

C. Stroeck

5/20/10

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

AVON BEND HOMEOWNER'S ASSOCIATION, INC.,  
*Plaintiff,*

v.

CIVIL ACTION NO. 09-C-170

PATRICK KELLY,  
*Defendant.*

RECEIVED

MAY 17 2010

ORDERJEFFERSON COUNTY  
CIRCUIT COURT

THIS MATTER came on this 17<sup>th</sup> day of May, 2010 upon the papers and proceedings formerly read and had herein; upon the appearance of Christopher Stroeck, Esq., on behalf of Avon Bend Homeowner's Association, Inc.; upon the appearance of J. Michael Cassell, Esq. on behalf of Patrick Kelly.

The Court conducted an Evidentiary Hearing on February 19, 2010. The Court heard testimony of various witnesses and the parties introduced various Exhibits. In consideration of all of which the Court does make the following Findings of Fact:

**A. Findings of Fact:**

1. Avon Bend Homeowner's Association, Inc., (hereinafter HOA) is a West Virginia Corporation organized after December 1986.
2. Patrick Kelly (hereinafter Kelly) is the record title owner of Lot 2323, Section 23C, Avon Bend Subdivision, Jefferson County, West Virginia as described in a Deed recorded in Deed Book 962, page 67.

3. The HOA seeks to enforce the Avon Bend Covenants against Mr. Kelly. The HOA introduced into evidence a copy of the Covenants marked as Plaintiff's Exhibit 1.

4. The specific Covenant which the HOA seeks to enforce is Covenant No. 1 which states as follows:

"No trailer shall be erected on the premises and the said tract of parcel herein conveyed shall not be subdivided into smaller parcels or lots less than one acre in area."

5. After he bought Lot 2323 Mr. Kelly invested approximately \$29,000.00 in improvements including well and septic, underground electric, and a garage.

6. Mr. Kelly also improved his property by clearing the same and investing other money in landscaping.

7. It is Mr. Kelly's intention to construct a substantial residence on the property. The estimated cost to construct the house is \$270,000.00. He has paid an architect and an engineer to prepare design drawings for submission to the County for a Building Permit.

8. Mr. Kelly has been working with the County authorities for approximately two years in an effort to obtain a Building Permit to construct his residence on his property.

9. Mr. Kelly's property is adjacent to the Shenandoah River and his lot is within the floodway of the river. This presents additional design problems which Mr. Kelly has attempted to overcome in an effort to obtain a Building Permit for his home.

10. Mr. Kelly has paid thousands of dollars to an engineer and an architect in an effort to design his home in a manner that will be approved by the county authorities.

11. The witnesses for the HOA and Mr. Kelly have testified that Mr. Kelly returns to his property a couple of times a month during warm weather to maintain the property at which time he uses a recreational vehicle to avoid the necessity of staying in a hotel.

12. Mr. Kelly introduced into evidence a series of photographs which demonstrate that he maintains his property in excellent condition.

13. Mr. Kelly removed the RV from his property in late January 2010. The RV was not located on the property at the time of the hearing.

14. Mr. Kelly testified that his RV is connected to water, sewer, and electric only during warm weather. The RV is disconnected from those services in cold weather. Mr. Kelly further testified that he removed the RV to avoid severe weather in the winter and to perform maintenance on the RV.

15. The RV is a tow behind vehicle on wheels which is registered as a motor vehicle in the State of Maryland where Mr. Kelly resides.

16. Mr. Kelly testified that he receives no mail at his West Virginia property and that his domicile is in the State of Maryland. Mr. Kelly does not consider his West Virginia property to be residence and to perform maintenance on the RV.

17. All of the witnesses testified that the Restrictive Covenants do not contain a prohibition of the use of an RV in the Avon Bend Subdivision.

18. Mr. Kelly introduced a series of photographs which demonstrate that there are many trailers, RV's, and other vehicles located within the Avon Bend Subdivision.

19. Mr. Kelly introduced photographs showing that there are twenty-four (24) trailers located on property in Avon Bend in his immediate neighborhood. Of that number, six (6) are boat trailers and three (3) are horse trailers.

20. Mr. Kelly introduced photographs demonstrating that there are nineteen (19) RV's on property within his immediate neighborhood. Many of the RVs are connected to electric service and are being occupied.

21. Mr. Kelly introduced photographs showing that RV's and trailers are located on Lots in the subdivision with no house erected on the lot where it was clear that the RVs are occupied.

22. Mr. Kelly introduced photographs that show the use of portable outhouses with no other means of septic disposal on certain property located within his neighborhood.

23. The HOA filed a Complaint with the County Compliance Officer who investigated Mr. Kelly's use of this RV on his property.

24. The Compliance Officer inspected the property and found that there were no violations of any Ordinances and that Mr. Kelly had obtained all necessary Permits for his use of the property.

25. The testimony of the HOA also reveals that the only other case filed as an enforcement action was filed in 1986 in Civil Action No. 86-P-19.

26. In Civil Action No. 86-P-19, the Court denied an injunction requested by the HOA on grounds stated in the Order entered by the Court and introduced into evidence in this case.

27. There have been no other enforcement actions filed by the HOA since 1986.

In consideration of the foregoing Findings Fact the Court does make the following Conclusions of Law:

**B. Conclusions of Law.**

1. Venue is proper is this Court.
2. The Court has personal jurisdiction over the parties.
3. The Court has subject matter jurisdiction in this matter.
4. The Restrictive Covenant which the HOA seeks to enforce against Mr. Kelly contains little or no definition.
5. The Restriction Covenant merely states that "No trailer shall be erected on the Premises."
6. The word "trailer" is defined by Webster's Dictionary as a non-automotive vehicle designed to be hauled over the road as a vehicle designed for transporting something, a vehicle designed to be used wherever parked or a mobile home.
7. The term "erect" may be defined as follows: to construct by assembling or to set up and establish. The term "erect" mandates that the trailer must be constructed, assembled, or set up in a manner that is more permanent than merely parking a trailer upon the property.

8. The only definition of "trailer" that makes sense in the context of these Restrictive Covenants is "mobile home" when read in the context of the term "erect" which means that it is more permanent in nature than the temporary use of an RV on the property as described in this case.

9. Mr. Kelly uses his RV at his property for purposes of maintenance in only a seasonal and temporary fashion.

10. Mr. Kelly intends to construct a residence on the property at which time the temporary and seasonal use of the RV will become unnecessary.

11. The Court concludes that the seasonal or temporary use of an RV while Mr. Kelly performs the work necessary maintain his property and construct a residence on is not a violation of the Restrictive Covenants.

12. Mr. Kelly's temporary and seasonal use of the RV is not a violation because the RV is not "erected" on the property as a permanent residence.

13. The RV in question is on wheels and is not connected to the property, a foundation or any other structure attached to the land.

14. The seasonal and temporary use of the RV at Mr. Kelly's property is further mitigated by the removal of the RV in January or February of this year.

15. The Court concludes that Mr. Kelly's seasonal and temporary use of his RV at his property is not a violation of the covenant which

prohibits the "erection" of a trailer as a residence upon a property in Avon Bend Subdivision.

16. The testimony also reveals that there are many other various types of trailers in the subdivision.

17. The photographs introduced by Mr. Kelly demonstrate that there are fifteen (15) enclosed trailers, nineteen (19) RV's, six (6) boat trailers, three (3) horse trailers, a bus and other various motor vehicles stored on lots in Avon Bend.

18. There are more serious and damaging violations of the Restrictive Covenants in existence in Mr. Kelly's neighborhood to which the Plaintiff has acquiesced for a protracted period of time.

19. In Syllabus Pt. 2, *Morris v. Nease*, 160 WV 774, 238 SE 2d 844 (1977) the Supreme Court of Appeals States as follows:

"In an action brought to enforce Restrictive Covenants, acquiescence may be asserted as a defense where the Defendant can demonstrate that his covenant violation is not more serious and damaging to the Complainant than other violations in the same neighborhood in which the Complaints or their predecessors in title, acquiesced for a protracted period."

20. The Court concludes that the Plaintiff acquiesced in the many purported violations by third parties in Mr. Kelly's immediate neighborhood in Avon Bend Subdivision. *Morris v. Nease* 160WV 774, at page 779, 238 SE 2d 844 at page at page 848.

21. The Supreme Court of Appeals in *Morris v. Nease* (Supra) states as follows at page 848:

"Where the Complainant is failed to enforce a similar equitable servitude against third parties, he has debarred himself from obtaining

equitable relief against the Defendant for subsequent violations of the same character.”

22. The Plaintiff seeks an injunction in this case which is an equitable remedy and the Plaintiff's conduct must be evaluated pursuant to equitable principals.

23. The Court must evaluate the Motion for a Preliminary Injunction by balancing the hardships of the parties in this matter.

24. In Syllabus Pt. 2 of *Severt v. Beckley Coals, Inc.* 153 WV 600, 170 SE 2<sup>nd</sup> 577 (1969) the Supreme Court of Appeals states as follows:

“The granting or refusal of an injunction whether mandatory or preventative calls for the exercise of sound judicial discretion in view of all the circumstances of a particular case; regard being had to the nature of the controversy the object for which the injunction is being sought, and the comparative hardship or convenience of the respective parties involved in the award or denial of the Writ.” Syllabus Pt. No. 4 *State ex rel Donley v. Baker*, 112 WV 263, 164 SE 154 (1932). (Emphasis added)

25. The Court concludes that the acquiescence of the Plaintiff allowed a multitude of purported violations to exist in Mr. Kelly's immediate neighborhood.

26. The Court concludes that if the injunction is granted, the hardship suffered by Mr. Kelly who only uses his RV temporarily and seasonally at most, is far greater than the hardship suffered by the Plaintiff in light of the Plaintiff's failure to enforce the Covenants against others in Mr. Kelly's neighborhood.

27. The Plaintiff filed one previous enforcement action in Civil Action No. 86-P-19, in which the Court denied equitable relief to the Avon Bend Homeowner's Association.

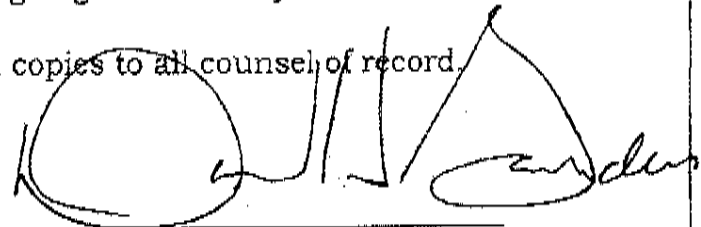
28. The failure of the Plaintiff to enforce the Restrictive Covenants against the multitude of other violations above-described constitutes acquiescence pursuant to the holding in *Morris v. Nease* (Supra).

WHEREFORE, this Court denies the Plaintiff's Motion for a Preliminary Injunction upon the grounds above-stated.

The Court notes the objections and exceptions of the parties to all adverse rulings.

The Clerk shall place this matter among the causes ended.

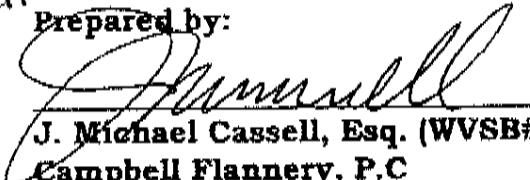
The Clerk shall enter the foregoing as of the day and date first above-written and shall transmit attested copies to all counsel of record.



Hon. David H. Sanders  
Judge of Circuit Court  
Of Jefferson County, West Virginia

2 cc  
C. Streech  
- J. Cassell  
5/18/10  
RW

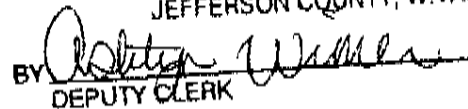
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ATTEST:

LAURA E. RATTENNI  
CLERK, CIRCUIT COURT  
JEFFERSON COUNTY, W.VA.

  
DEPUTY CLERK