SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0765-15T3

DANIEL MATTHIES and
HEATHER MATTHIES,

Plaintiffs-Respondents,

v.

CHARLES DIETRICH and
MARY DIETRICH,

Defendants-Appellants.

Argued December 15, 2016 – Decided August 3, 2017

Before Judges Hoffman and O'Connor.

On appeal from Superior Court of New Jersey, Chancery Division, Monmouth County, Docket No. C-0146-13.

Gary E. Fox argued the cause for appellants (Fox & Melofchik, LLC, attorneys; Mr. Fox, on the briefs).

R.S. Gasiorowski argued the cause for respondents (Gasiorowski & Holobinko, attorneys; Mr. Gasiorowski, of counsel and on the brief; Cathy S. Gasiorowski, on the brief).

PER CURIAM

Defendants Charles Dietrich and Mary Dietrich appeal from a September 11, 2015 General Equity Part judgment entered in favor of plaintiffs Daniel Matthies and Heather Matthies following a non-jury trial.[1] Among other things, the judgment mandated defendants to remove trees from an easement. We reverse.

I

The salient evidence that emerged from the trial was as follows. In 2004, defendants purchased property in Middletown Township (municipality) in order to build a home. Later that year, defendants obtained approval from the municipality's Planning Board to subdivide their property into two lots, on the condition the lots be subject to a conservation easement (easement). Defendants agreed and, in October 2004, recorded a "Deed to Perfect Conservation Easement" (deed restriction or restrictive covenant). This document states:

> The [defendants], in consideration of the requirements of the minor subdivision approval referred to above, and the sum of One ($1.00) Dollar, the receipt of which is hereby acknowledged, do[] hereby give, grant and convey unto [the municipality], its successor and assigns forever, a conservation easement, as defined by the Planning and Development Regulations of the Township of Middletown, as being an area of land upon which a deed restriction is placed

[1] For ease of reference, when we use the singular "plaintiff," we refer to Daniel Matthies, and when we use the singular "defendant," we refer to Charles Dietrich.

> limiting disturbance, clearing, construction and other activities.
>
> THIS EASEMENT is dedicated to the TOWNSHIP OF MIDDLETOWN for any and all of the following purposes: (1) of protecting steep slopes from erosion; said easement is intended to be an uninterrupted and unobstructed easement, under, across and over the area described, consisting of the right to restrict the removal of trees and ground cover except for the purposes of removing dead or diseased trees, thinning of trees and growth, and (2) of maintaining open space in as close to its natural state as possible.

The pertinent municipal regulation defines a conservation easement in relevant part as:

> An area of land upon which a deed restriction is placed limiting disturbance, clearing, construction and other activities. Conservation easements are generally utilized to protect environmentally sensitive areas, including but not limited to . . . steep slopes.
>
> [Middletown Twp., N.J., Planning and Dev. Ordinance § 540-203.]

At the time defendants bought their property in 2004, grass covered the area comprising the easement. In April 2008, defendant hired a landscaper to plant ten to twelve Leyland Cypress trees in the easement, for the purpose of creating privacy and to control erosion. When first planted, the trees were six feet high. Defendant did not know if or how much grass was removed in order to insert each tree into the ground;

however, there was evidence grass remained between the trees. Defendant claimed no soil was removed.

In October 2008, plaintiffs moved into a house on an adjacent lot. Plaintiffs were aware of the deed restriction affecting defendants' home when they bought their own home. Plaintiffs did not complain to defendants about the trees until 2012, when the trees began to block their view of the Verrazano Bridge. Plaintiffs did not object to trees being in the easement, merely that the trees were obstructing their view.

In response to plaintiffs' complaints, defendants trimmed the trees back, and did so on three or four occasions thereafter. Plaintiffs offered to pay for trimming the trees or to remove the trees and put in a slower-growing type of tree, but defendants declined both offers.

In 2013, defendants put their house on the market. Defendant testified plaintiffs asked him to include in any contract of sale a provision the buyers agreed to trim the trees on a periodic basis. Defendants refused, because at that time they were already under a contract to sell their home. The sale price was $1,185,000. Plaintiffs then advised they would consult with an attorney about taking legal action.

Shortly thereafter, in September 2013, plaintiffs filed a complaint. In their complaint, plaintiffs alleged defendants

violated the terms of the deed restriction by planting the subject trees. They demanded the trees be removed and the area in the easement restored to its natural condition. There is some indication in the complaint plaintiffs were alleging defendants wrongfully allowed the trees to interfere with their view but, just before trial, plaintiffs clarified they were not asserting such claim. In addition, plaintiffs stated they were seeking as a remedy either the trees be removed or defendants ordered to maintain the trees at a certain height.

After the complaint was filed, the buyers declined to complete the sale. There is evidence the buyers retreated from the contract upon learning of the conservation easement, but there is also evidence plaintiffs advised the prospective buyers of their intention to litigate over the trees, and the buyers backed out of the contract to avoid being involved with any litigation.

Defendants filed a counterclaim. They contended plaintiffs wrongfully and intentionally induced the buyers to renege on their agreement to purchase defendants' home. However, at trial, defendant conceded the house was sold approximately six months later for $1,835,000.[2] Defendants claimed $27,042 in

[2] The record informs the purchasers of defendants' house agree to be bound by any judgment entered against them.

damages, the money they had to pay toward the carrying charges on their home during those six months, but it is undisputed defendants had the benefit of living in their home during this period.

Plaintiff's testimony was in many respects consistent with defendant's. However, plaintiff did add the trees were eighteen to twenty feet in height in 2012. He also testified there is grass on either side of and "foliage" underneath the trees.

Michael LeMana, plaintiffs' expert arborist, testified Leyland Cypress trees were created in the 1800s, when cross-bred with two species of trees native to the northwestern part of the United States. This tree has become very popular in New Jersey over the last twenty years because it grows at a rate of three feet per year, and can exceed fifty feet in height.

LeMana testified Leyland Cypress trees are not commonly used for soil erosion control, but grass is. He further stated this kind of tree is not stable in high winds, because they have shallow root systems and can be pulled out of the ground. The expert did not state at what wind speeds these trees can be uprooted. Finally, he stated when he observed the site in 2013, he noticed "tree foliage" between the trees, which were planted very close to each other.

Plaintiffs' planning expert, Peter G. Steck, testified photographs taken in 2002 revealed the easement was a wooded area comprised of deciduous trees. Photographs taken in 2007 demonstrated most of the trees had been removed and replaced with grass, although some deciduous trees remained. At some point thereafter, the grass and deciduous trees were replaced with the Leyland Cypress trees, which were planted in two rows in a staggered, geometric pattern.

Although qualified as an expert in the field of planning, over defendants' objection, Steck was permitted to provide various opinions about Leyland Cypress trees; the court reasoned he could do so because he had an engineering degree.[3] Steck noted this tree is not native to New Jersey, and is not "typically" used to protect "steeper" slopes. However, Steck noted the subject slopes are not in the "steepest" category, being only "fifteen to twenty percent."

Steck also opined putting "tall" trees on a steeply sloped area may cause them to tilt in a wind storm and be partially uprooted. He did not say how high a Leyland Cypress tree must be in order to be vulnerable to tilting in a wind storm. He conceded when he examined the site in 2014, he did not see any erosion or instability of the easement and, with the passage of

[3] Defendants do not challenge this ruling on appeal.

time since planted, the roots to the trees were deeper. At that time, the trees were thirteen feet in height.

Although not qualified as a legal expert, Steck provided his legal interpretation of both the language in the deed restriction and an ordinance referencing conservation easements. We do not recount this testimony, as his legal opinion is not entitled to any deference from either the trial court or from us. "As with other legislative provisions, the meaning of an ordinance's language is a question of law that we review de novo." Bubis v. Kassin, 184 N.J. 612, 627 (2005) (citing In re Distribution of Liquid Assets, 168 N.J. 1, 11 (2001)).

The interpretation of the language in the deed restriction is also one to be decided by the court. It is well-established "[e]xpert witnesses simply may not render opinions on matters which involve a question of the law." Healy v. Fairleigh Dickinson Univ., 287 N.J. Super. 407, 413 (App. Div.), certif. denied, 145 N.J. 372, cert. denied, 519 U.S. 1007, 117 S. Ct. 510, 136 L. Ed. 2d 399 (1996)).

At the conclusion of the trial, the court found the planting of the Leyland Cypress trees violated the deed restriction, because its purpose is to protect steep slopes from erosion and the "testimony is uncontroverted that Leyland Cypress trees do not prevent erosion." The court further

determined the deed restriction "restricts the right to remove trees and ground cover. Although defendants did not remove any trees, they planted them. The planting of the trees removed the ground cover, thereby violating the easement."

The court also noted another purpose of the deed restriction was to maintain open space in as close to its natural state as possible. According to the court, the area in which the easement is located is no longer maintained in its natural state, because the Leyland Cypress tree is "not natural to the area[, and] [t]hey are planted in a geometric pattern which is not natural. The trees have caused the ground cover to die. They do not prevent erosion on steep slopes."

As a result of the deed restriction being violated, the court ordered the trees removed, and efforts undertaken to restore the area to its natural state, which the court determined was "grass cover."

II

On appeal, defendants present the following arguments for our consideration:

> POINT I - THE COURT BELOW ERRED IN CONCLUDING THAT THE EASEMENT PROHIBITS THE PLANTING OF TREES WITHIN ITS RESTRICTED AREA
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> POINT II - PLAINTIFFS COMPLAINT SHOULD HAVE BEEN DISMISSED FOR FAILURE TO JOIN INDISPENSIBLE PARTIES

POINT III - THE COURT BELOW SHOULD HAVE DENIED PLAINTIFFS' REQUEST FOR RELIEF BECAUSE OF THE EQUITABLE DOCTRINE OF LACHES

POINT IV - THE COURT BELOW ERRED IN NOT DENYING PLAINTIFFS RELIEF BECAUSE OF THE AFFIRMATIVE DEFENSE OF EQUITABLE ESTOPPEL

POINT V - BECAUSE PLAINTIFFS HAVE COME INTO COURT WITH "UNCLEAN HANDS" THE COURT SHOULD DENY THEM THE RELIEF THEY REQUEST

POINT VI - THE COURT BELOW ERRED IN NOT FINDING THAT PLAINTIFFS UNLAWFULLY INTERFERED WITH THE DEFENDANTS' CONTRACTUAL RELATIONS

Our standard of review of a trial court's decision following a bench trial is well-settled. The trial court's factual findings are to be upheld if supported by sufficient credible evidence in the record. Brunson v. Affinity Fed. Credit Union, 199 N.J. 381, 397 (2009). However, we do not owe the trial court such deference when we review its legal conclusions. Lobiondo v. O'Callaghan, 357 N.J. Super. 488, 495 (App. Div.), certif. denied, 177 N.J. 224 (2003).

Here, the parties do not dispute the deed restriction is a restrictive covenant. Restrictive covenants are contracts, "subject to the interpretative doctrines of contract law which focus on the parties' mutual purpose." Caullett v. Stanley Stilwell & Sons, Inc., 67 N.J. Super. 111, 115 (App. Div. 1961); see also Cooper River Plaza E., LLC v. Briad Grp., 359 N.J.

Super. 518, 527 (App. Div. 2003) (holding a restriction in a deed "is regarded in New Jersey as a contract, and its enforcement constitutes a contract right"). "The polestar of contract construction is to find the intention of the parties as revealed by the language used by them." Homann v. Torchinsky, 296 N.J. Super. 326, 334 (App. Div.), certif. denied, 149 N.J. 141 (1997).

If "the intent of the parties is evident from an examination of the instrument, and the language is unambiguous, the terms of the instrument govern." Rosen v. Keeler, 411 N.J. Super. 439, 451 (App. Div. 2010) (citing Hyland v. Fonda, 44 N.J. Super. 180, 187 (App. Div. 1957)). The words in a covenant are given their ordinary meaning. Citizens Voices Ass'n v. Collings Lakes Civics Ass'n, 396 N.J. Super. 432, 443 (App. Div. 2007).

However, if the language in a document creating an easement is ambiguous or in dispute, a court may resort to extrinsic evidence to inform the court's interpretation of the parties' intent in the case of an ambiguity. Boylan v. Borough of Point Pleasant Beach, 410 N.J. Super. 564, 569 (App. Div. 2009). "An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations." Nester v. O'Donnell, 301 N.J. Super. 198, 210

(App. Div. 1997) (quoting Kaufman v. Provident Life and Cas. Ins. Co., 828 F. Supp. 275, 283 (D.N.J. 1992), aff'd, 993 F.2d 877 (3d Cir. 1993)).

The relevant portions of the deed restriction state:

> The [defendants], . . . do[] hereby give, grant and convey unto [the municipality] . . . a conservation easement, as defined by the Planning and Development Regulations of the Township of Middletown.
>
> THIS EASEMENT is dedicated to the TOWNSHIP OF MIDDLETOWN for . . . the following purposes: (1) . . . protecting steep slopes from erosion; said easement is intended to be an uninterrupted and unobstructed easement, under, across and over the area described, consisting of the right to restrict the removal of trees and ground cover except for the purposes of removing dead or diseased trees, thinning of trees and growth, and (2) of maintaining open space in as close to its natural state as possible.

Simply stated, the purpose of the deed restriction is to protect steep slopes in the easement area from erosion, and to maintain the open space in the easement in as close to its natural state as possible. The deed restriction includes the right to limit the removal of trees and ground cover, except as permitted by the language in the deed restriction.

The court found the planting of the Leyland Cypress trees was a violation of the deed restriction, because this kind of tree does not prevent erosion. However, this finding is not

supported by the evidence. LeMana merely stated this kind of tree is not commonly used as a form of soil erosion control, not that this tree cannot prevent erosion. He did state at high winds this tree might be uprooted, but he failed to provide the wind speed that would cause a tree of this kind to be dislodged from the ground, and did not state how likely and often such speed would occur.

When the trees were inspected by Steck in 2014, they had been in place for six years, and there was no sign of soil disruption or erosion. Steck opined a tall Leyland Cypress on a steep slope may tilt in a wind storm and be partially uprooted. But he, too, failed to clarify how tall the tree, strong the wind, and steep the slope must be to cause a tree of this kind to tilt and upend. On balance, we are not persuaded the evidence supports the finding the planting of the Leyland Cypress trees violated the deed restriction. In addition, the court did not provide a reason why all of the trees should be removed and those areas where the trees had stood replaced with grass, when there was no evidence the integrity of the slope was being compromised.

The court noted the deed restriction limits the right to remove trees and ground cover. Although the court found

defendants did not remove any trees, it did find they violated the deed restriction by removing grass from the easement.

As previously stated, the words in a covenant are given their ordinary meaning. Citizens Voices Ass'n, supra, 396 N.J. Super. at 443. Webster's II New College Dictionary defines "ground cover" as:

> 1. Low-growing plants that form a dense, extensive growth and tend to prevent weeds and soil erosion. 2. Small plants other than saplings, such as mosses and undershrubs, growing on a forest floor : UNDERGROWTH.
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> [Webster's II New College Dictionary 502 (3rd ed. 2005).]

The applicability of the first definition of ground cover is questionable, because it is common knowledge grass does not tend to prevent weeds. The second definition is inapplicable. But more important, there is no conclusive evidence grass was removed. Defendant did not know what happened to the grass when his landscaper inserted the trees into the ground, although defendant was able to say the soil was not removed. Plaintiff testified there is grass on either side of and foliage underneath the trees. When LeMana visited the easement in 2013, he observed "foliage" between the trees. In the final analysis, there is insufficient evidence defendants removed ground cover from the easement.

The court observed another purpose of the deed restriction is to maintain open space in as close to its natural state as possible. The court determined planting Leyland Cypress trees violated the deed restriction because this tree is not native to the area and was planted in a geometric pattern, which is not found in nature.

The term "open space" is defined in the Municipal Land Use Law as follows:

> [A]ny parcel or area of land or water essentially unimproved and set aside, dedicated, designated or reserved for public or private use or enjoyment or for the use and enjoyment of owners and occupants of land adjoining or neighboring such open space; provided that such areas may be improved with only those buildings, structures, streets and offstreet parking and other improvements that are designed to be incidental to the natural openness of the land or support its use for recreation and conservation purposes.
>
> [N.J.S.A. 40:55D-5.]

There is no evidence the planting of the subject trees in this easement is inconsistent with the definition of "open space."

Neither the Municipal Land Use Law nor the deed restriction defines the term "natural." Thus, we resort to the dictionary to ascertain its meaning. Webster's II New College Dictionary defines the term "natural" as "present in or produced by

nature."[4] Webster's II New College Dictionary 746 (3rd ed. 2005).

The trees that were planted in the easement are present in and produced in nature. The fact they are not native to the area or were planted in a certain pattern is irrelevant. The second purpose of the easement is to maintain open space in as close to its natural state as possible. A "natural" state is merely one that is present in or produced by nature. Thus, an easement that contains Leyland Cypress trees is in a natural state.

To the extent it was the court's reasoning the deed restriction compelled the easement area be returned to a state before touched by human hand, the remedy ordered - to remove the current trees and maintain only grass throughout the entire easement - would not achieve the desired result. The grass was deliberately put in place by some entity or individual after the removal of the deciduous trees. It is not known if the deciduous trees came into existence as the result of human intervention, as that question was not explored, or what existed before the latter trees. But, at the least, if the trial

[4] There are other definitions of "natural," but none is applicable to the issues before us.

court's reasoning governed, the correct remedy would not have been to order that only grass be maintained in the easement.

In light of our disposition, we need not address defendants' remaining arguments.

Reversed.