involves the interpretation of the various provisions of the Agreement and determining whether those provisions are ambiguous, our review is *de novo*. *Shields Pork Plus, Inc. v. Swiss Valley Ag Service*, 329 Ill. App. 3d 305, 311 (2002). This standard of review also applies when, as here, we review a judgment on the pleadings. See *H&M Commercial Driver Leasing, Inc.*, 209 Ill. 2d at 56-57.

¶ 17 The resolution of this case centers primarily on the interpretation of the following four sections of the Agreement.

> "Section 1.03. Except as may be shown on the Site Plan, no signs, fences, hedges, curbings, barriers, walls[,] structures or other obstructions which would prohibit or interfere with the free flow of pedestrian or vehicular traffic between the Sites shall be erected on the Common Area portions of the respective Sites. Notwithstanding the foregoing, each Owner may reasonably limit

construction traffic over such Owner's Site so long as reasonable access to the Total Site is permitted.

* * *

Section 1.09. Each party hereto reserves the right, from time to time, without obtaining consent or approval of the other parties hereto, to make any changes, modifications or alterations in its portion of the Total Site which are not subject to the Common Area easements herein provided; however, it being expressly understood that neither the visibility of the respective Sites nor the accessibility of the respective Sites to pedestrian and vehicular traffic shall be altered or restricted thereby and, also, that the total amount of the parking area on the *** respective Sites is not, and shall not be, reduced. Seller, however, may build an addition adjacent and to the east of his main building on Parcel A to the east of the main building on said Parcel and may reduce said parking by any amount provided, however, that sufficient access in favor of Parcel B is maintained across said area to the east of said main building. *** The parties hereto shall mutually agree upon the reasonable rules and regulations with respect to the traffic flow in the Total Site. *** Seller shall have the right, however, to construct additional buildings on Parcel A to the southwest of the main building and adjacent and to the east of the main building provided, however, that the ingress and egress for delivery to the

rear of Parcel B over Parcel A in said southwest corner of Parcel A shall always be sufficient in area so that there will be access by semi-trailers and room for one (1) semi-trailer to turn around. Any such additions or additional buildings in said southwest corner area shall not be constructed in any manner that shall prohibit the deliver or turn around of a semi-trailer truck to serve Parcel B. Any additions constructed adjacent and east of the main building on Parcel A shall be permitted so long as there shall continue to be access across the remainder of said Parcel, to the rear of the main building shown on Parcel A and to the southwest corner of said Parcel A, so as to continue to provide access to the rear of Parcel B.

* * *

Section 2.02. Each party shall:

(a) Prohibit the sale or display of merchandise in the Common Area, except that each party [m]ay for a period no longer than 10 days at a time sell in the north parking lot, each in their respective parcels, as long as said sales area is in front of the first row of lights as shown on the Site Plan and may erect tents in said areas and conduct sales of goods and merchandise no more than 4 times per year for 10 days at a time. Nothing in this paragraph, however, shall prohibit either party from conducting occasional sidewalk sales or other occasional special events as long as said

sales or events shall not unreasonably restrict the free flow of pedestrian traffic between Parcels A and B. Further, nothing in this paragraph shall prohibit the owner of Parcel A from displaying not more than 4 small sheds, approximately 10' x 10' in size each, more or less, in the southeast corner of said north parking lot. Said display buildings shall be replaced or remodeled every two years and shall be of a pleasing color and kept in a neat appearance. *It is further understood and agreed however, that Buyer may on Parcel B, sell Christmas trees from November 15 through December 31 of each year and conduct the sale of flowers, plants and trees from April 1 through June 30 of each year in said area.*

(b) Subject to the foregoing rights, Buyer and Seller shall prohibit the Common Area from being used for any purpose other than for ingress and egress, parking and the like for customers, invitees and business visitors of the Retail Stores ***.

* * *

Section 3.01. Neither Seller nor Buyer shall construct or permit to be constructed any buildings or structures of any kind on the parking area and main entrance that is north of the retail buildings along Wabash Avenue in front of said buildings shown on Parcels A and B." (Emphasis added.)

¶ 18 Plaintiff relies on sections 1.03, 1.09, and 3.01 to support its claim; whereas, defendant relies on section 2.02. Each party claims the sections respectively relied upon

unambiguously define what activities are authorized, and likewise prohibited, under the Agreement.

¶ 19 When the provisions of the Agreement are read as a whole, it is clear to this court the parties intended to allow defendant the opportunity to construct a seasonal, temporary, or makeshift garden center from which he could sell plants, trees, and flowers in the common area between April 1 and June 30 each year. Therefore, we disagree with plaintiff and the trial court's interpretation of the provisions at issue.

¶ 20 Section 1.03 sets forth certain restrictions with regard to each party's use of the common area or parking lot. This lot spans the distance across each storefront from east to west to the north of the businesses. This lot is divided in half in terms of ownership, but is actually one continuous lot. Pursuant to section 1.03, neither party shall erect "signs, fences, hedges, curbings, barriers, walls[,] structures or other obstructions which would prohibit or interfere with the free flow of pedestrian or vehicular traffic between the sites." Plaintiff claims the garden center, made of a stacked wooden boundary, a tent, tables, cash registers, and an inventory of plants, flowers, and trees, violates the Agreement in that it will (1) reduce the number of parking spaces by 25, including a handicap space, in violation of section 1.09; (2) interfere with the free flow of pedestrian and vehicular traffic in violation of section 1.03; (3) negatively affect the visibility of the respective sites in violation of section 1.09; and (4) consist of a "structure" in the parking area north of the retail stores along Wabash Avenue in violation of section 3.01.

¶ 21 Plaintiff claims the term "structure" is unambiguous and includes defendant's planned garden center. We note the following:

> "A contract must be enforced according to its terms or not at all, and a court has no authority to compel the party to do something

> other than that which he has agreed to do in his contract. [Citation.] When construing a contract, the court's primary objective is to ascertain the intent of the parties as evidenced by the language used. If the terms of a contract are unambiguous, then the intent of the parties must be ascertained solely from the words used; a contract is not rendered ambiguous simply because the parties failed to agree upon its meaning. [Citations.] A contract is ambiguous if its terms are capable of being understood in more than one sense because either an indefiniteness of expression or a double meaning is attached to them. [Citation.]" *Village of Grandview v. City of Springfield*, 122 Ill. App. 3d 794, 797 (1984).

¶ 22 If we were to accept plaintiff's claim that defendant's proposed temporary garden center, which includes a fence-like barrier, a tent, tables, cash registers, and plant inventory, was prohibited as a "structure *** which would prohibit or interfere with the free flow of pedestrian or vehicular traffic between the Sites" within the meaning of section 1.03, then the explicit authorization to sell plants, flowers, and trees between April 1st and June 30th each year pursuant to section 2.02 would be rendered meaningless. Section 2.02, which generally prohibits the sale of merchandise in the common area, allows for specifically named exceptions to this general restriction. One such exception provides each party may erect tents and sell merchandise on their respective side of the common area for no more than 10 days at a time and no more than 4 times a year. A second such exception provides each party may conduct occasional sidewalk sales, which presumably would occur on each party's respective sidewalk directly in front of their store. A third such exception allows plaintiff to display four small sheds in the southeast

corner of the common area. The fourth and final such exception allows defendant to sell Christmas trees between November 15th and December 31st and flowers, plants, and trees from April 1st through June 30th of each year "in said area." "Said area" refers to the "common area."

¶ 23 Specifically allowing these exceptions to the no-selling-in-the-common-area rule set forth in section 2.02 indicates the parties intended to authorize temporary (with the exception of the sheds) "structures" for the stated purposes. If the parties had intended to *always* prohibit "structures" in the common area, the allowed four exceptions set forth in section 2.02 would be rendered meaningless. See *Thompson*, 241 Ill. 2d at 442 ("A court will not interpret a contract in a manner that would nullify or render provisions meaningless, or in a way that is contrary to the plain and obvious meaning of the language used.").

¶ 24 Likewise, section 3.01 prohibits either party from constructing "any building or structures of any kind on the parking area and main entrance that is north of the retail buildings." Because the parties had earlier, in section 2.02, addressed when and what type of structures were permissible, it is reasonable to assume this restriction refers to any building or structure of a permanent nature not previously addressed in the Agreement.

¶ 25 Plaintiff contends section 2.02 cannot be read in isolation of the restrictions set forth in the remaining covenants of the Agreement, namely sections 1.03, 1.09, and 3.01. Plaintiff acknowledges defendant has the right to sell flowers, plants, and trees as long as the sale does not (1) obstruct or interfere with the free flow of pedestrian or vehicular traffic between the sites, (2) affect the visibility of the businesses, or (3) reduce the total amount of parking. It is plaintiff's contention that defendant may sell flowers, plants, and trees, but may not construct "buildings or structures *of any kind* on the parking area" to do so. We disagree with plaintiff's

interpretation. In order to sell flowers, plant, and trees, defendant would need to construct some type of area within which to do so. Plaintiff's interpretation is too restrictive and unreasonable.

¶ 26 In drafting section 1.03, this court believes the parties intended to prohibit the *permanent* construction of "fences, hedges, curbings, barriers, walls[,] structures or other obstructions which would prohibit or interfere with the free flow of pedestrian or vehicular traffic between the Sites." When reading this section in light of the remainder of the Agreement as a whole, it appears the parties intended that neither would construct nor erect any kind of barrier that could prevent customers from being allowed to drive or walk from business to business across the lot on a permanent basis. However, that being said, it is clear the parties intended, according to section 2.02, to allow for such sales, which ultimately would require a structure for support and designation of the particular area, on a temporary or seasonal basis.

¶ 27 This court interprets section 2.02 to allow defendant to establish a seasonal and temporary garden center as it had planned. Our interpretation is supported by the explicit language of section 2.02, which clearly allows the parties "to erect tents in said areas and conduct sales of goods and merchandise no more than 4 times per year for 10 days at a time." The section goes on to state that "[n]othing in this paragraph, however, shall prohibit either party from conducting occasional sidewalk sales or other occasional special events as long as said sales or events shall not unreasonably restrict the free flow of pedestrian traffic." The "nothing in this paragraph" language was likely included so as not to limit the parameters of these special or seasonal sales. It appears the tents, for example, were not intended to be allowed *only* with the sale that could occur "4 times per year for 10 days at a time." We find plaintiff's position that the parties intended to allow for the tents during certain times but not others illogical, as the problems associated with these tents, according to plaintiff, would exist during the permissible

times as well. Further, we find nothing in the Agreement that would prohibit the extra items necessary to effectuate the occasional or seasonal sale, such as tables or cash registers. Such items are necessary in the conduct of such sales.

¶ 28 It is reasonable to assume any sale which would transpire in a parking lot would effectively reduce the number of available parking spaces in that lot. Thus, the restriction set forth in section 1.09, which prohibits either party from making changes to their respective site which would reduce the number of parking spaces, was not in reference to the occasional or seasonal sales. According to the Agreement, the number of parking spaces shall not be altered or restricted by any "changes, modifications[,] or alterations" made to either party's portion of the total site. To be logical, these "changes, modifications[,] or alterations" likely refer to *permanent* changes, not to the occasional or seasonal sales temporarily conducted throughout the year.

¶ 29 In sum, we find no ambiguity in the restrictive covenants set forth in the Agreement. Even if there were an ambiguity in the applicable sections of the Agreement, any doubt or ambiguity should be resolved in favor of natural rights and against restrictions. *Fick*, 244 Ill. App. 3d at 417. That being said, we are of the opinion that defendant's establishment of a temporary garden center, which would include a boundary surrounding the area, a tent to house the plants, flowers, and trees, and the other necessary items to effectuate a sale, such as tables and cash registers, is not prohibited under the terms of the Agreement. We find the trial court erred in granting plaintiff a judgment on the pleadings and a permanent injunction. Thus, we reverse the court's order denying defendant's motion for judgment on the pleadings.

¶ 30 " '[R]estrictions that interfere with the free use of property are not favored in law, and all doubts must be resolved in favor of the free use of property without restrictions.' " *Ruble v. Sturhahn*, 348 Ill. App. 3d 667, 676 (2004) (quoting *Krueger v. Oberto*, 309 Ill. App. 3d 358,

370 (1999). Defendant's proposed use of his property in this case does not violate the restrictive covenants in the Agreement. Instead, defendant's proposed use of its property in this case is consistent with the uses and restrictions contemplated by the parties and set forth in the Agreement.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we reverse the trial court's judgment on the pleadings in favor of plaintiff, vacate the permanent injunction, and reverse the order denying defendant's motion for judgment on the pleadings.

¶ 33 Judgment reversed; order vacated.