FILED
04-14-2023
Clerk of Circuit Court
Manitowoc County, WI
2023CV000056

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

ANDREW J. BEHNKE, *et al.*,

Plaintiffs,

vs.

MANITOWOC ASSOCIATES, LLC; *et al.*

Defendants.

Case No. 2023CV000056

BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

At issue in this case is a "covenant" within an Amended and Restated Operating Agreement that was recorded on July 27, 1979, and purports to require Defendant Manitowoc Associates' consent for the Plaintiffs to build on two outlots (known as Lots 1 and 2) on the former ShopKo site in the City of Manitowoc (the "Covenant"). The Covenant however was not recorded separately; rather it was a provision in the Amended Operating Agreement that was recorded more than 40 years ago. It has never been re-recorded. Therefore, Wis. Stat. §893.33 (6), which imposes a 40-year statute of limitations on the enforcement of covenants restricting the use of real property, prohibits enforcing the Covenant against Plaintiffs' properties.

Further, declaring now that the Covenant is unenforceable has the practical benefit of removing a barrier to the development of the outlots at a retail site that has sat vacant for years. The Behnke Plaintiff wants to sell Lot 1 and TAM Acquisitions is prepared to purchase Lot 1 and develop it now. Manitowoc Associates should not have veto power over the development of Lot 1 or Lot 2 based on a Covenant buried in an Amended Operating Agreement recorded decades ago, beyond the 40-year enforcement period set forth in Wis. Stat. § 893.33 (6).

UNDISPUTED FACTS

The Amended Operating Agreement

ShopKo Stores, Inc. entered in and, on June 21, 1977 recorded, a Cross Easement Agreement with, at the time, adjoining property owners that generally allowed for shared parking of adjoining lots located generally at the cross roads of State Highway 42 and 35th Street in the City of Manitowoc (the entire multi-parcel site is referred to as the "Shopping Center;" the parcel within the Shopping Center on which ShopKo operated its department store, with a parking lot, is referred to as the "ShopKo Site"). *See* Sipe Aff. at ¶ 4, Ex. A.[1] The parties amended the Cross Easement Agreement when they entered into a "Super Valu Manitowoc Operating Agreement" (the "Operating Agreement") on February 16, 1978. *See* Sipe Aff. at ¶ 5, Ex. B. By its terms, the purpose of the Operating Agreement was to establish joint responsibility and share common area costs to operate adjoining but independent retail store fronts within the Shopping Center. The Operating Agreement was recorded on March 27, 1978.

In July of 1979, owners of the ShopKo Site entered into an agreement with other property owners in the Shopping Center entitled the "Amended and Restated Manitowoc Operating Agreement" (the "Amended Operating Agreement" or "Amendment"). *See* Sipe Aff. at ¶ 6, Ex. C. Article VIII of the Amended Operating Agreement contains the following Covenant:

> ***Neither Developer nor Shopko shall hereafter construct any additional buildings or structures on their respective portions of the Shopping Center Property without the prior written approval of the other party, which approval shall not be unreasonably withheld***; provided, however, that no buildings or structures shall be constructed which will reduce the available number of parking spaces available on the Shopping Center Property below the minimum number required by (a) any lease relating to the Shopping Center Property or (b) any law, ordinances or regulation relating to the Shopping Center Property. In any event, as long as Shopko occupies its portion of the property, neither Stangel nor the Developer will permit any portion

[1] Reference to the "Sipe Aff." is a reference to the Affidavit of Adam D. Sipe who is the Chief Title Officer of Knight Barry Title; the Exhibits to the Sipe Aff. are copies of documents recorded in the Office of the Register of Deeds for Manitowoc County against the Shopping Center.

> of the Super Valu Property or Developer Property to be used as a home improvement center or pharmacy without first obtaining the prior approval of Shopko. In the event any portion of the Super Valu Property of Developer Property is wrongfully used a home improvement center or pharmacy, Stangel or Developer, as the case may be, shall use its best efforts to enjoin any continued operation. If such party fails to act diligently, then Shopko shall be authorized to do so.

Sipe Aff. at ¶ 6, Ex. C. at p. 10 ("Article VIII Covenant" or the "Covenant") (emphasis added). The consent provision specifically in the Covenant is at issue in the instant case.

The Amended Operating Agreement was recorded against all the properties in the Shopping Center, including the ShopKo Site, on July 27, 1979. *Id.* at p. 1. The Amended Operating Agreement was never independently re-recorded, but it was generally referenced in a Manitowoc Operating Agreement recorded August 27, 1986 and a Second Amended Operating Agreement recorded on March 24, 1994 (the "Second Amendment"). *See* Sipe Aff. at ¶¶ 7-8, Exs. D and E. Nowhere in either instrument however, is the Article VIII Covenant specifically, or "expressly" referenced. *Id.* The same may be said for any reference to the Covenant in an Assumption and Assignment Agreement recorded on May 5, 2006 (the "Assignment"); it referenced the "Operating Agreements," but did ***not*** "expressly" reference the Covenant. *See* Sipe Aff. at ¶ 9, Ex. F. p. 1, ¶ 1.1.

ShopKo' Stores parent company filed for Chapter 11 bankruptcy reorganization on January 16, 2019, and the ShopKo in Manitowoc closed for business shortly thereafter. *See In re Specialty Retail Shops Holding Corp.*, No. 19-80064 (Bankr. D. Neb.) (jointly administered ShopKo Stores Operating Co., LLC, No. 19-BK-80064). Years prior to the bankruptcy, ShopKo Stores subdivided the Shopko Site to create multiple out lots that included Lot 1 and Lot 2 on the northwest corner of the Shopping Center property.

Lots 1 and 2 Today

In 2019 - over 43 years after recording of the Amended Operating Agreement, Cool Investment LLC ("Cool Investment") purchased Lot 1 and Lot 2 from ShopKo and properly recorded a warranty deed with the Manitowoc County Register of Deeds. *See* Richards Aff. at ¶ 3, Ex. A.[2] More than 45 years after recording of the Amended Operating Agreement, Cool Investment sold Lot 1 to Andrew Behnke ("Behnke"). *See* Richards Aff. ¶ 4, Ex. B. Behnke remains the owner of Lot 1 today. *See* Randall Aff. ¶ 3.[3] Cool Investment remains the owner of Lot 2. *See* Richards Aff. ¶ 5. Neither Behnke nor Cool Investment signed the Amended Operating Agreement, nor did they agree to its terms. *See* Richards Aff. at ¶ 6.

In March of 2022, Plaintiff TAM Acquisitions LLC ("TAM") notified Defendant William Spatz ("Spatz"), who is the managing member of Defendant Manitowoc Associates, LLC ("Manitowoc Associates"), of TAM's intent to purchase Lot 1 from Behnke and build a Pizza Hut drive-thru restaurant. *See* Randall Aff. ¶ 4, Exs. A and B. TAM asked Spatz to consent to building on Lot 1. *Id.* Spatz declined and has continued to withhold consent to TAM's construction of the restaurant on Lot 1, and instead demanded payment of $200,000. *See* Randall Aff. ¶ 4, Ex. A. Spatz indicated he would never consent to building on Lot 2. *Id*.

STANDARD OF REVIEW

I. THE COURT MAY TAKE JUDICIAL NOTICE OF THE MATERIAL FACTS.

The material facts of this case, as applied to the issue of whether the Covenant expired under Wis. Stat. § 893.33 (6) are found in the documents recorded against Plaintiffs' properties in the Manitowoc County Register of Deeds. Public records on file with a government office are a proper subject of judicial notice, provided such records are within the territorial jurisdiction of the

[2] References to the "Richards Aff." are to the Affidavit of Thomas J. Richards of Cool Investment LLC.
[3] References to the "Randall Aff." are to the Affidavit of Timothy J. Randall of TAM Acquisitions LLC.

court and their accuracy may be readily determined. *See* Wis. Stats. § 902.01 (2)(a) and (b). Accompanying this Motion is the Affidavit of Adam D. Sipe, Chief Title Officer of Knight Barry Title, Inc., who authenticates copies of the recorded documents he obtained from the Manitowoc County Register of Deeds in the normal course of his profession. Plaintiffs therefore request that this Court take judicial notice of the documents recorded against Plaintiffs' properties.

II. STANDARD FOR A MOTION FOR SUMMARY JUDGMENT

It cannot be disputed reasonably in this case that: (1) the Amended Operating Agreement was recorded in 1971; (2) the Amendment contains a "covenant" within the meaning of Wis. Stat. § 893.33 (6); (3) the "covenant" was never re-recorded nor was it expressly referenced in a subsequently recorded instrument; (4) Plaintiffs are "purchasers" within the meaning of Wis. Stat. §893.33 (1); and (5) Plaintiffs purchased their respective parcels after the Covenant was recorded more than 40 years ago as part of the Amended Operating Agreement. The Court may therefore declare the 40-year limitations period applicable to the Covenant has expired as a matter of law.

"The well-established purpose of summary judgment procedure is to determine the existence of genuine factual disputes in order to avoid trials where there is nothing to try." *Yahnke v. Carson*, 2000 WI 74, ¶ 10, 236 Wis. 2d 257, 613 N.W.2d 102 (internal citation omitted). Section 802.08(2) of the Wisconsin Statutes sets forth the summary judgment standard as follows:

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Wis. Stat. §802.08 (2). This case is appropriate for disposition on a summary judgment motion because there are no material facts genuinely in dispute and the Court may rule on the enforceability of the Covenant as a matter of law.

ARGUMENTS

I. The Covenant in the Amendment that Requires Manitowoc Associates to Consent to Building on Lots 1 and 2 has Expired and Cannot Be Enforced.

A. The Amendment was Recorded More than 40 Years Ago.

We begin with the common law presumption that Wisconsin law favors the "free and unrestricted use of property" and deed restrictions "must be strictly construed in favor of unencumbered and free use of property." *Crowley v. Knapp,* 94 Wis. 2d 421, 434, 288 N.W.2d 815 (1980). That presumption notwithstanding, this is a case of statutory interpretation. Section 893.33 (6) of the statutes is clear; it provides as follows:

> Actions to enforce easements, or ***covenants restricting the use of real estate***, set forth in any recorded instrument shall not be barred by this section for a period of 40 years after the date of recording such instrument, and the timely recording of an instrument expressly referring to the easements or covenants or of notices pursuant to this section shall extend such time for 40-year periods from the recording.

Wis. Stat. § 893.33 (6). This statute effectively places a 40-year statute of limitations on enforcement of "covenants restricting the use of real estate . . . ." *Mnuk v. Harmony Homes*, *Inc.*, 2010 WI App 102, ¶ 16 n.7, 329 Wis.2d 182, 790 N.W.2d 514.

The reason the legislature enacted Wis. Stat. § 893.33 (6) was for the specific purpose of reducing the timeframe for enforcing restrictive covenants against purchasers of property to the previous 40 years. In other words, a purchaser's obligation to look back from date of purchase to determine if there is anything recorded against the property that restricts that purchaser's use is 40 years. Any restrictions older than 40 years that have not been re-recorded or "expressly" referenced in a subsequent recording may be disregarded.

The Covenant in this case was recorded as part of a broader agreement, namely the Amendment to the Operating Agreement, recorded in 1979 by agreement among the property owners at the time. The purpose of recording the Amendment was to put the public on notice of

the existence of the Covenant. It cannot be disputed reasonably however that 40 years has passed since the Amendment that contained the Covenant was first recorded. Enforcement of the Covenant is therefore time-barred by § 893.33 (6).

B. The Covenant Was Not Recorded Separately nor was it "Expressly" Referenced in a Subsequently Recorded Document.

It cannot be disputed that the Covenant itself was never independently recorded against Lots 1 or 2. It was only recorded as part of the Amended Operating Agreement. Because the covenant was not independently recorded it must have been expressly referenced in another recorded document prior to the expiration of the 40-year statute of limitations to remain enforceable. It was not.

Under Wis. Stat. § 893.33 (6), a "covenant restricting the use of real estate" is no longer enforceable after 40 years unless one of two recordings takes place: first, the document containing the Covenant, here the Amendment, could be re-recorded; or, second, the Covenant could be "expressly" referenced in a subsequently recorded instrument. Neither of those recordings are in the public record against Lots 1 or 2 in this case.

To be certain, the Amended Operating Agreement was not re-recorded. Multiple subsequent documents were recorded against the Shopping Center property generally or the ShopKo Site specifically, but none of them expressly reference the Article VIII Covenant. These documents include the Manitowoc Operating Agreement, the Second Amendment to Manitowoc Operating Agreement, and the Assignment and Assumption Agreement. *See* Sipe Aff., Exs. D, E and F, respectively. Those documents referenced previously recorded documents generally, such as "Operating Agreements" and even "easements and covenants" generically but none reference the Covenant in particular. Under the second half of the analysis under Wis. Stat. § 893.33 (6), a

subsequently recorded document must "expressly" reference the "covenant." Such general references are not specific enough to extend the statute of limitations on the Covenant.

Easements and covenants are restrictions on property separate and distinct from the instruments in which they are recorded. That was the underlying premise in the court of appeal's holding in *Mnuk*, 2010 WI App 102. In that case a homebuilder and homeowner entered into an access easement agreement, that, as part of the agreement, contained a traffic easement. The homeowner sued after the builder failed to install a driveway over the easement. The builder's argument, rejected by the court of appeals, was that enforcement of the easement was subject to a six-year statute of limitations for breach of contract because the easement was part of the access agreement. The court ruled the easement within the broader agreement was distinct and subject to Wis. Stat. §893.33 (6), that carries a 40-year enforcement period; the remainder of the access agreement, including the builder's obligation to pay for a driveway, was a contract subject to the six-year statute of limitations. *Id.* ¶¶ 16-18.

The holding of *Mnuk v. Harmony Homes, Inc.* demonstrates the Covenant in the Amendment here is a distinctive "covenant restricting the use of real estate" within the meaning of Wis. Stat. §893.33 (6). To be enforced after 40 years, it must have been previously re-recorded or "expressly" referenced in another document, but it was not. Courts have recognized this important distinction – between a restrictive covenant on one hand and the broader contract in which it is contained, on the other hand; *Mnuk* was such a case, but there are others in other contexts as well.

For example, in *Star Direct, Inc. v. Dal Pra*, 2009 WI 76, 319 Wis.2d 274, 767 N.W.2d 898, the Wisconsin Supreme Court held that a provision in an employment contract barring solicitation of an employer's customers was a restraint of trade under Wis. Stat. § 103.465. The

court held further, however, that the unreasonable restraint, and necessary provisions intertwined with the unreasonable restraint, could be struck down by a court without voiding the entire employment contract. This case, yet again, demonstrates the independent nature of a restrictive covenant, such as Article VIII here.

C. Plaintiffs are "Purchasers" for Value.

Restrictive covenants recorded more than 40 years ago against real property are only enforceable against current owners that have consented to them. Buyers of real estate that purchase property before the statutory enforcement period expires implicitly consent to restrictive covenants. They are not enforceable however after expiration of 40-year statutory enforcement period against "purchasers" of real estate.[4] Here again, there are no material facts in dispute: Behnke purchased Lot 1 in 2021 from Cool Investment; Cool Investment purchased Lots 1 and 2 on September 12, 2019. *See* Richards Aff., Exs. A and B. Both Plaintiffs Behnke and Cool Investment are true purchasers for value who acquired their respective parcels after expiration of the 40-year enforcement period. The Plaintiffs are therefore "purchasers" as a matter of law.

D. The Covenant has Expired and may not be Enforced Against Lots 1 and 2.

All the statutory elements of Wis. Stat. § 893.33 (6) have been met: 40 years have passed since the original recording of the Amended Operating Agreement on July 27, 1979, the Amendment was not re-recorded nor was the Covenant against Lots 1 and 2 expressly referenced in any instrument recorded subsequently, and Plaintiffs are "purchasers" for value within the meaning of § 893.33 (1) that may invoke § 893.33 (6). In addition, neither Plaintiff Behnke nor Cool Investment consented to the Covenant. The Covenant of Article VIII in the Amendment may therefore be declared unenforceable as a matter of law.

[4] Under Wis. Stat. § 893.33 (6), "purchaser" means a person to whom an estate, mortgage, lease or other interest in real estate is conveyed, assigned or leased for a valuable consideration.

II. Given the Above Dispute is Ripe for Judicial Determination, the Court may Issue a Declaratory Judgment as a Matter of Law.

Having met the statutory elements of the § 893.33 (6) defense to enforcement of the Covenants, the Court may declare the Covenant unenforceable. The Uniform Declaratory Judgments Act grants this Court authority to "declare rights, status and other legal relations" of the parties, including but not limited to "any question of construction or validity arising under [an] instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder." *See* Wis. Stat. § 806.04 (1) and (2). In determining whether the Declaratory Judgment Act applies, it "is to be liberally construed and administered" because it is "remedial." *See* Wis. Stat. § 806.04 (12). It cannot be argued reasonably that the Act does not apply in this case. Manitowoc Associates asserts the right to consent under the Article VIII covenant and is thereby interfering with the sale of Lot 1 by Behnke to TAM and further impeding Cool Investment's development of Lot 2. Judicial intervention is needed to resolve the dispute.

Declaratory relief is appropriate when controversy justiciable, given four criteria. *See Olson v. Town of Cottage Gro*ve, 2008 WI 51, ¶ 29, 309 Wis. 2d 365, 749 N.W.2d 211. First, the party seeking relief must have a legally protectible interest in the controversy. *Id.* Second, the moving party must assert a claim of right against someone with an interest in contesting that right. *Id.* Third, the controversy must be between persons with adverse interests. *Id.* Finally, the issue must be ripe for judicial determination. *Id.*

Here, all four criteria necessary for judicial relief are satisfied. Behnke seeks to sell Lot 1; TAM Acquisitions seeks to purchase and build on Lot 1, which, absent the Article VIII Covenant, would be their right. Cool Investment wants to develop Lot 2, but Manitowoc Associates has indicated it will refuse to consent to any development on Lot 1 or Lot 2. Thus, the first and second criteria are satisfied.

For similar reasons, the parties are adverse with respect to all claims and thereby satisfy the third criterion necessary for a declaratory judgment. Either Lot 1 will be sold and developed into a Pizza Hut (because the Covenant is unenforceable) or it will not (if Manitowoc Associates' consent is required) – the positions of Behnke and TAM and Manitowoc Associates are thus diametrically opposed. The same adversity exists between Cool Investment and Manitowoc Associates. The issue of whether the Article VIII Covenant has expired under Wis. Stat. § 893.33 (6) is squarely before the Court and ripe for judicial determination. The Court may therefore declare the rights, status and other legal relations of the parties.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grants their motion for summary judgment in the above-captioned action and declare the "covenant" in Article VIII of the Amendment to Operating Agreement unenforceable.

Dated this 14th day of April, 2023.

MICHAEL BEST & FRIEDRICH LLP

By: *Electronically signed by John D. Finerty, Jr.*

John D. Finerty, Jr., #1018183
jdfinerty@michaelbest.com
Ena M. Kovacevic, #1101342
emkovacevic@michaelbest.com
790 North Water Street, Suite 2500
Milwaukee, WI 53202
Telephone: 414.271.6560
Facsimile: 414.277.0656

Attorneys for Plaintiffs