

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

KAREN LYNN SCHNEIDERMAN,)
MELVYN and SUELLEN ESTRIN and)
ROBERT SNYDER,)
)
Plaintiffs,)
)
v.) C. A. No. 3887-MG
)
NORTH SHORES BOARD OF)
GOVERNORS, INC.,)
)
Defendant.)

MASTER'S REPORT
(Motion to Dismiss)

Date Submitted: May 8, 2009
Additional Submissions: October 27, 2009
Final Report: November 16, 2009

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GLASSCOCK, Master

This matter involves North Shores, a private beach resort between the town of Henlopen Acres and Cape Henlopen State Park. The plaintiffs, Karen Lynn Schneiderman, Melvyn and Suellen Estrin and Robert Snyder, are beach-front property owners in North Shores. The defendant is the North Shores Board of Governors, Inc. (“the Board”), the entity responsible for the management of the community. It is also a property owner of certain lands in the community, as a successor to North Shores, Inc., the developer (“NSI”). The Board owns the beach area of the community, which is subject to an easement in favor of the lot owners of the community to use the beach for recreational purposes. Plaintiffs’ lots adjoin the beach to the west. West of the plaintiffs’ lots is a public street, Ocean Drive. The Board also owns several ten-foot-wide beach access ways (“the alleyways”), some of which adjoin the plaintiffs’ lots. The Board has constructed boardwalk-style dune crossings in these alleyways, by which residents of North Shores may access the beach.

The plaintiffs in their amended complaint ask this Court to order the removal of the dune crossings, on three grounds: that the structures were erected without their permission, as required by deed; because the structures constitute a nuisance; or because the structures as built or used overburden the easements upon which they are located. The defendant has moved to dismiss under rule 12 (b)(6) for failure to state a claim upon which relief can be granted. The matter has been briefed and argued. This is my report on the defendant’s motion.

I STANDARD

I may grant a motion under Rule 12(b)(6) only where, assuming the truth of the well-pled allegations of the complaint and all reasonable inferences therefrom, I find with reasonable certainty that the plaintiffs cannot prevail. *E.g.* Xu Hong Bin v. Heckmann Corp., Del. Ch., No 4637, Chandler, Ch.(October 26, 2009)(Mem. Op.) at 5.

II DISCUSSION

1) Plaintiffs' Theory Based on Deed.

In a "Deed of Easement"¹ created in 1958, as North Shores was in the first stages of development, NSI granted an easement to "all present and future owners of any lot or lots situate in North Shores development" for access to the beach for purposes of "sun bathing" and recreation. The area of this easement is described as follows:

[b]ounded on the East by the waters of the Atlantic Ocean; bounded on the West by the Easternmost line of lots laid out upon the aforesaid Supplementary Plot No. 1, North Shores, Inc.; bounded on the South by the common boundary between North Shores, Inc. and the lands of Henlopen Acres, Inc.; and bounded on the North by the common boundary line between North Shores, Inc. and the Public Lands of the State of Delaware; all as designated upon said "Supplementary Plot No. 1, Lands of North Shores, Inc.," as "North Shores Private Beach."²

¹ The Deed of Easement is attached to the amended complaint.

² Supplementary Plot No.1 is attached to the amended complaint.

In addition to providing the easement to the North Shores Private Beach area (the “Private Beach”) for the benefit of the lot owners of North Shores, the Deed of Easement gives a special right to owners of beach-front property lots in North Shores. After the conveyance described above, the deed provides

FURTHER, the party of the first part, for itself and its successors and assigns, does covenant, promise and agree to and with the parties of the second part, their respective heirs, successors and assigns, as the case may be, that no building, structure or obstruction of any kind shall ever be erected or constructed upon said tract, piece or parcel of land abovedescribed, nor shall any business or commercial enterprise be operated or conducted thereon, without first obtaining the unanimous written consent of the then record owners of all the easternmost lots laid out upon the aforementioned Supplementary Plot No. 1, Lands of North Shores, Inc.

Thus, the beach-front property owners, including the plaintiffs here, have a veto right over construction on the Public Beach.

The Board has constructed, pursuant to Delaware Department of Natural Resources and Environmental Control (“DNREC”) permits, dune crossings to provide access to the beach. These dune crossings are constructed within alleyways that connect the interior roads of North Shores and the beach. Each alleyway runs between two beach-front lots. The plaintiffs have challenged the construction of dune crossings in alleyways near the eastern ends of Cedar, Holly and Farview Roads. These dunes crossings are structures constructed without the unanimous written consent of the “easternmost lot owners”—that is, without the consent of the plaintiffs here. The question presented, therefore, is a simple one of deed interpretation: Does the area that the Deed of Easement

creates, within which construction is prohibited absent plaintiffs' consent, include the alleyways near the eastern end of Cedar, Holly and Farview Roads?

The construction of the language of a deed is a matter of law. The language of the deed determines the scope and extent of the property rights granted therein. Rohner v. Niemann, Del. Supr., 380 A.2d 549, 552 (1977). Since the Deed of Easement and the plot plan it refers to, "Supplementary Plot No. 1," are referred to, incorporated and attached to the amended complaint, I may consider them in this motion to dismiss. *See In re Lukens, Inc.*, Del Ch., 757 A.2d 720, 727 (1999).

The beach-front property owners have a right to veto construction only in that area, the Private Beach, over which an easement was conveyed in favor of the North Shores lot owners in the Deed of Easement. The north, south and east boundaries of the Private Beach are not in dispute. Because I assume that the construction is entirely within the alleyways that connect the road system of North Shores with the Private Beach west of the eastern most lines of the plaintiffs' property, the question is whether those alleys are within the area designate as the Private Beach.³ The area subject to the easement is

³ The complaint seeks injunctive relief with respect to construction in the "beach access ways," however, the complaint is silent with respect to whether any portion of the construction exists east of the alleyways, that is, east of the easternmost property lines of the beach-front lots. The briefing and argument in this matter proceeded as though all construction complained of was in the alleyways westward of those lines. In an effort to resolve this matter without converting the analysis to that appropriate to a motion for summary judgement, I requested that the parties agree whether any of the construction complained of existed to the east of the beach-front lots. The plaintiffs declined "to concede" that the construction was entirely west of the line, but could point to no evidence or allegation of the complaint averring that the construction existed east of the alleyways. "Factual inferences will not be assumed true without specific allegations of fact which support the conclusion." Heckmann Corp. (Mem. Op.) at 5. Therefore,

bounded, by the explicit language of the Deed of Easement “on the West by the Easternmost line of lots laid out upon the aforesaid Supplementary Plot No. 1, North Shores, Inc.....”⁴ The eastern most property line of the lots in North Shores is clearly delineated on that plot. The boundary proceeds to the north and south in a straight line, across the eastern ends of the plaintiffs’ and others’ beach-front lots, the alleyways and other reserved lands retained by the developer. Together with the ocean to the east and the northern and southern boundaries of North Shores, the western boundary creates a near-parallelogram marked on Supplementary Plot No.1 as “North Shores Private Beach.” The alleyways between lots 2 and 3 and 179 and 180,⁵ shown as ten feet wide, are marked on the plot plan, as are the interior roadways of North Shores, together with two large reserved parcels in the middle of the beach-front area. Nothing in the plot plan and, most importantly, nothing in the Deed of Easement, indicates that the “North Shores Private Beach” area includes the alleyways over which the defendant has now built dune crossings.

The plaintiffs argue that, because the plot shows “gaps” in the easternmost property lines at the alleyways, that the call to the “Easternmost line of lots” in the Deed of

based upon the well-pled allegations of the amended complaint together with the documents attached or referenced therein, I assume the construction complained of is entirely within the alleyways.

⁴ I have attached Supplementary Plot No. 1 to this report.

⁵ According to counsel, these lot number designations have changed since the plot plan was created.

Easement should be interpreted as including an area following the alleyways to the west, past plaintiffs' lots, across the interior streets, westward until a private lot line is met. The drafters of the Deed of Easement could have made such a call, describing the Private Beach as running west along the alleyways and across the public roadways (or, more straightforwardly, simply have included the alleyways), but they did not do so. Instead, they provided the western boundary of the Private Beach simply as the easternmost line of lots in North Shores. The plaintiffs' reading of the Deed of Easement is simply incompatible with the plain language of that document.

The plaintiffs argue forcefully that the Private Beach area, as conveyed by the Deed of Easement, must contain these alleyways, because the Deed of Easement explicitly conveys a "perpetual easement and right of way...in and upon, through and across, over and from" the Private Beach. The purpose of this easement, as recited, is for "ingress, egress, regress and passage to and from [the lot owners'] respective lots situate in North Shores, Inc...and the waters of the Atlantic Ocean" as well as to provide "a place of recreation, including sun bathing..." The plaintiffs therefore argue that the beach area delineated in the Deed of Easement must include the alleyways, or its purpose—to provide ocean access—would be frustrated. However, the clear language of the deed provides that the western boundary of the Private Beach is the line—depicted as a straight north/south line running along the eastern boundaries of the easternmost lots—depicted on Supplementary Plot 1. There is nothing in the Deed of Easement describing the Private Beach as including the alleys or, for that matter, the large reserved areas not marked as

lots on Supplementary Plot 1. Plaintiffs' allegations are consistent instead with an argument that the deed, notwithstanding its language, should be interpreted or reformed to include those alleyways because without them, the right of non-beach-front property owners to have access to the beach would be frustrated.

Even if that were true, however, it would not apply to the independent right of beach-front property owners to veto construction on the beach. Nothing about the right of non-beach-front property owners to access the beach is frustrated by the ability of the defendant to construct dune crossings; in fact, the opposite is the case. If the right to veto any construction on the beach extended to dune crossings in the alleyways, the beach-front owners would have the right to frustrate access to the beach for all non-beach-front residents of North Shores. Even if a reformation of the deed were warranted, such reformation would not provide the "right" plaintiffs seek to vindicate here.

The beach-front property owners have the right to veto any construction on the Private Beach. Because I find that the construction complained of here, the dune crossings in the alleyways providing access to the beach, is not within the area to which the veto applies as provided in the Deed of Easement, those counts of the complaint based on the failure of the defendant to obtain consent to the construction of the dune crossings must be dismissed.

2) Nuisance.

The plaintiffs contend that the dune crossings constitute a nuisance in two ways. First, that they are so constructed to create a gathering place attractive to non-beach-front property owners. According to the amended complaint, these individuals congregate on the dune crossings in a way that infringes the quiet enjoyment of the plaintiffs' properties. They talk to one another, and "gawk" at the plaintiffs' residences. Beachgoers also, according to the complaint, tend to injure themselves crossing the dune, "which directly affect[s] the plaintiffs, as victims...have requested aid from plaintiffs."⁶ Second, the plaintiffs contend that the particular dune crossings, as constructed here, provide a substantial risk of injury to the property of the plaintiffs in any storm. As a result, the plaintiffs allege that the dune crossings as constructed constitute a nuisance, and seek an injunction directing the defendant to remove them.

Actionable nuisance arises where one property owner uses or maintains his property so as to impair the reasonable use or enjoyment of his neighbor's property. Artesian Water Co. v. New Castle County, Del. Ch., No. 5106, Hartnett, V.C.(August. 4, 1983)(Mem. Op.) at 15, *citing* Hylton v. Shaffer's Market, Inc., Del. Supr. 343 A.2d 627, 629 (1975). In order to survive a motion to dismiss, the complaint must allege that the use made of the defendant's property has resulted in an unreasonable invasion of the

⁶ Plaintiffs' Response to Defendant's Motion to Dismiss Count IV of Plaintiffs' Amended Verified Complaint, at 2.

plaintiffs' property rights in light of the facts and circumstances present. *See Artesian* (Mem. Op.) at 15.

It is clear to me that the nuisance claim pled here is not susceptible to dismissal under Rule 12(b)(6). The complaint alleges that, because of the method of construction and the height of the dune crossings, and their proximity to plaintiffs' houses, they represent an unreasonable risk of property damage to the plaintiffs' properties in any storm. This leaves a factual issue which may well be the appropriate subject of a motion for summary judgment, but which cannot be resolved at this stage of the proceedings. Because this issue of fact precludes dismissal of the nuisance claim, I need not consider whether the plaintiffs state an actionable claim by alleging that the crossovers attract beachgoers whose "talking and gawking" disturbs the plaintiffs' quiet enjoyment of their properties. Nor do I need to determine whether a claim that the pleas for help of alleged injured elderly beachgoers constitutes an unreasonable interference with plaintiffs quiet enjoyment sufficient to withstand a motion to dismiss. Since discovery must go forward on the nuisance claim in any event, I leave the entire claim to be disposed of by motion for summary judgment or after trial.

3) Easement.

Finally, plaintiffs attempt to state a claim in easement. They contend that the height of the dune crossings in their current iteration, and their use as places of repose by beachgoers, exceed the easement, express or implied, to cross the alleyways. To the

extent that the plaintiffs are arguing a cause of action based on current use exceeding the scope of any easement across the alleyways, that cause of action must fail for lack of standing. The fee ownership of the alleyways has at all times pertinent been in NSI or its successor, the Board. Under the plaintiffs' theory, the alleyways themselves are the servient property, burdened with the right of the lot owners to cross to use the beach. If that burden has progressed beyond the scope of any easement, it is the Board—as owner of the fee—which has standing to enforce the terms of the easement, not the neighboring property owners, whose relief must sound in nuisance or not at all.

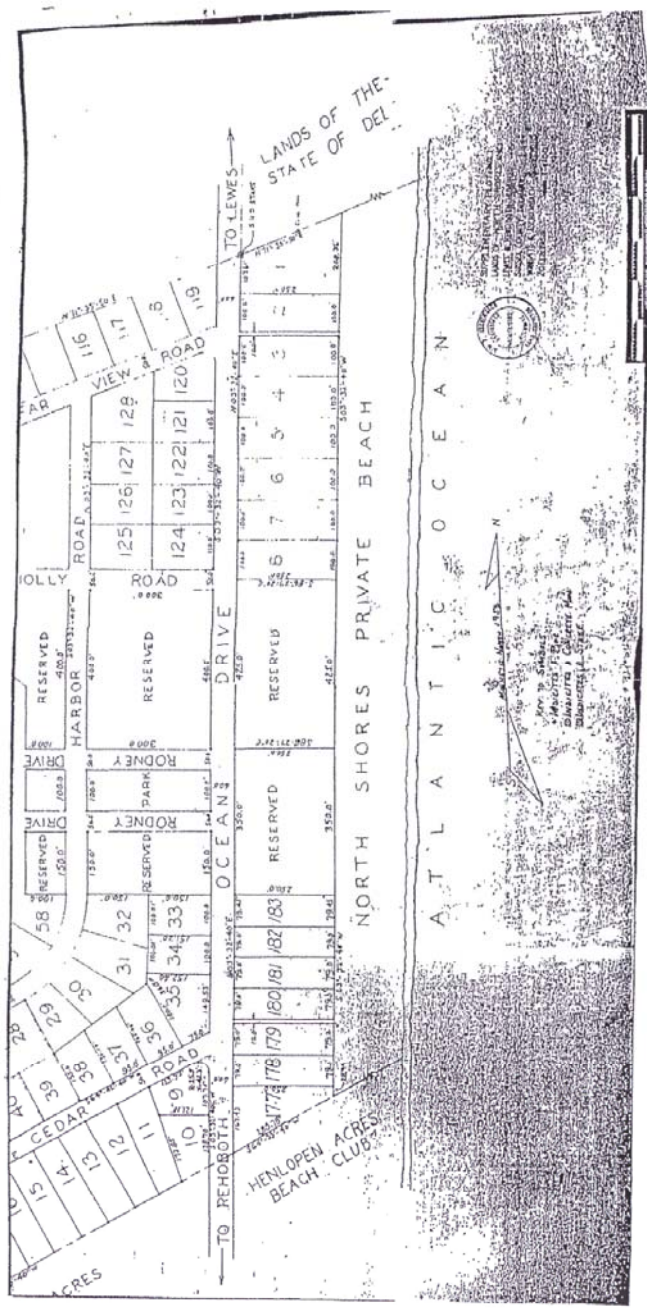
III CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss is granted in part and denied in part.

/s/ Sam Glasscock, III
Master in Chancery

149

Plot 149 - Shoreline



BOUNDARY LINE
of
1/27-1