



Covenants & Restrictions Survive Donnelly Act Challenge & City Acris Search Trumps Lender's Foreclosure Motion

DONNELLY ACT DECISION

The question raised in *Neri's Land Improvement LLC v. J.J. Cassone Baker Inc.* (NYLJ July 10, p 23, col 1) is whether a Covenant and Restriction, imposed by grantor on its adjoining lands, which prohibits the use of that adjoining land in competition with the commercial use which the covenantor makes of its remaining land, a violation of the antimonopoly provisions of General Business Law, § 340 et seq., commonly known as the *Donnelly Act*.

In the instant case the plaintiff through an interim owner purchased the parcel, situated between the competing bakery operations of the plaintiff and the defendant. When the defendant sold the subject property, it placed a covenant on the land prohibiting its use as a bakery or for related activities. The covenant provides that for a period of 50 years following the initial conveyance by the defendant the parcel conveyed –

shall not be used as a bakery or for any purpose related or ancillary to a bakery, including, without limitation, a bakery or kitchen facility, a bakery delivery truck storage facility, a baked goods distribution facility, a baked goods retail store and/or a baked goods wholesale store. The foregoing covenant and restriction shall attach to the premises hereby conveyed and shall remain in effect for the period expiring on the date that is the fiftieth (50th) anniversary of the date of this deed, and until the same shall so expire, said covenant and restriction shall constitute a covenant running with the land, binding upon the party of the second part and its devisees, heirs, successors and/or assigns as subsequent owners of the premises hereby conveyed (and the tenants, subtenants and licensees thereof), and said covenant and restriction is made for the benefit of, and shall be enforceable by, the party of the first part and such party's devisees, heirs, successors and/or assigns, as owner (and the tenants, subtenants and licensees thereof) of those certain bakery premises located in the Village of Port Chester, Town of Rye, County of Westchester and State of New York, commonly known as and by the street number 202 South Regent Street, which bakery premises are currently owned by the party of the first part and which are in the vicinity of the premises being conveyed by this deed.

Plaintiff, a competitor, sued under Real Property Actions and Proceedings Law § 1951 to bar claim and extinguish the covenant

first claiming that the covenant was not a real covenant running with the land and second, under an amended complaint, that it violates GBL § 340. Defendant moved to dismiss plaintiff's amended complaint and plaintiff cross moved to further amend its complaint.

Clearly, it was the defendant's intention to protect its economic interest by preventing any competition on this parcel. Moreover, since defendant's immediate neighbor is also a competing bakery, the covenant seems focused at the economic interests of the plaintiff. But would such a motive give rise to a claim under the *Donnelly Act*?

The threshold question which the Trial Court first addressed was whether the covenant meets the test of a real covenant, or is it merely personal to the parties to the conveyance. The Trial Court based its analysis of whether the covenant "runs with the land" on the seminal holding by the Court of Appeals in the *Neponsit P.O. Assn. v. Emigrant Ind. Sav. Bank*, 278 NY 248 (1938) (covenant imposing a charge against each lot to pay for the upkeep of roads parks and other facilities in the development). The Court of Appeals in *Neponsit* recognized that it is impossible to state a precise test to determine which covenants "touch and concern" the land. Rather, Judge Lehman writing for the Court, held that "[t]he question is one for the court to determine in the exercise of its best judgment upon the facts of each case" and that in most cases is a question of "degree." Judge Lehman further stated –

The age-old essentials of a real covenant, aside from the form of [*255] the covenant, may be summarily formulated as follows: (1) it must appear that grantor and grantee intended that the covenant should run with the land; (2) it must appear that the covenant is one "touching" or "concerning" the land with which it runs; (3) it must appear that there is "privity of estate" between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant. (Clark on Covenants and Interests Running with Land, p. 74.)

Moreover, assuming the covenant is valid and binds subsequent owners of the servient estate, can the plaintiff make out a case that the covenant has "no actual and substantial benefit to the persons seeking its enforcement" as required by the section. The Court here found that the covenant, in its view, met the test set forth in *Neponsit* in that it was intended to run with the land, benefitted the economic interest of the covenantor and that the plaintiff was

aware of the covenant at the time it purchased (presumably, at least by virtue of the recorded instrument in its chain of title), and that no equities tipped in the plaintiff's favor. In a footnote to the decision, the Court noted that even if the covenant did not run with the land, Plaintiff's CEO stated in an affidavit that he knew of the covenant prior to his purchase of the land. Whether mere knowledge of a personal covenant is sufficient to rescue the covenant, if found not be a real covenant, is another issue not discussed in this article. There is no question that the element of privity of estate was met by virtue of the chain of title.

In the instant case, the Court found that under the principals laid down in *Neponsit*, the covenant met the test and it would be enforceable unless to do so offended public policy. Turning then to the question of whether the covenant was at odds with the prohibition in GBL § 340, the Court noted that to state a *Donnelly Act* claim a party must –

- (1) identify the relevant product market, (2) describe the nature and effects of the purported conspiracy, (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question, and (4) show a conspiracy or reciprocal relationship between two or more entities". *Benjamin v. Austin*, 34 AD 3rd 91, 94 (2d Dep't 2006).

The Court found that the plaintiff's case failed as it made only conclusory allegations of a conspiracy among the defendant, its own officers and the interim purchaser, the plaintiffs predecessor in title; it did not demonstrate how the restriction imposed an unreasonable restraint on trade, rather than merely an adverse impact on the plaintiff and its use of a particular parcel. Moreover, the Court held that a claim under GBL § 340 cannot be sustained based on an alleged conspiracy between parties who are not competitors. The covenantor corporation and its officers are not competitors nor was it proved that the interim title holder prior to plaintiff's purchase was a competitor. By reason of the foregoing both causes of action were dismissed.

ACRIS SEARCH TRUMPS FORECLOSURE DECISION

In a decision in a mortgage foreclosure case, *Netbank v Vaughan*, decided June 13, 2007 NYLJ (May 9, 2007, p. 20, col 1), Justice Arthur M. Schack, Supreme Court, Kings County made use of the City of New York's ACRIS (Automated City Register System) to determine that plaintiff's mortgage foreclosure action should have been dismissed rather than grant plaintiff's motion for a judgment of foreclosure and sale.

In his decision on the motion, Justice Shack reported that he looked at the property in ACRIS only to find that the mortgage being foreclosed had already been satisfied of record and presumably paid as recited in the satisfaction instrument. The discharge instrument for the mortgage was recorded in April 2007,

subsequent to the submission of the motion, but prior to it being assigned to Justice Schack.

While it is certainly probable that clients don't always keep their counsel fully aware of the conduct of their business, the Court's ire over wasting its time on the motion is somewhat understandable in light of the ease with which information about real property is available through ACRIS.

The moral of the story, it seems, is that counsel handling matters relating to real property located in counties of New York City (other than Richmond County), either litigated or transactional, will benefit by becoming familiar with and using the ACRIS to avoid unexpected surprises.

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