

IN THE COURT OF COMMON PLEAS OF FAIRFIELD COUNTY, OHIO

TED STACY, ET AL.,

Plaintiffs,

vs.

WILL SNELL, ET AL.,

Defendants.

CASE NO. 06 CV 1263

JUDGE BERENS

ENTRY

FILED
2007 JAN -4 PM 3:51

ROBERTA SHALLEY
CLERK OF COURTS
FAIRFIELD CO. OHIO

This matter came before the Court on December 28, 2006 for a hearing regarding Plaintiffs' Motion for a Preliminary Injunction. On that date, the parties presented evidence for and against the Motion.

In order to obtain an injunction, Plaintiffs must prove, by clear and convincing evidence (1) that they have a substantial likelihood of success with regard to the merits of the claims upon which their motion for injunction is based (2) that Plaintiffs will suffer irreparable harm if the injunction is not granted; (3) that no third parties will be unjustifiably harmed by an injunction and (4) that the public interest will be served by an injunction. Blakeman's Valley Office Equipment, Inc., vs. Breedman (2003) 152 Ohio App. 3d 86. No one factor is dispositive, as the Court is to balance the equities involved. Blakeman.

A. Necessity of Clear Right.

Injunctions are issued to prevent injury to clear rights, not when rights are doubtful or the facts in support thereof are not ascertained. Clay vs. Hamson Hills City School District, (C.P. 1999), 102 Ohio Misc 2d 13. In the Second and Third Claim (Paragraphs 22 through 50) of their Complaint,

Plaintiffs set forth the basis of their claims for injunctive relief.

In the Second Claim, Plaintiffs allege that Defendants have - in multiple ways- violated the Code of Regulations, Constitution and Bylaws (hereinafter "Bylaws") of the Chevington Woods Civic Association (hereinafter "CWCA").

Plaintiffs claim:

- (A) That Defendants are violating the Bylaws by operating the Board of Trustees with less than the required number of trustees, (i.e. 15), with at least one (1) trustee for each area of the subdivisions which together constitute Chevington Woods;
- (B) That Defendants are violating the Bylaws by failing to hold elections each year at an annual meeting;
- (C) That Defendants are violating the Bylaws by not complying with the requirement which Plaintiffs contends exists in the Bylaws that each trustee serve a two (2) year term.
- (D) That Defendants have and are misinforming CWCA members regarding their right to vote at CWCA meetings.
- (E) That Defendants have made de facto amendments to the bylaws concerning the authority of the board of trustees, the procedure for elections, the timing of elections, the terms of the trustees, the voting rights of members, the setting of dues years and collection of dues.

With regard to their Third Claim, Plaintiffs assert that:

- (A) Defendants have acted as the Architectural Control Committee (a committee created by the original deed provisions relative to this matter) without authority to do so;

- (B) That Defendants seek to enforce deed restrictions relating to construction and operation of yard lampposts and storage of recreational, camping and other vehicles when such deed restrictions have been waived due to lack of enforcement for an extended period of time; and
- (C) That Defendants have, without authority to do so, instituted a civil lawsuit against a former Chevington Woods resident.

Plaintiffs have the burden of proving a substantial likelihood of success on the merits of these claims by clear and convincing evidence, i.e., proof - that although not necessarily conclusive is so strong that it produces in the mind of the Court a strong belief or conviction.

Upon application of this standard, the Court finds that Plaintiffs have not proven, based on the evidence produced thus far in this proceeding by clear and convincing evidence a substantial likelihood of success on the merits of their claims contained in the Second and Third Counts of their Complaint, except as noted herein.

With regard to Plaintiffs' claims that the Bylaws require a trustee from each subdivision area, the parties agree that this is a correct interpretation of the Bylaws and, based on the evidence presented thus far in these proceedings, Plaintiffs have proven that a trustee from every area was not on the Board of Trustees at all times relevant to the Plaintiffs' Complaint, in particular Area 15. Clear and convincing evidence thus exists with regard to this aspect of Plaintiffs' claims. However, while it is clear that such is the case, it is equally clear based on the testimony thus far, that Defendant solicited candidates for nominations and elections to the Area 15 trusteeship. Plaintiff Carol Comanita testified that this was the case and the CWCA 's May 2006 Newsletter, (Defendants' Exhibit B) reflects the

efforts the Board employed to solicit nominations. Thus, while the fact that the CWCA was operating at times without an Area 15 trustee may be relevant to the Declaratory Judgment aspect of this case, it is not relevant to the Preliminary Injunction aspect of this case. Injunctive relief is to be granted to prevent future harm or damages. It appears to the Court that the CWCA is making a good faith effort to solicit nominees for Area 15. Thus, there is no harm to prevent and thus no right to injunctive relief.

With regard to Plaintiffs' assertions that Defendants are violating the Bylaws by failing to hold elections each year and that the Bylaws require each trustee to serve a two year term, the parties do not agree on this interpretation of the Bylaws and the evidence presented concerning these matters does not convince the Court, by clear and convincing evidence that such is the case. The same is true with regard to Plaintiffs' claim that Defendants have misinformed CWCA members regarding their rights to vote as CWCA members. While Plaintiffs produced some evidence regarding this point, Defendants' interpretation regarding what the Bylaws require is not the same and the Court, upon review of the applicable section of the Bylaws finds that reasonable minds can differ concerning what is required. Thus, Plaintiffs have not established proof in this regard by clear and convincing evidence.

With regard to the Plaintiffs remaining claims in the Second Count of the Plaintiffs' Complaint, i.e., that Defendants have, by their actions made de facto amendments to the Bylaws concerning the authority of the board of trustees, the procedures and terms of elections, the terms of trustees, the voting rights of members and matters concerning the amount of and collection of dues, the Court, for the reasons stated previously finds that clear and convincing evidence was not produced.

In sum, the Plaintiffs have proven, by clear and convincing evidence that, with regard to the claims contained in Plaintiffs' Second Count, only that the Defendants have not operated the Board of

trustees with at least one trustee from each area at all times relevant to this Complaint. However, for reasons stated herein, this determination does not in and of itself cause the Court to order a preliminary injunction on behalf of Plaintiffs.

With regard to the allegations in Plaintiffs' Third Claim, that the Defendants have, without authority to do so, acted as the Architectural Contract Committee, Defendant Will Snell testified that while a Deed Restriction Committee (hereinafter DRC) did meet and act within the providence of the CWCA it was not acting as the Architectural Contract Committee and the DRC was a distinct and separate entity. Plaintiffs did not produce clear and convincing evidence to the contrary.

With regard to the allegations in Third Claims that the Defendants have, without authority to do so, instituted a lawsuit against Chevington Woods resident, the Court is not convinced by clear and convincing evidence that a litigation was instituted, where and by whom. In fact, Plaintiff Eugene Bednarski said that he was not aware of the CWCA suing anyone for deed restrictions. Assuming arguendo that a civil complaint has been filed, it is not clear, based on the evidence presented whether this violates the Bylaws and gives rise to injunctive relief.

With regard to the final aspect of Plaintiffs' assertions in their Third Claim, Plaintiffs assert that as a result of lack of enforcement of deed restrictions for an extended period of time (relating to construction of lampposts and storage of recreational and other vehicle) all such deed restrictions have been waived and are no longer enforceable. Plaintiffs produced testimony from several long-term residents who testified that boats and other recreational vehicles have been stored in the community for many years. Testimony was presented that as many as 20% of the property owners park a recreational vehicle on their properties at certain times of the year. On the other hand, testimony was also

presented that some property owners store their recreational vehicle other than on their property. The Court can reasonably infer therefore that some owners are aware of the restrictions and choose to comply while others choose not to comply. In any event, it is clear that Defendants have not - at least since May 2005 - ignored those who choose to not comply. See Plaintiffs' Exhibit 1, letter from CWCA to Plaintiff Manukian regarding a "boat violation". Additionally, Defendant, Will Snell, who has been a trustee since January, 2003, testified that since becoming a trustee the CWCA tried to enforce deed restrictions and even before he was trustee he was aware of actions in this regard. In particular, he testified that CWCA Newsletters prior to January 2003 contained information regarding deed restrictions. Based on the totality of the evidence presented regarding this case, it does not appear to the Court that Plaintiffs have proven their claims in this stage of the proceedings by clear and convincing evidence. Lastly it appears to the Court, from a review of the CWCA Newsletters (Defendant's Exhibit D) that as far back as the years 1974 the deed restrictions were a matter of concern by and public comment upon by the CWCA.

B. Adequate Remedy at Law.

Plaintiffs have the burden to prove, by clear and convincing evidence that they have no adequate remedy at law. In order to qualify for injunctive relief, a Plaintiff must demonstrate that the requested injunction is "necessary to protect a clear right from immediate and irreparable harm when any other remedy at law is inadequate." *Agrigeneral vs. Lightner* (1998) 127 Ohio App. 3d 109.

Defendants contend that the Bylaws of the CWCA provide the parties "with recourse which obviates any need for any injunction". In particular, general meetings may be called by residents of Chevington Woods; officer and trustees of CWCA may be recalled through a petition process;

members can form committees to investigate, consult or negotiate with trustees; and members have petition rights appoint any action or vote of the trustees.

At the hearing concerning this matter, several witnesses testified concerning these matters. Plaintiff Eugene Bednarski testified that he has not attended CWCA Board of Trustees meetings for at least the last 18 months because of the way the CWCA "was being run", although he had been to meetings prior to that period of time during which he made recommendations regarding deed restrictions. Despite receiving registered letters from the CWCA within the last 12 months regarding alleged deed restriction violations occurring on his property, Mr. Bednarski did not attend any CWCA meetings. Moreover, Mr. Bednarski, although aware of the process contained in the Bylaws regarding modification of the Bylaws, did not ever initiate any formal action to do so. He testified that he did not take (nor is he aware of any other Plaintiffs taking) formal action to change a deed restriction, remove a trustee or to challenge a specific action of the Board.

Plaintiff Don McMillen also testified that he did attend some CWCA meetings after he moved into the area in 2000, and that at the last meeting he attended he felt his contribution to the discussions was not wanted. Despite this and despite his disagreement with certain actions of the CWCA, he has not ever taken any action to formally challenge any action of the CWCA through the various processes outlined in the Bylaws.

Plaintiff V. Alex Manukian, on the other hand, testified the he did challenge specific actions CWCA was attempting to take against him in the enforcement of certain deed restrictions. See also Plaintiffs' Exhibit 4, letter dated August 10, 2005 from Plaintiff V. Alex Manukian. As a result of Plaintiff Manukian's challenges to the deed restrictions, the CWCA sought an advisory legal opinion

from their counsel (see Plaintiffs' Exhibit 5). Defendant Will Snell testified that as a result of this opinion the CWCA Board decided to not attempt to enforce the deed restrictions relating to the construction of "detached outbuildings" (sheds). Although the Articles themselves neither preclude, nor provide for the manner in which a sole member such as Mr. Manukian challenged the actions of the Board (see Article X, Section 3 of the Bylaws which only provide for a petition process by a group of at least 250 members, not a sole member), the CWCA Board responded to Plaintiff Manukian's Complaint and at least, in part agreed with his position.

Other witnesses presented testimony concerning Plaintiffs' contention that the Board has not responded to residents' concerns in the past and that therefore is no reason to believe the Board would do so in the future. Specifically, Harlene Eggleston testified that there currently is no trustee in Area 15 and that she cannot recall there being one for at least the last 10 years and that this concerns her and other residents of this area. On cross examination, she stated, however, that she was not aware of anyone seeking appointment and/or election as a trustee who was denied the opportunity to do so. Additionally, she testified that she had not attempted to utilize any of the procedures set forth in the Bylaws to alter the membership of the board and/or challenge the Board's actions.

Plaintiff Gina Stacy testified as to the efforts to become a member of the Board of Trustees. After apparently being told that she was appointed as a Board member, representing Area 14, she was later told she would have to stand for election. She submitted her request to be nominated to a committee and her name appeared on the ballot. She was not selected and asserts that this was the result because of improvements concerning tallying of votes. Ms. Stacy stood for election in June, 2006, but did not seek election to the Board in this most recent election which took place in December

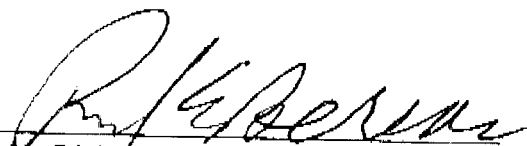
2006, because, as she asserts, she was not aware there was a nominating committee formed relative to this election. Defendants produced evidence to support their contentions that the nominations and election process were conducted properly - see Defendants' Exhibit B, CWCA May, 2006 Newsletter. Notwithstanding Plaintiffs' assertions that the June 2006 and December 2006 elections were not valid (because non-dues paying members' votes were not counted and/or votes from out of area members were improperly counted which the Court has determined has not been proven by clear and convincing evidence) it appears to the Court that the Plaintiffs have made efforts to provide for a fair nomination and election process. The Court does not agree with Plaintiffs assertions that it would be futile, as an alternative to other injunctive relief, to seek the remedies they request through the procedures set forth in the Bylaws. Additionally, it appears to the court, based in part on the Board's willingness to consider and acquiesce to Mr. Manukian's requests, that the Board is being responsive to other members' concerns. In sum, it appears to the Court that the Board is willing to comply with its Bylaws. The Court concludes, therefore, that the Plaintiffs have at their disposal an alternative remedy other than preliminary injunctive relief, to wit, the procedures in the Bylaws, specifically set forth in Article IV, Section 6; Article IX, Sections 1 and 2; and Article X, Sections 1, 3, and 4.

C. Irreparable Harm.

In Plaintiff's Reply Brief in Support of Preliminary Injunction, Plaintiffs address the issue of irreparable harm. Plaintiffs assert that if Defendants are permitted to act Plaintiffs will suffer monetary loss because the CWCA will be improperly spending funds. Based on their assertion and the evidence submitted at that the Court considered that Plaintiffs have not shown by clear and convincing evidence that they will suffer irreparable harm, as monetary losses are irreparable.

D. Conclusion.

As the Plaintiffs have not shown, by clear and convincing evidence that they have a clear right concerning the merits of their claims, that other alternatives besides injunctive remedial relief are available, that Plaintiffs will not suffer irreparable harm and because the Court concludes based on the totality of the circumstances that the public interest and third parties would unjustifiably be harmed by a preliminary injunction, the Plaintiffs' motion for a Preliminary Injunction is hereby OVERRULED. This matter shall proceed accordingly. There is just cause for delay.


Judge Richard E. Berens

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