

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

CASE NO. 2007-12897

DIVISION "B"

SECTION 15

**FAIRWAY ESTATES HOMEOWNERS ASSOCIATION, INC.  
VERSUS  
ALFRED AND DARLENE JORDAN AND KEVIN AND SAMANTHA NGUYEN**

JUDGMENT

This matter came for trial on the merits on March 25 and 26, 2008.

Present:       Stuart Smith and Al J. Robert  
                  attorneys for plaintiffs, Fairway Estates Homeowners  
                  Association, Inc., Clyde McCoy and Alicia Plummer

                  Joel R. Waltzer and Clay Garside  
                  attorneys for defendants, Kevin and Samantha Nguyen

                  and       Ermence DeBose-Parent  
                  attorney for defendants, Alfred and Darlene Jordan

Considering the testimony, exhibits, applicable law, and for reasons assigned herein;

**IT IS ORDERED, ADJUDGED, AND DECREED** that there be judgment in favor of plaintiffs, Fairway Estates Homeowners Association, Inc. granting a permanent mandatory injunction against Kevin and Samantha Nguyen **ORDERING** Defendants to remove the rear addition to their home located at 5043 Par Four Drive, New Orleans, Louisiana 70128, Square D, Lot 64, zoned RS-1.

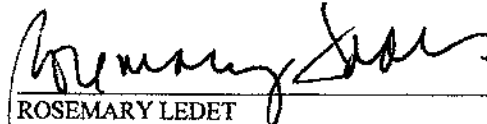
**IT IS FURTHER ORDERED** that there be judgment in favor of defendants, Alfred and Darlene Jordan, dismissing plaintiffs', Fairway Estates Homeowners' Association, Inc.'s, Clyde McCoy's, and Alicia Plummer's, Petition for Preliminary and Permanent Injunction, with prejudice.

**FURTHER**, defendants' Kevin and Samantha Nguyen's Reconventional and Third Party Demands against Fairway Estates Homeowners Association, Inc., Clyde McCoy and Alicia Plummer are **DENIED** and dismissed with prejudice.

Defendants', Alfred and Darlene Jordan's Reconventional Demand is **DENIED** and dismissed with prejudice.

Each party shall bear its own costs.

May 1, 2008

  
ROSEMARY LEDET  
JUDGE

A TRUE COPY



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PARISH OF ORLEANS  
STATE OF LOUISIANA

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Reasons for Judgment

Fairway Estates Homeowners Association, Inc., Clyde McCoy, and Alicia Plummer are seeking permanent mandatory injunctive relief against two homeowners in the Fairway Estates subdivision for violation of the Declarations of Covenants and Restrictions for Fairway Estates Subdivision ("Restrictive Covenant Agreement").

Kevin and Samantha Nguyen constructed an addition to extend the family room of their home in violation of the 20 feet rear setback requirements allowed in Article 7.4 of the Restrictive Covenant Agreement that require a minimum 20 feet rear setback. (Plaintiffs' Exhibit 8).

The evidence at trial shows the Nguyens sent by certified mail a completed application for approval, along with two sets of construction plans and a check for \$150.00 to Alicia Plummer, President of the Fairway Estates Homeowners Association, Inc. ("Homeowners Association") at her home address on June 16, 2007. (Nguyens' Exhibit 10). Markings on the mail tube indicate a delivery attempt was made by the U.S. Post Office on June 19, 2007. Samantha Nguyen testified the application and accompanying documents were not delivered to Ms. Plummer. Ms. Nguyen stated the mail tube was returned to her by July 24, 2007.

Alicia Plummer acknowledged receiving notification of attempted delivery of certified mail and at the time she did not have time to pick it up because the U. S. Post Office closed at 3:00 p.m. Ms. Plummer testified she has never refused certified mail and added that a few days following the attempted delivery, she received a certified letter from the Louisiana Attorney General's office advising her of a discrimination complaint filed by the Nguyens.

The Nguyens argue Alicia Plummer received their application for approval when she was given notice of certified mail by the Post Office. Pursuant to Article 6.6 of the Restrictive Covenant Agreement approval or disapproval of an application "must be rendered with (10) days from the date of receipt by Fairway Estates Development, L.L.C." Plaintiffs' maintain Ms. Plummer could not refuse to accept certified mail or fail to pick it up from the U.S. Post Office to avoid the running of the 10 day time period for action on their application. The Nguyens contend the Homeowners Association waived any objection to their construction.

It is well settled case law that a party may not defeat service by refusing to accept a certified letter. However, it is only after three notices were left and the U.S. Post Office returned the letter marked "unclaimed" that the Court considered a party served. *Hardy v. Dowe Co., Inc.*, 674 So. 2d 452 (La. App. 4 Cir. 1996). *Dean v. Waters*, 667 So. 2d 1137 (La. App. 4 Cir. 1995). Based on the facts presented in the instant case, Alicia Plummer did not receive notice of the Nguyens application for approval of its construction. Therefore, the Court finds the Nguyens failed to obtain approval from the Homeowners Association for the addition to their home.

The Nguyens also argue that by obtaining a variance by the City of New Orleans Board of Zoning Adjustments (B2.A), they were in compliance with Article 7.4 of the Restrictive Covenant Agreement that allow for a rear setback of 24 feet or as "required by the applicable Orleans Parish Zoning Ordinance". (Plaintiffs' Exhibit 2) The New Orleans Comprehensive Zoning Ordinance Article 4, Section 4.1.7 entitled "Height Area and Yard Requirements" allow for a minimum rear yard depth of 20 feet. (Plaintiffs' Exhibit 12)

The Court finds a plain reading of the Restrictive Covenant Agreement contemplates a maximum rear setback requirement of 24 feet and a minimum of 20 feet. Moreover, the minutes of the April 9, 2007 meeting of the City of New Orleans Board of Zoning Adjustments (BZA) indicated a decision on a variance was "completely separate from any covenants or other restrictions on the property". (Plaintiffs' Exhibit 2, p. 14)

Restrictive covenants are to be strictly construed. *Diefenthal v. Longue Vue Management Corporation*, 561 So.2d 44 (La. 1990); *Clark v. Manuel*, 463 So.2d 1276, 1279 (La. 1985). The words of a contract must be given their generally prevailing meaning. C.C. art. 2047, *Diefenthal*, *id* at 51. Thus, the Court concludes the Restrictive Covenant Agreement did not contemplate a rear setback in excess of 20 feet without approval of the Fairway Estates Homeowners' Association.

Finally, the Nguyens argue the Board of Directors and the Architectural Review Committee (ARC) of the Fairway Estates Subdivision acted without legal authority because they are improperly constituted. The evidence at trial supports a finding that at the time the Nguyens purchased their home in February 2007, the Board of Directors of Fairway Estates operated with three officers: President, Vice President, and Secretary. The ARC had one member, Hilliard Butler.

Defendants filed a Peremptory Exception of No Right of Action on this issue on October 5, 2007 that was heard at trial.<sup>1</sup> In denying the Exception, the Court concludes The Fairway Estates Homeowners Association, Inc. consists of owners of land within the Fairway Estates subdivision who have an interest in judicially enforcing its Restrictive Covenant Agreement. La. C.C.P. art 927. *Diefenthal v. Longue Vue Foundation*, 865 So.2d 863, 875, 2002-1470 (La. App. 4 Cir. 1/7/04).

Because Article 10.3 of the Restrictive Covenant Agreement and case law allow any homeowner subject to the restrictions and covenants to bring an enforcement action, the Court finds plaintiffs' argument that the Board and ARC had no authority to act without merit. *Diefenthal*, id at 875. Also, the record supports a finding the Homeowners Association ratified the Board's decision to seek injunctive relief against the Nguyens at their September 2007 general meeting.

Building restrictions create a real right, which is the right of property owners to bring enforcement actions to prohibit any use of the property that does not comport with the general plan of development. *Diefenthal*, 865 So. 2d at 875, citing Allen Scott Crigler, Covenant, "Some Observations on Building Restrictions", 41 La. L.Rev. 120, 1202 (1981). Therefore, defendants reconventional demand and third party demand seeking damages against the Fairway Estates Homeowners Association, Inc., Clyde McCoy and Alicia Plummer for failure to produce corporate financial records, ultra vires acts, abuse of process and harassment are denied because the substantive right to enforce restrictive covenants rest with the homeowners of the subdivision. Moreover, an action pursuant to La.R.S. 12:264B is inapplicable to this case.

Finally, there has been no showing of harassment by Mr. McCoy or Ms. Plummer in

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<sup>1</sup>The Nguyens also filed dilatory exceptions of lack of procedural capacity and unauthorized use of summary proceeding. These were either mooted or waived as they were not set for hearing prior to trial. La. Uniform District Court Rule 9.8(a).

enforcing the building restrictions. Other residents of Fairway Estates testified they had to modify the design and/or construction of their homes to comply with the Restrictive Covenant Agreement.

Although the Court denied the Nguyens' Exception of No Right of Action, it granted plaintiffs' oral motion to add Alicia Plummer and Clyde McCoy as additional plaintiffs. The Court found there was no prejudice to defendants since Ms. Plummer and Mr. McCoy were acting in a representative capacity on behalf of the homeowners association and were made party defendants in the Nguyens' Third Party Demand filed on October 5, 2007.

Therefore, the Court finds the record clearly establishes the Nguyens are in violation of the rear yard setbacks outlined in Article 7.4 of the Restrictive Covenant Agreement. Further, the Court finds the Nguyens failed to submit an application and architectural plans for review pursuant to Article 6.3 of the Restrictive Covenant Agreement. The Court grants plaintiffs relief in the form of a permanent and mandatory injunction and orders Kevin and Samantha Nguyen to demolish and/or renovate any construction to their residence to comply with the covenants and restrictions of the Fairway Estates subdivision.

Plaintiffs' requested relief for attorneys fees and costs is denied as the Court finds the indemnification language in Article 6.2 inapplicable to the instant case.

Alfred and Darlene Jordan placed a gazebo in their rear yard within ten feet of their rear property line. Their home adjoins the subdivision's golf course and Article 7.4 of the Restrictive Covenant Agreement allows for only a ten feet rear setback. However, Article 7.4 outlines setback requirements "for the dwelling (living area)" (Plaintiffs Exhibit 8, p.10) Since the Jordans' gazebo is not a part of their dwelling structure, the Court finds the rear setback requirements inapplicable and denies plaintiffs' request for injunctive relief. When there is any doubt as to the existence, validity, or extent of building restrictions, the matter must be resolved in favor of unrestrictive use. *Prien Oaks Homeowners' Ass'n., Inc. V. Mocklin*, 560 So. 2d 115 (La. App. 3 Cir. 1990).