

**COURT OF APPEAL - FOURTH CIRCUIT - STATE OF LOUISIANA
DOCKET NO: 2008 - CIVIL ACTION - 0949**

**KEVIN AND SAMANTHA NGUYEN
DEFENDANTS - APPELLANTS**

VERSUS

**FAIRWAY ESTATES HOMEOWNERS ASSOCIATION, INC., CLYDE
MCCOY, AND ALICIA PLUMMER
PLAINTIFFS - APPELLEES**

ON APPEAL FROM

**The Civil District Court For The Parish Of Orleans
NO. 2007-12897 B-15 HONORABLE ROSEMARY LEDET, JUDGE**

**REPLY BRIEF ON BEHALF OF
APPELLANTS, KEVIN AND SAMANTHA NGUYEN**

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I. Introduction

This case involves an unfortunate amount of neighborhood factionalism and animosity. Both sides have their own versions of a multitude of ancillary facts and conversations. Both sides speculate about the motives and intentions of the other. However, at bottom, this case boils down to whether the rear setback provision of Fairway Estates' restrictive covenants was so clearly worded that a reasonable person upon reading it could not have believed that complying with the New Orleans Comprehensive Zoning Ordinance would satisfy its requirements. Based upon the actual language of the Restrictive Covenants and the Ordinance, the Nguyens believe their interpretation is not only reasonable, it is correct.

II. Standard of Review

FEHA faults the Nguyens for ignoring the manifest error standard. This Court has no need for a primer on the standard of review it should apply. Suffice it to say that the manifest error standard that FEHA exclusively relies upon applies only to findings of fact, not to legal conclusions, which are reviewed *de novo*.

The only factual finding that the Nguyens have appealed is that the addition to the home encroached closer than twenty feet to the rear lot line, which finding was unsupported by any evidence. It is FEHA, not the Nguyens, that would like to rewrite findings of fact. FEHA represents that Hilliard Butler was the "head of the ARC"¹ and "served on the ARC".² But, the trial court actually found: "The ARC had one member, Hilliard Butler."³ Clearly, this finding establishes the Nguyens' contention that the ARC was improperly constituted. FEHA represents that the trial court found as a matter of fact that the Nguyens failed to submit an application.⁴ But, the trial court actually found:

¹ FEHA Br. at 3.

² FEHA Br. at 16.

³ Rec. at 328.

⁴ FEHA Br. at 15.

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 Fairway Estates Homeowners Association, Inc. ("Homeowners Association") at her home address on June 16, 2007 (Nguyen Exhibit 10). Markings on the mail tube indicate a delivery attempt was made by the U.S. Post Office on June 19, 2007.

However, the trial court concluded that the Nguyens' efforts were insufficient because "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" in a prior case. The requirement that the U.S. Post Office leave three notices⁵ is obviously a conclusion of law to be reviewed de novo, as are the other legal conclusions reached by the trial court.

III. FEHA Fails To Locate A Single Piece of Evidence Regarding the Actual Encroachment of the Addition.

FEHA spends a large portion of its brief outlining its version of facts that were never determined by the trial court because they are largely irrelevant. However, absolutely fundamental to FEHA's case is the finding of fact that the addition constructed by the Nguyens extends closer than twenty feet to the rear of their property. The burden of establishing a violation falls on the party seeking injunction. As pointed out in Appellants' Original Brief, all of FEHA's witnesses testified that they had never seen the addition. In the face of its own affirmative testimony that it cannot prove a violation, FEHA attempts to satisfy its burden by pointing to a letter from Hilliard Butler disapproving plans because the plans indicate an insufficient rear setback. However, Mr. Butler testified under oath regarding the actual construction: "whether it was 20 feet off the property line or 10 feet...we didn't know." The letter in no way contradicts his sworn testimony and does nothing to prove a violation. It is not a violation of the Restrictive Covenants to submit plans. Where only conclusory evidence supports a finding,

⁵ The Nguyens would point out that the trial court never made a finding as to how many notices were left. There are several markings on the package, and apparently only the July 19, 2007 marking was considered conclusive by the court. The Nguyens have no control over the U.S. Post Office's procedures or the clarity of its markings.

the granting of an injunction based on that finding is an abuse of discretion.

Oakbrook Civic Ass'n, Inc. v. Sonnier, 481 So.2d 1008, 1012 (La. 1986). How much more of an abuse in this case where there is no evidence at all.

**IV. The Nguyens Did Submit An Application,
And Those Purporting To Represent FEHA Did Not Review It.**

FEHA wants to fault Mr. Nguyen for not hand-delivering an application to Ms. Plummer's house a second time, after she refused the materials he hand-delivered the first time. FEHA is astounded that after only two abusive encounters with Ms. Plummer, Mr. Nguyen was leery of visiting her house again "as she had directed him to."⁶ In addition to being callous, FEHA's sentiment is irrelevant.

As extensively outlined in Appellants' Original Brief, Ms. Plummer cannot just "direct" her neighbors to do things, unless she is authorized to do so by publicly recorded Restrictive Covenants and the Articles of the non-profit corporation of which she and the Nguyens are equal members. Mr. Nguyen correctly testified that there is no requirement in the Restrictive Covenants that he hand-deliver application materials to Ms. Plummer's house. To the contrary, the Restrictive Covenants explicitly provide that applications are to be delivered by unspecified means to an entity that no longer exists at an abandoned building. That the Nguyens chose to utilize certified mail in dealing with Ms. Plummer was perfectly reasonable in a contentious situation. Sending certified mail is not "a game of 'Gotcha!'" as FEHA characterizes it.⁷ The Nguyens did not want another confrontation, and they wanted an official record of their efforts. Their choice has proven wise because the post office records introduced below show that Ms. Plummer failed to claim their application, even though it was properly addressed to her at her house.

⁶ FEHA Br. at 15.

⁷ FEHA Br. at 17.

The Nguyens insist that they were under no obligation to provide Ms. Plummer with application materials at her house. Nevertheless, the record establishes that they did do so, and their submission was ignored.

V. The Nguyens Have Not Appealed The Procedural Capacity Of FEHA; They Have Appealed The Substantive Authority Of Certain Of Their Neighbors To Make Demands In Contravention Of The Recorded Covenants And The Articles Of Their Corporation.

By reviewing case law concerning lack of procedural capacity, FEHA spends an inordinate amount of space arguing an issue that is not before this Court. As the trial court did below, FEHA confuses the procedural capacity to sue with the authority to demand that a homeowner undertake affirmative activities. The Nguyens have not appealed the denial of their exceptions. Conceding that FEHA and the individual homeowners have the capacity to sue, their suit fails on the merits where the allegations concern the violation of nonexistent duties and the refusal to submit to nonexistent authority.

A hypothetical may help clarify the distinction. Suppose the Nguyens' neighbor Joe Homeowner demands that they submit an application to him by walking it over to the McDonald's on Bullard Avenue, and they refuse. Joe Homeowner, as a homeowner, has the procedural capacity to sue for a violation of the restrictive covenants, but he loses on the merits because he has no authority to demand that an application be submitted to him, and, even if he did, there is no requirement that applications be walked over to McDonald's.

The trial court reasons: "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 that plaintiffs' [sic] argument that the Board and ARC had no authority to act without merit."

According to this reasoning, Joe Homeowner has authority to demand that the Nguyens give him an application at McDonald's, because he also is allowed to

bring an enforcement action. FEHA seizes on this reasoning and argues very thoroughly that the Nguyens cannot challenge FEHA's procedural capacity, as if that disposed of the real issue of a lack of substantive authority.

Instead of addressing the actual issue, FEHA couches it in terms of procedural capacity and baldly asserts that there is no Louisiana jurisprudence that an improperly elected board's actions are invalid. However, in their Original Brief the Nguyens spent several pages detailing the cases that mandate that very conclusion.⁸ FEHA's reliance on the law that allows a majority of a board of directors to transact business sidesteps the prerequisite that there be a valid board in place before a majority of that board can act. A board must be valid and its actions must be authorized in order to be effective. This legal requirement and the trial court's factual finding regarding FEHA's three member board of officers dispose of all the procedural complaints related to failing to hand-deliver applications to Alicia Plummer at her house for Hilliard Butler to review, none of which is authorized by the Restrictive Covenants or the Articles of Incorporation. The real issue in this case is and always has been whether the Nguyens' reading of the rear setback requirement is reasonable.

VI. The Nguyens' Interpretation of the Restrictive Covenants Is Reasonable and Is Less Restrictive Than Those Put Forth By The Trial Court and FEHA.

FEHA states that "[i]n *Cosby v. Holcomb Trucking, Inc.* the Louisiana Supreme Court held that restrictive covenants are to be interpreted as other contracts."⁹ *Cosby* held no such thing; the opinion of the Court never addressed the standard for interpretation of restrictive covenants. The only mention of the standard applicable to restrictive covenants is found in Justice Knoll's dissenting

⁸ See Nguyens Orig. Br. at 18-21. The Court will note that the Nguyens briefed the issue of the necessity of a five member board at pages 18-21 and concluded that "[a]ccording to the line of cases cited in this and the preceding section, the appropriate remedy was for the trial court to order a proper election of the board, as the Nguyens requested in their Reconvventional Demand."⁸ Accordingly, the Nguyens have not waived their Ninth Assignment of Error as FEHA contends.

⁹ FEHA Br. at 20-21.

opinion. Contrary to FEHA's misleading statement of the law, Justice Knoll provided the correct standard, which has already been provided by the Nguyens, as follows:

It is well established that restrictive covenants are strictly construed. *Cashio*, 481 So.2d at 1015; *Clark v. Manuel*, 463 So.2d 1276, 1279 (La.1985). Doubt as to the existence, validity, or extent of building restrictions is resolved in favor of the unrestricted use of the immovable. LA. CIV.CODE ANN. art. 783. Apart from the rule of strict interpretation, documents establishing building restrictions are subject to the general rules of the Louisiana Civil Code governing the interpretation of juridical acts. *Id.*, comment (c); *Allen v. Forbes*, 345 So.2d 950 (La.App. 2 Cir.1977). *Cosby v. Holcomb Trucking, Inc.*, 2005-0470, 4 (La. 9/6/06), 942 So.2d 471, 482.

FEHA attempts to argue that the Restrictive Covenants establish a 20-foot minimum setback so clearly that no interpretation is required. FEHA cites Louisiana Civil Code Art. 2046, dealing with interpretation "when the words of a contract are clear and explicit," as controlling. However, in attempting to apply Article 2046, FEHA conspicuously fails to analyze, or even quote, the actual words of the setback provision in either the restrictive covenants or the Comprehensive Zoning Ordinance ("CZO"). The failure speaks volumes. If the provisions so clearly establish a 20-foot setback, why avoid quoting them?

The Restrictive Covenants never mention a 20-foot setback. They specifically provide: "The rear setback requirements for a dwelling (living area) shall be *twenty-four (24) feet or as required by the applicable Orleans Parish Zoning Ordinance.*" The CZO does indicate a 20-foot rear setback at Table 4.A of Article 4.1.7. However, the same article of the ordinance expressly provides in relation to that table: "These standards apply to all permitted and accessory uses, *unless a variance is granted by the Board of Zoning Adjustments under Section 14.6.*" (emphasis added.) The Nguyens were granted a variance by the Board of Zoning Adjustments under Section 14.6, so the standard set forth in Table 4.A does not apply to their rear yard. Both FEHA and the trial court simply ignore this

language as if the law did not contain the words. FEHA and the trial court read the incorporation of “the applicable Orleans Parish Zoning Ordinance” into the restrictive covenants as an incorporation of Table 4.A of Article 4.1.7 of the applicable Orleans Parish Zoning Ordinance. But it is not at all clear that this is the meaning. It is not the Nguyens who have incorporated the variance procedures into the setback provisions of the ordinance. That is the way the law is written. If Civil Code Art. 2046 is applicable to anyone’s interpretation in this litigation it is the Nguyens’, which actually relies on the clear and explicit language at issue.

FEHA argues that, because the Restrictive Covenants contain a variance provision, recognizing the variance provision of the CZO would render a portion of the covenants a nullity. The argument is false because the rear setback provision of the Restrictive Covenants is the *only one* that incorporates the CZO. All of the other setbacks and restrictions are brightline requirements that are not affected by the provisions of the CZO for variances or otherwise. To build contrary to these other restrictions, a variance from the (defunct) ARC and the (dissolved) Fairway Estates Development L.L.C. is required.¹⁰ Thus, the variance provision of the Restrictive Covenants remains an important part of the overall scheme even though the variance provisions of the CZO apply to rear yard setbacks.

VII. Conclusion

FEHA cannot point to a single provision of the Restrictive Covenants, as they are actually written, that the Nguyens violated. It even failed to prove that the Nguyens violate its own interpretation of the rear setback. The Restrictive Covenants vest limited authority in certain clearly defined bodies and establish certain procedures to follow. FEHA has not shown how the Nguyens have run afoul of any of these covenants. The failure to comply with the unrecorded dictates of other members of their homeowners association cannot support the conclusion

¹⁰ See PI’s Exh No. 8, Restrictive Covenants at arts. 6.1 and 6.7.

that the Nguyens should tear down part of their home. The bottom line is that the Nguyens' rear yard setback complies with the requirements of the applicable Orleans Parish Zoning Ordinance. That is exactly what the Restrictive Covenants mandate. Any other interpretation that is more restrictive must be rejected. Accordingly, this Court should reverse the trial court's judgment and enter judgment in the Nguyens' favor.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 29th
day of October, 2008, served a copy of the
foregoing pleading on all counsel for all parties by:

- () Hand Delivery () Prepaid U.S. Mail
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