State of New Hampshire

Superior Court

Carroll County; ss. March, 2016

Case # 212-2015-CV-00203

JOHN SULLIVAN & SUSAN SULLIVAN, PLAINTIFFS

vs.

PROPERTY OWNERS ASSOCIATION AT SUISSEVALE, INC., DEFENDANT

PATRICIA MONAHAN, personally and as an agent, representative or servant of the Property Owners Association at Suissevale, Inc., DEFENDANT

DOE DOE, personally and as an agent, representative or servant of the Property Owners Association at Suissevale, Inc., DEFENDANT

Plaintiffs Memorandum in Support of Preliminary Injunction

1. Suissevale, Inc. Made Enforceable Promises to Covenantees Preventing Changed Covenants

A covenant is an agreement, by the covenantor to do something or to refrain from doing something, which agreement is enforceable by the covenantee. Shaff v. Leyland, 154 N.H. 495, 497 (2006).

The original, 1966 covenants are incorporated into the Sullivans' deed:[1]

> "Subject to restrictions and easements of record and restrictions applicable to 'Suissevale at Winnipesaukee' duly recorded with said Carroll County Registry of Deeds at Book 406, Page 411, as amended."

Suissevale, Inc. is the covenantor and the Sullivans are the covenantees by succession.

Paragraph 24 of the covenants reserves rights to Suissevale, Inc. while simultaneously making promises to the Sullivans:

> 24. Anything herein to the contrary notwithstanding, Suissevale, Incorporated[2] reserves the right to change or modify these covenants and restrictions by duly recorded amendment(s) hereto, but no such change or modification shall have retroactive effect or shall otherwise in any substantial way change the character of the subdivision or otherwise affect lots previously sold.

[1] The original Declaration & extension is attached hereto as **Exhibit A** and the new declaration is attached as **Exhibit H.**
[2] The original ¶ 24 contains an apparent typo. It reads: "Anything herein to the contrary notwithstanding, Suissevale, Incorporated Suissevale, Incorporated shall be deemed. . . ."

Paragraph 1 of the covenants reinforces the intent of the covenantor: "These restrictions may be amended, changed, modified or revoked only as set forth herein." Suissevale, Inc. has promised the covenantees that no changes or modifications to covenants or restrictions shall affect their property. The Sullivans ask the Court to enforce that promise.

2. Suissevale, Inc. Reserved Personal Rights, *Not* Running With The Land

Paragraph 23 declares:

> 23. These covenants are imposed as part of a common scheme for the protection and benefit of Suissevale, Incorporated and each subsequent owner of a lot in the subdivisions, and their respective successors and assigns, shall run with the land and shall be binding on all parties claiming under them for a period of thirty (30) years from July 1, 1966, and as may be extended for successive periods of twenty (20) years by vote of the owners of a majority of lots in said Development. If any provision hereof shall be held invalid by any court, such invalidity shall in no way affect the validity of any other provision hereof.

Wherefore, the covenants: "run with the land" until 1996; and, "may be extended for successive periods of twenty (20) years by vote of the owners of a majority of lots."

In paragraph 24, *supra*, Suissevale, Inc. reserved rights to itself "notwithstanding" any other paragraph. "The plain meaning of the word 'notwithstanding' is '*without prevention or obstruction from or by*' or '*in spite of*'." King v. Sununu, 126 N.H. 302, 306, 490 A.2d 796, 800 (1985).

In paragraph 25, Suissevale Inc. further isolated their "rights" from running with the land by restating "notwithstanding" and declaring:

> 25. Notwithstanding any other provisions hereof, the words "Suissevale, Incorporated" shall be deemed to include any successor or assign of Suissevale, Incorporated to which rights hereunder may be specifically assigned by written and recorded instrument.

Wherefore, Suissevale, Inc. expressly intended that, no entity be regarded as a "successor or assign" unless the authority to exercise Suissevale, Inc.'s rights has been "specifically assigned" in writing and recorded at the Registry of Deeds. Thus, Suissevale, Inc. intended to keep these rights personal without an automatic transfer.

"'Personal' means that a servitude benefit or burden is not transferable and does not run with land." Restatement (Third) of Property (Servitudes) § 1.5 (2000). *See* Shaf, at 498, stating same. "Running with the land means that the benefit or burden passes automatically to successors." Shaff, at 498, *citing Restatement (Third) of Property: Servitudes* § 1.5 comment *a.* at 31 (2000).

Suissevale, Inc. expressly reserved rights to itself, including the right to change or modify covenants and restrictions. Suissevale, Inc. intended those rights remain personal otherwise, there would be no need to specify how those personal rights would leave their control.

Presuming the covenants were extended in 1996 (which the Sullivans dispute), Property Owners Association at Suissevale, Inc. ("POASI") has no "right" to change, modify, re-write or create covenants, because POASI does not have a written and recorded assignment of rights from Suissevale, Inc. (in addition to the prohibition on changes affecting lots previously sold).

3. The So-Called 1976 Decree, Which Doesn't Exist

POASI attached to its Objection a document entitled, "Stipulation for Settlement by Consent Decree." (Exhibit C to POASI's Objection dated February 25, 2016, referenced herein as "**the 1976 document**.")

POASI claims that paragraph # 3 of that document passed **all** the rights of Suissevale, Inc. to POASI. Suissevale, Inc. did not sign that document and Suissevale, Inc. did not assign any rights to POASI as required by the original declaration of Suissevale, Inc. Also, in 1987, POASI entered into an agreement wherein POASI declared the 1976 document represented an attempt to put disputes to rest and, in the 1987 agreement, POASI recognized another entity as successor to Suissevale, Inc. **Exhibit B**, referenced herein as "**the 1987 agreement**." Thus, in 1987, POASI acknowledged that they did not acquire Suissevale, Inc.'s rights under the 1976 document.

The 1976 document was never signed or approved by a judge.[3] POASI claims that a separate document, "Report of the Master," contains a judge's approval and adoption of the so-called "Decree." **Exhibit C**. The "Report of the Master" contains a recommendation that the *"proposed settlement agreement be approved by the Court and entered as a consent decree,"* but there is no explicit reference within the "Report of the Master" which identifies the proposed settlement agreement to be approved. And, the "Report of the Master" is not affixed to any document.

The 1976 document is nothing more than a proposed settlement agreement. The signatories did not agree that POASI could exercise Suissevale, Inc.'s rights under the original declaration. Instead, the signatories employed language indicating that the court may find that POASI is "recognized as the lot owners association to exercise the powers under the recorded covenants." The Court never made such a finding. Keep in mind also that, in the 1987 agreement, POASI recognized R & W Realty Company, Inc., as successor to Suissevale, Inc.

The 1976 document is not a court order. POASI claims the 1976 document allows them to take rights from Suissevale, Inc. which Suissevale, Inc. specifically reserved to itself and never assigned to anyone. POASI's assertion is similar to:

A & B agree that B shall have the rights held by C in Blackacre, and C has not agreed.

Neither A nor B, nor POASI, have a right to strip-away the rights of another person or entity. But, even if this Court now decides that POASI has the right to change or modify the original declaration, such changes or modifications cannot affect the Sullivans' property because paragraph 24 expressly forbids such result (no change or modification may affect lots previously sold).

4. Covenants Expired in 1996

Recall paragraph 23 of the original declaration:

[3] Inexplicably, the 1976 document was not recorded at the Registry of Deeds until 1980, further implying it was not a decree.

> "These covenants . . . shall be binding on all parties claiming under them for a period of thirty (30) years . . . and may be extended for successive periods of twenty (20) years by vote of the owners of a majority of lots . . . ."

In 1996, POASI caused an "Extension to Declaration of Easements, Covenants, and Restrictions" and a "Certificate of Vote" to be recorded at the Carroll County Registry of Deeds. Said documents purported to extend the original declaration for twenty (20) years and the Certificate of Vote stated, "Signed ballots evidencing the vote are available for inspection at the offices of POASI during its regular business hours." These "signed ballots" were not recorded at the Registry of Deeds. In response to a subpoena requiring production of the ballots, Atty. Pappas (one of POASI's attorney) informed the Sullivans that, "POASI did not retain the original ballots from the 1996 vote."

On recently learned information, a majority of owners did not assent to this purported extension. On recently learned information, a majority of owners did not vote and, therefore, a majority did not extend the covenants. Therefore, the original declaration expired and there are no covenants to be changed or modified by POASI or anyone else.

5. Statute of Frauds

Under New Hampshire law, every interest in lands requires an instrument in writing signed by the grantor and no interest in lands shall be assigned, granted or surrendered except by writing signed as aforesaid. N.H. Rev. Stat. Ann. § 477:15 (1996). POASI recorded the purported 1996 extension upon a certification that POASI acted as agent for the lot owners. Unless POASI has "an instrument in writing" signed by the lot owners, the extension is invalid pursuant to the statute. In title disputes, New Hampshire courts are not allowed to rely on circumstantial evidence and weigh whether "it is more probable than not" that a required writing exists or existed. Riverwood Commercial Properties, Inc. v. Cole, 134 N.H. 487, 490 (1991) (denying the existence of chain of title without a writing).

"Covenants burden titles as effectively as easements and should be created with the same formalities, whether the covenant is affirmative or negative, and whether it calls for payment of money

or some other performance. The Statute of Frauds expresses a policy that transactions involving interests in land should be in writing, or be evidenced by a writing, and signed." Restatement (Third) of Property (Servitudes) § 2.7 (2000), *comment a.* "If these requirements are not met, servitudes are terminable at will or unenforceable unless an exemption or exception to the Statute of Frauds applies." Id. *comment d.*

POASI has asked for declaratory judgment "that the Sullivans are bound by the original 1966" covenants.[4] Answer of POASI, Counterclaim Count II, ¶ 13. And, the Sullivans have claimed that the covenants expired in 1996, *supra*, and Complaint ¶¶ 23-25 & 30.

The property interest at issue here, the extension of covenants, is a right reserved exclusively to the lot owners when the majority give assent to an extension. Paragraph 23, *supra.* The statute of frauds requires the assent to be in writing and signed by the owners. The statute is intended to promote certainty and to prevent frauds and perjuries in land transactions. Greene v. McLeod, 156 N.H. 724, 727 (2008). Parol evidence is not permitted to replace the writing requirement because it would circumvent the purpose of the Statute of Frauds." Id.

New Hampshire's statute of frauds is not satisfied by a document signed by an agent unless the agent's authority is in writing. Ashuelot Paper Co. v. Ryll, 109 N.H. 573, 575 (1969). POASI's 1996 "Certificate of Vote" is a document lacking the written authority of the lot owners. Consequently, the statute of frauds applies and the 1996 extension is void and unenforceable.

6. The Sullivans' Water Rights

A. The 1976 Document

POASI has selectively quoted and edited paragraph 11. See POASI's Objection, ¶¶ 10-14. In particular, POASI has manipulated the text of paragraph 11 and to claim that subparagraph V gives

[4] POASI has asserted, without specifics, *laches* in their Answer. But, "a cause of action does not accrue until the plaintiff discovers or, in the exercise of reasonable diligence, should have discovered both the fact of his injury and the cause thereof. McCollum v. D'Arcy, 138 N.H. 285, 286 (1994). POASI recorded a "Certificate of Vote" which invited reliance and concealed the cause of action.

POASI the right to terminate the Sullivans' water supply "on account of unpaid dues." POASI Objection, ¶ 14. Paragraph 11 does not make such statement and cannot be interpreted as such (nor can any other part of the document).

Paragraph 11 addresses the ownership and operation of the water system, and not POASI's voluntary membership dues. Paragraph 11 asserts that POASI may terminate the water supply for unpaid water bills, which is currently a crime. Although the entire document is of no effect, paragraph 11 is nullified by POASI's representations to the New Hampshire Public Utilities Commission ("NH PUC") and the New Hampshire Department of Environmental Services ("NH DES") wherein POASI represented to the State that POASI does not charge property owners for water. (see POASI's Exhibit B attached to its Objection.) POASI made those representations to obtain exemptions from State regulations and remove regulatory protections for property owners. Wherefore, the Sullivans do not owe money to POASI for water.

The Court should also consider paragraph 11, subparagraphs I, II, III, & IV, and paragraph 14. The gist of these paragraphs is that, upon failure of the prior owner of the water system to convey the water system to a public utility or village water district, the water system reverts to POASI "which shall then operate or cause to be operated the system in accordance with subparagraph III, A through F." In general, A through F require compliance with the laws and regulations of the NH PUC. POASI never operated the water system in accordance with the 1976 document,[5] and is further evidence that the document is neither a decree nor an agreement.

B. The 1987 Agreement

In 1987, POASI entered into an agreement which was not intended to be, nor approved as, a decree. **See Exhibit B** entitled, "Stipulation and Settlement Agreement" ("**the 1987 agreement**"). One of the parties to the agreement was R & W Realty Company, Inc. ("R&W").

[5] POASI did, however, obtain an exemption from State regulation in 2003, by claiming it does not sell water to lot owners but, prior to 2003, POASI never operated the water system under state regulations.

In that 1987 agreement, POASI recognized R&W as successor in interest to Suissevale, Inc. and R&W assigned some rights to POASI which were formerly held by Suissevale, Inc. Additionally, POASI agreed as follows:

> Paragraph XI.
> "Undeveloped lots owned by R & W shall be construed as "Inventory Lots". Inventory Lots include those lots acquired by R & W Realty Company, Inc., BCS Financial Corporation or John P. Ryan, either as successors in interest to Suissevale, Inc. or by virtue of default on installment sales contracts. **The parties acknowledge that inventory lots are not subject to charges and assessments of POASI** as enumerated in the Declaration of easements, covenants, restrictions, agreements and charges affecting real property known as Suissevale at Winnipesaukee, a subdivision in Moultonborough, County of Carroll, State of New Hampshire, dated September 12, 1966, as amended. . . ."
>
> Paragraph XII.
> "This agreement shall be binding upon the heirs, successors and assigns of each of the undersigned parties"

Exhibit B (the 1987 agreement), paragraphs XI & XII (emphasis added). POASI and R&W are signatories to the agreement.

The Sullivans' property is one of R & W's inventory lots. See chain of deeds attached hereto as **Exhibit D**. Wherefore, the Sullivans do not owe POASI any money for anything. POASI expressly bargained-for that result in 1987.

C. Breach and Discharge

To the extent that POASI attempts to claim an implied contract replaces the express agreement, the Sullivans disagree but, if the court is somehow persuaded otherwise: (1) POASI has breached, *and continues to breach*, any implied contract; (2) POASI was notified of the breach and asked to cure; (3) POASI did not cure; and, (4) any implied duties owed by the Sullivans are now discharged. Additionally, POASI breached the covenant of good faith and fair dealing.

In July 2015, the Sullivans sent notice to POASI of breach of the Articles of Agreement and POASI by-laws. See **Exhibit E**. The notice contains 17 specific breaches and POASI never responded or cured. Among the breaches: **(1)** POASI failed to allow the Sullivans to vote on corporate matters as

required by governing documents; **(2)** POASI has failed to hold required meetings with, and obtain approval from, property owners on corporate matters as required by governing documents; **(3)** POASI has allowed unqualified people (non-property owners) to hold Director positions; and, **(4)** none of the people currently controlling POASI have been properly elected. Similar concerns were expressed by a sitting POASI Director and other property owners through their attorney. See **Exhibit F**. In November 2015, POASI directed its attorney to break-off discussion of these matters with the Sullivans.[6]

POASI claims it does not require property owners to pay for water. This was the basis upon which they avoided regulation by the NH PUC and the NH DES. Consequently, there is no quasi-contract or novation in this regard. Since the water is free, and POASI is required to provide water, there is no equitable justification to terminate the water supply without judicial process. Keeping in mind also, that self-help termination of water service is both, a crime and a private nuisance in New Hampshire. See Complaint, ¶¶ 56 – 62 for applicable law.

In addition, paragraph 17 of the original declaration promised the following to lot owners, in relevant part:

> "Suissevale, Incorporated, its designated successors or assigns, will whenever possible provide water to be available and maintained with sufficient capacity to serve each house and each lot owner will have the right to tie in to any such available system at an initial hook-up charge of $1,000.00 per lot, plus an initial maintenance and use charge of $35.00 per year."

POASI controls the water system, and the Sullivans are entitled to water under the original declaration even though POASI does not sell water to property owners. This is particularly true because the same paragraph prohibits the digging of a well by property owners.

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6 Finally, in order to curb extensive legal costs the Board of Directors for POASI has instructed me to inform you that all future correspondence be forwarded directly to the Board of Directors, not to this law office. I will not be commenting on any future correspondence unless authorized to do so by the Board of Directors.

The Sullivans assert that, ***if*** an implied contract or novation arose, it is no longer in effect or enforceable due to POASI's subsequent breach, and any duties owed thereunder by the Sullivans are **discharged**. Consequently, the 1987 agreement controls and POASI is bound by the bargain they made in 1987 – the Sullivans are not obligated to pay any charges or assessments to POASI.

D. Equity

It is inequitable to allow POASI to terminate the water supply to the Sullivans' property, as self-help without judicial process. Terminating the water to the Sullivans' home would entirely deprive them of the use and enjoyment of their, approximately, $250,000.00 home. Without water, the Sullivans shall be unable to flush toilets, bathe, wash clothes or dishes, or even drink water. POASI claims less than five hundred dollars (<$500) are owed to them (and they have not proved that debt). See **Exhibit G**. Wherefore, it would be manifestly unjust and inequitable to allow POASI to terminate the water supply, *and thereby render the Sullivans' home useless*, without judicial process.

7. Preliminary Injunction & Irreparable Injury

a. Preliminary Injunction

A preliminary injunction preserves the status quo pending a final determination of the case. Kukene v. Genualdo, 145 N.H. 1, 4 (2000). An injunction should only issue if: there is an immediate danger of irreparable harm to the party seeking injunctive relief; there is no adequate remedy at law; and, the party seeking injunctive relief would likely succeed on the merits. New Hampshire Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63, 917 A.2d 1277, 1281 (2007).

b. Irreparable Injury Standard

Irreparable injury, in the injunctive relief context, has been defined as follows:

> "Wrongs of a repeated and continuing character, or which occasion damages that are estimated only by conjecture, and not by any accurate standard, are included.... 'Irreparable injury' justifying an injunction is that which cannot be adequately compensated in damages or for which damages cannot be compensable in money."

Sys. Concepts, Inc. v. Dixon, 669 P.2d 421, 427-28 (Utah 1983), *citing* Black's Law Dictionary 707 (rev. 5th ed. 1979). "[A]n injury that cannot be adequately measured or compensated by money and is therefore often considered remediable by injunction." McCann v. McCann, 152 Idaho 809, 820, 275 P.3d 824, 835 (2012), *citing* Black's Law Dictionary 856 (9th Ed. 2009).

c. No Adequate Remedy at Law

POASI has, without right, declared to the world that it holds a present and future right to unilaterally change the benefits and burdens affecting the Sullivans' real property on a perpetual basis.

POASI has, without right, recorded new covenants against the Sullivans' property which removed some benefits under the original covenants and added new burdens to the Sullivans' property. Some of the removed benefits are shown in **Exhibit I** and some of the added burdens are shown in **Exhibit J**.

These benefits and burdens are intangible, nonpossessory interests. They are unliquidated damages, and their value is subject to conjecture. Their value cannot be adequately measured or compensated by money. Furthermore, the Sullivans and others are on notice that POASI claims they have the present right to change the covenants, conditions or restrictions at any time.

The Sullivans are entitled to water at their home as a matter of law.[7] Without water they are deprived of the use of their home. Real property is unique. There is no adequate remedy at law to replace the use of the home, and its many comforts and conveniences, including the personalty therein.

d. Likely to Succeed

Paragraph 24 of the covenants, conditions and restrictions specifically forbids changing covenants for lots previously sold:

> 24. Anything herein to the contrary notwithstanding, Suissevale, Incorporated[8] reserves the right to change or modify these covenants and restrictions by duly recorded amendment(s) hereto, but no such change or modification shall have retroactive effect or shall otherwise in any substantial way change the character of the subdivision or otherwise affect lots previously sold.

[7] See Complaint, ¶¶ 56 – 62 for applicable law.

[8] The original ¶ 24 contains an apparent typo. It reads: "Anything herein to the contrary notwithstanding, Suissevale, Incorporated Suissevale, Incorporated shall be deemed. . . ."

The above paragraph is written in plain language and easily understood. This paragraph, by itself, is sufficient to support the Sullivans' claims even though other grounds exist. POASI had no reasonable, good faith basis to believe POASI could change or modify covenants, conditions, or restrictions, and record them against the Sullivans' property.

POASI has asserted, it does not charge the Sullivans for water; the water is free.[9] POASI has no lawful right to terminate water to the Sullivans' home. Doing so is simultaneously a crime and a nuisance. See Complaint, ¶¶ 56 – 62 for applicable criminal law. For nuisance, *see* Robie v. Lillis, 112 N.H. 492, 495 (1972) defining 'private nuisance' as "an activity which results in an unreasonable interference with the use and enjoyment of another's property."

e. Balancing of Harms

For the first time in the history of POASI they are claiming, *and have exercised*, a forbidden and unprecedented right to change, modify and create new covenants. POASI has disturbed the *status quo ante* which has existed for a nearly a half century. Their conduct is expressly forbidden by the original covenants: no changes or modifications shall affect lots previously sold. Paragraph 24, *supra.*

Under these circumstances, it is imperative that the court maintain the *status quo ante* pending the outcome of this case. POASI shall not suffer any harm by doing so. The parties would merely be returned to their relative positions, and the quality and scope of the Sullivans' title would be retained.

Since POASI does not charge owners for water, POASI suffers no harm if they are enjoined from terminating the water supply. In contrast, without water, the Sullivans lose the use and enjoyment of their home. Once again, the *status quo ante* should be maintained pending outcome of this case.

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[9] *Supra*, p. 7, and (see POASI's Exhibit B attached to its Objection) wherein POASI represented to the State that POASI does not sell water to property owners.

8. Conclusion

For all the aforesaid reasons, and the reasons stated in the Complaint, the Court is empowered to grant a preliminary injunction ordering that POASI may not change or modify the 1966 Declaration, nor enforce any changed or modified declaration against the Sullivans property while this suit is pending. The Court is further empowered to issue a preliminary injunction to prevent termination or disruption of water service to the Sullivans' home during the pendency of this action.

Without a preliminary injunction, the Sullivans shall suffer harm and damages which cannot be adequately remedied, measured or compensated by money.

Date: March 5, 2016

Respectfully submitted,

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Certificate of Service

I hereby certify that on
the 5th day of March 2016,
a copy hereof was sent by email to:

Atty. Thomas Pappas (tpappas@primmer.com)
Atty. Matthew Delude (mdelud@primmer.com)
Atty. Jeremy Eggleton (jeggleton@orr-reno.com)
Ms. Sandra Merrigan (smerrigan@primmer.com)

Atty. John F. Sullivan