VERMONT SUPERIOR COURT
Rutland Unit
83 Center St
Rutland VT 05701
802-775-4394
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 23-CV-02924

Mark Wilson et al v. Gegham Artsruni et al

ENTRY REGARDING MOTION

Title: Motion to Dismiss for Failure to State a Claim (Motion: 1)
Filer: Daniel A. Seff
Filed Date: September 11, 2023

The motion is DENIED.

In this case Plaintiffs seek to enjoin Defendants from developing for their own purposes a 3.06 acre "community property lot" in a residential community. Defendants move for dismissal of the case for failure to state a claim pursuant to V.R.C.P. Rule 12(b)(6). Defendants own the adjoining lot as well as the lot at issue. They plan to combine the lots to construct a building and improvements that would be located on both lots.

For purposes of this motion, the court assumes all factual allegations pleaded in the Complaint are true. *Dernier v. Mortgage Network, Inc.*, 2013 VT 96, ¶ 23, 195 Vt. 113, 121 (2013). A motion to dismiss for failure to state a claim may only be granted "when it is beyond doubt that there exist no facts or circumstances, consistent with the complaint that would entitle the plaintiff to relief." *Bock v. Gold*, 2008 VT 81, ¶ 4.[1] In examining a Rule 12(b)(6) motion, the court not only assumes that all factual allegations in the complaint are true but must also "accept as true all reasonable inferences that may be derived from plaintiff's pleading." *Richards v. Town of Norwich,* 169 Vt. 44, 48–49 (1999).

Thus, the motion should not be granted unless it is *beyond doubt* that there are no circumstances upon which Plaintiffs could have a legal basis for their claim. All reasonable inferences are to be construed in favor of Plaintiffs, whose pleading is designed to give notice of a claim at the level of notice pleading rather than provide a comprehensive factual and legal basis for it.

[1] This standard has a long history of consistent and continuing application. "A court should grant a motion to dismiss for failure to state a claim only when 'it is beyond doubt that there exist no facts or circumstances that would entitle [the plaintiff] to relief.'" *Montague v. Hundred Acre Homestead, LLC*, 2019 VT 16, ¶ 10, 209 Vt. 514 (quoting *Powers v. Office of Child Support*, 173 Vt. 390, 395 (2002)). *Ass'n of Haystack Prop. Owners, Inc. v. Sprague*, 145 Vt. 443, 443 (1985). A motion to dismiss tests "'the law of the claim, not the facts which support it.'" *Id*. (quoting *Powers*, 173 Vt. at 395).

In seeking dismissal, Defendants rely heavily on the fact that the 1972 "Declaration of Protective Covenants Restrictions and Reservations" that created mutual restrictions on lot owners in the Cricket Hill residential development contains no specific covenant prohibiting individual ownership of the 3.06 acre lot and no specific covenant prohibiting construction on it.[2] While this is true, the document clearly lays out the creation of a planned residential community in which the owners have mutual obligations to each other.

The Declaration references (and may possibly be deemed to incorporate[3]) a specified survey laying out the entire Cricket Hill development, which was created out of a single parcel. The plan shows 24 lots of 4+ acres each and an additional lot of approximately 3.06 acres labeled as "community property."[4] This language suggests the possibility that all Cricket Hill residential owners may have an interest in it. The Declaration states that its purpose is "[t]o protect and preserve the residential nature and appearance. . .for the benefit of all present and future owners of lots in Cricket Hill" and provides that the covenants, restrictions, and reservations are set forth so that they may be "incorporated by reference in each subsequent conveyance." It further provides that they will be binding on all lots and owners and shall run with the land.

Defendants acknowledge that the Vermont Supreme Court has adopted the legal principle of "general plan developments" (as distinct from statutory common interest communities) as recognized by the Restatement (Third) of Property (Servitudes, ch. 6), and that the servitude that is a necessary component of such may be implied if a "general plan" exists:

> A servitude may be implied in a particular deed if a "general plan" exists, and generally speaking, "the doctrine is applied when: (1) a common owner subdivides property into a number of lots for sale; (2) the common owner has a general scheme of development for the property as a whole, in which the use of the property will be restricted; (3) the vast majority of subdivided lots contain restrictive covenants which reflect the general scheme; (4) the property against which application of an implied covenant is sought is part of the general scheme of development; and (5) the purchaser of the lot in question has notice, actual or constructive, of the restriction." *Patch*, 2009 VT 117, ¶ 19 (citation omitted) (emphasis omitted).

Khan v. Alpine Haven Prop. Owners' Ass'n, Inc., 2016 VT 101, ¶ 30.

The Court in *Patch v. Springfield School Dist.,* 2009 VT 117, described that in prior decisions, Vermont law "recognized that restrictive covenants can be established via a common

---

[2] Defendants attached this document to their motion as Exhibit A and correctly note that it may be relied on in their motion because it was identified and relied on by Plaintiff in the Complaint.

[3] The court is not concluding that this is so, but at this stage, all possible reasonable inferences must be construed in favor of Plaintiffs.

[4] The survey plan itself is not part of the record, but the court accepts the statement in the Complaint that both the original survey and amended versions that were recorded in the land records in 1973-74 all contain the label of "community property" for the 3.06 acre lot.

development scheme for a general-plan development." *Id.* at ¶ 9. It further noted that one of the two methods of establishing a restrictive covenant applicable in such cases is "by implication. . .usually ascertained from a common plan of development." *Id.* (citations omitted). The Court in *Patch* concluded that in that case a "general plan" development had not been created by the grantor because no declaration of covenants was filed prior to the sale of the first lot and not all deeds contained the covenants. It also noted that while there is a second method of establishing a "general plan" development, which is an agreement among owners, this was not shown by the facts. Thus there was an insufficient basis for implying the servitude at issue in that case.

The Court noted that it had reached a similar conclusion in a prior case, *Creed v. Clogston,* 2004 VT 34, in which it concluded that there was no general-plan development. "Absent a predicate declaration of covenants or a subsequent agreement by the lot-holders, the common mobile home covenants were not sufficient to infer a general-plan development." *Patch* at ¶ 11. Not all deeds in the alleged development in *Creed* contained the covenants at issue and there was no subsequent agreement among property owners.

In this case, it appears that the Restatement/*Khan/Patch* elements of a general-plan development are all present with respect to those explicit covenants set forth in the Declaration, which was recorded prior to the sale of the first lot and which specifically makes them binding on all present and future owners in Cricket Hill. In contrast to the situations in *Creed* and *Patch*, the facts in Plaintiffs' Complaint show the creation of a general-plan development with specified servitudes. The issue presented by this case is whether the general-plan servitudes include, in addition to those specifically stated in the Declaration, one that may be implied to prohibit individual private development on the "community property" lot. The Declaration references the comprehensive survey plan of the development which identifies the 3.06 acre lot as "community property."

The Court in *Patch* stated that a plat map that simply lays out lot lines cannot constitute the creation of a general-plan development. "The mere existence of a recorded plat map does not constitute the creation of a general-plan development because the map simply lays out the location of lots within a certain area of land; it gives no indication of any restrictions that might govern those lot." *Patch* at ¶ 12. Plaintiffs' facts in this case show that the survey, referenced in the Declaration intended to be referenced in all deeds, shows more than lot lines. It gives an "indication" of a restriction that governs the 3.06 non-buildable lot as "community property." The issue here is not whether a general plan was created, as the facts show that one was created that contained explicit covenants, but whether a servitude that was not explicit in the Declaration creating the general-plan development but "indicated" in a related creation document may be the basis for an implied servitude that is binding on lot owners within the development. The 3.06 acre lot is shown as community property on the original survey creating the Cricket Hill residential community, which is referenced in the Declaration applicable to all lots conveyed thereafter. It may be inferred at this stage that the survey is identified in the property description

of the deeds of all lot owners.[5] It appears that there may be facts from which such a servitude might be implied.

Moreover, the second basis identified in *Patch* for implying a non-articulated covenant may be pertinent: agreement among owners. *Patch* at ¶ 15. The property description in Defendants' own deed to the 3.06 acre lot includes the 'community property' purpose in a manner that appears to have been carried forward over time from the original conveyance and references the original survey. Again, it may be inferred that the deeds of lot owners over time contain a reference to the survey that identifies the "community property lot." The facts suggest that no private development has occurred on the 3.06 acre in the 50+ years since its creation. Acceptance over time by the multiple owners of the 24 lots to the "community property" use of the lot may possibly be found to constitute an agreement from which a servitude may be implied under the reasoning of *Patch* as the alternative basis for implication of a servitude. The Complaint contains no facts about the use of the property to date although it may reasonably be inferred that there has been no private development on it.

While no conclusions can be reached at this stage, the court cannot rule out the possibility that the facts of this case might satisfy the requirements of the Restatement standard and the elements deemed necessary in *Patch*.[6]

Whether Plaintiffs have sufficient facts and can satisfy all legal elements required for proof of their claim is unknown at this time. The facts have not yet been developed as a basis for applying a legal analysis to a full body of facts. The issue before the court on Defendants' motion is limited to whether, considering all facts in the Complaint and reasonable inferences in favor of Plaintiffs, there is a possibility that Plaintiffs have a valid claim based on the legal principles developed in *Patch* and *Khan* and facts that differ from the facts in those cases.

Facts and reasonable inferences include:

(a) the creation in 1972 of a planned residential community on a single parcel of land with a Declaration setting forth mutual covenants to be observed by owners of all subdivided parcels and to be included in all deeds,

(b) the cross reference in the Declaration to a survey plan for the entire development which shows not only multiple lots for residential use but also a lot too small to be a building lot under the mutual covenants,

(c) the identification of the small lot as the "community property lot" on all versions of the plan of the development and in the property description of the lot itself, and

---

[5] Exhibit B attached to Defendants' Motion is Defendants' deed to the 3.06 lot. There are two references to the property as the "community property" lot including it "being the 'community property', so-called as shown on a plan of lots entitled 'Deux Mondes, Inc., Cricket Hill Development, Revisions A & B', originally dated 11/21/73 and filed in the Sherburne Land Records."

[6] An issue that may need to be addressed is whether other lot owners need to be joined as persons needed for just adjudication pursuant to V.R.C.P. Rule 19. The court takes no position on this issue at this time.

(d) the apparent observance of no development on the "community property lot" for over 50 years by the owners of 24 lots in the residential community.

These are sufficient to support the conclusion that, pursuant to the principles and analysis set forth in the Restatement and *Patch,* Plaintiffs' facts show a general-plan development with specified mutual servitudes, and *may* support the implication of an additional servitude prohibiting private development on the "community property lot*"* or an agreement by lot owners to such a servitude.

The sole issue is whether, accepting the facts in the Complaint as true[7] and considering all reasonable inferences in Plaintiffs' favor, Defendants have shown that it is beyond doubt that there exist no facts and circumstances to support Plaintiffs' claim. For the reasons described above, the court cannot reach such a conclusion.

Therefore, the Motion to Dismiss is *denied.*

Electronically signed October 16, 2023 pursuant to V.R.E.F. 9 (d).

Mary Miles Teachout
Superior Judge (Ret.), Specially Assigned

[7] This analysis is based only on specific facts alleged by Plaintiffs and not Plaintiffs' legal interpretation in ¶¶ 27-29 in the Complaint about what those facts 'establish.'