SHORT FORM ORDER

INDEX No. 08-13202
CAL. No. 10-01748EQ

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 1-10-11
ADJ. DATE 3-8-11
Mot. Seq. # 003 - MD

SHINNECOCK SHORES ASSOCIATION, INC., Plaintiff, - against - DENNIS KIVEL and ADELE KIVEL, Defendants.	SCHNEIDER MITOLA, LLP Attorney for Plaintiff 666 Old Country Road, Suite 412 Garden City, New York 11530 EGAN & GOLDEN, LLP Attorney for Defendants 96 South Ocean Avenue Patchogue, New York 11772

Upon the following papers numbered 1 to 59 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 34; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 35 - 51; Replying Affidavits and supporting papers 54 - 59; Other memorandum of law 52 - 53; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor, and setting this matter down for a hearing on reasonable attorneys fees, is denied.

The plaintiff Shinnecock Shores Association, Inc. (the Association) commenced this action seeking a mandatory injunction directing the defendants to remove a 184 square foot addition to their existing home, an order enjoining the defendants from completing construction of the addition, and a declaratory judgment that the Association's declaration of covenants and restrictions is enforceable against the defendants. The Association also claims that it is entitled to recover reasonable attorneys fees upon a determination in its favor in this action. The Association is a domestic membership corporation governed by a restated and amended declaration of covenants and restrictions (DCR) which was filed in the office of the Suffolk County Clerk on February 14, 2003, in Liber 12236 at page 854 . The defendants are the owners of 11 Marlin Road, in the Hamlet of East Quogue, located in the Town of Southampton, New York (Town). The defendants' lot is located within the Shinnecock Shores Subdivision pursuant to a certain map entitled "Subdivision Map Section 2, Shinnecock Shores, situate at Pine Neck near East Quogue, Town of Southampton, Suffolk County, New York and filed in the Office of the Clerk of the County of Suffolk County on May 25, 1953 under File No. 2071." All of the lots on said map are members of the Association subject to the DCR, which

provides, in pertinent part: "No structure shall be erected on any residential plot nearer than thirty(30) feet to the front lot line ..." The complaint contains allegations that the defendants obtained a variance to construct the addition from the Town without obtaining permission from the Association, and that the addition violates the 30 foot front yard set back . The defendants' answer contains four affirmative defenses. The first alleges that the Association lacks standing or the authority to maintain this action. The second sets forth a defense sounding in selective enforcement and bad faith. The third alleges that the Association unreasonably delayed notifying the defendants of its objections to the construction of the addition, and failed to object to other projects which violate the DCR, resulting in a waiver of its right to enforce the set back requirement. The fourth alleges that, pursuant to the doctrine of equitable estoppel, the Association's failure to object to other projects which violate the DCR bars it from maintaining this action. It is undisputed that the defendants' addition is 22 feet from the front lot line at one corner, and 21.8 feet from the front lot line at the other corner.

The Association moves for summary judgment on its claims for equitable relief and declaratory judgment herein. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [1990]).

In support of its motion, the Association submits the affidavit of its current president, Victoria Greenbaum (Greenbaum), who swears that the amended DCR requires members of the Association to obtain approval for all construction from its architectural control committee (ACC), and that a board member, Edward Hogan (Hogan), was authorized to act as the committee representative. She states that the defendants never applied for approval to construct their addition, and that they were aware of the need for Association approval because they had previously applied to the Town for a variance to build a garage on their lot. In that earlier matter, the defendants had requested a letter of approval to construct the garage from the Association's Board of Directors (Board). On August 2, 2007, the Town granted the defendants' application for a variance to construct their addition. By letter dated September 14, 2007, counsel for the Association advised the defendants that any construction pursuant to the Town's variance would violate the DCR resulting in litigation to enforce the 30 foot front yard set back requirement.

At his deposition, Hogan testified that he was a member of the Board from 2004 to 2007, that he was chair of the legal committee for two of the four years that he was a member of Board, and that the Board was in charge of enforcing the DCR during his term. He indicated that after the amendment to the DCR in 2002, the Board decided on an "action change" to enforce the provisions of the amended DCR, but that no action would be taken on violations of the DCR occurring before 2002. In 2007, there were four cases of possible violations of the DCR, including that of the defendants. Two of the four cases were discovered not to be in violation. The fourth case was similar to that of the defendants, but that member decided not to proceed with

their addition when the DCR's 30 foot front yard set back was brought to their attention. Hogan further testified that, during his term on the Board, although there were more than two dozen construction projects commenced, no member applied to the ACC for approval of their construction project, that the ACC never met, and that there is no penalty under the DCR if a member fails to apply for ACC approval. He stated that the Association president, as chair of the ACC, is authorized to appoint a representative to act for the ACC. He stated that retaining walls, porches and decks are not subject to the 30 foot front yard set back, that "ancient" violations of the DCR are not enforced, and that there were violations of the DCR prior to 2005. He indicated that the defendants' addition was not substantial.

The Association submits a copy of its current DCR which provides, in pertinent part:

> 3. (a) No structure shall be erected, placed or altered on any lot until ... approved by an architectural control committee composed of the President, Vice President, and Secretary of the [Association] ... as to maintenance of set-back and side line restrictions ...
>
> (b) A majority of the Committee may designate a representative to act for it ...
>
> (c) The Committee's approval or disapproval as required by these covenants shall be in writing. In the event that the Committee, or its designated representative fails to approve or disapprove within sixty (60) days after plans, specification and plot diagram have been submitted to it, or in the event, no suit to rejoin (*sic*) the construction has been commenced prior to the full completion thereof, approval will not be required and the related covenants shall be deemed to have been fully complied with.

In addition, the Association submits a copy of its current Bylaws. The Court notes that Article IV, Section a, provides for six standing committees. However, the listed committees do not include the architectural control committee provided for in the DCR.

The decision of the Board to enforce the DCR against the defendants based, at least in part, on their alleged failure to seek ACC approval is subject to review under the business judgment rule (*see* ***Matter of Renauto v Board of Directors of Valimar Homeowners Assn.***, 23 AD3d 564, 806 NYS2d 656 [2005], ***Captain's Walk Homeowners Assn. v Penney***, 17 AD3d 617, 794 NYS2d 82 [2005]; ***Forest Hills Gardens Corp. v Evan***, 12 AD3d 563, 786 NYS2d 70 [2004]), which requires that such decision must be sustained if it was authorized, and was taken in good faith and in furtherance of the legitimate interests of the homeowners association (*see* ***40 W. 67th St. v Pullman***, 100 NY2d 147, 760 NYS2d 745 [2003]; ***Matter of Levandusky v One Fifth Ave. Apt. Corp.***, 75 NY2d 530, 554 NYS2d 807 [1990]; ***Meadow Lane Equities Corp. v Hill***, 63 AD3d 701, 884 NYS2d 443 [2009]; ***del Puerto v Port Royal Owner's Corp.***, 54 AD3d 977, 865 NYS2d 258 [2008]; ***Walden Woods Homeowners' Assn. v Friedman***, 36 AD3d 691, 828 NYS2d 188 [2007] The decision at issue here fails to satisfy these standards, and the plaintiff has failed to establish its entitlement to summary judgment herein

There are material issues of fact requiring a trial in this action including, but not limited to, whether the Association provided the required procedures for its members to make application for approval of construction projects from 2002 to 2007, or waived the requirement during that period of time. The Court notes that neither Greenbaum's affidavit nor Hogan's affidavit, both made subsequent to their depositions and submitted with the Association's motion, eliminate this question of fact. Neither affidavit speaks to the actions of the ACC during the period before this litigation was commenced, and both state in conclusory fashion that Hogan was acting for the ACC during his service on the legal committee. The court's function on summary judgment is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rennie v Barbarosa Transport, Ltd.***, 151 AD2d 379, 543 NYS2d 429 [1st Dept 1989]).

Because the Board has not met its initial burden as to its claims for equitable and declaratory relief, summary judgment cannot be granted (*see generally*, ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

In addition, the defendants' submission in opposition to the Association's motion raises issues of material fact regarding their affirmative defenses sounding in waiver, equitable estoppel and lack of irreparable harm. The affidavit of a former member of the Board and president of the Association indicates that it has been the long accepted practice of the Association to allow the Town to decide on the merits of a members application for a variance, and that no member has asked for Association approval for their construction projects in thirty years. The affidavit raises questions of fact, regarding the defendant's affirmative defenses, including the Board's good faith, in seeking the removal of the defendant's addition.

Accordingly, the Association's motion for summary judgment seeking a mandatory injunction directing the defendants to remove a 184 square foot addition to their existing home, an order enjoining the defendants from completing construction of the addition, and a declaratory judgment that the Association's declaration of covenants and restrictions is enforceable against the defendants, is denied.

A review of the Court's computer system reveals that it still reflects prior counsel as attorney for the plaintiff, despite a prior order of disqualification. If it has not already done so, current counsel for the plaintiff is reminded to file a notice of appearance with the Calendar Clerk,

Dated: June 15, 2011

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**