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| <b>Piekunka v Straubing</b>  |
| 2016 NY Slip Op 30021(U)   |
| January 6, 2016  |
| Supreme Court, Wayne County  |
| Docket Number: 77237   |
| Judge: Dennis M. Kehoe   |
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STATE OF NEW YORK  
SUPREME COURT COUNTY OF WAYNE

THOMAS E. PIEKUNKA, JOHN A. HINSMAN, JR.  
and GLENDA L. HINSMAN,  
Plaintiffs,

-vs-

C. ROBERT STRAUBING and  
CORINNE V. STRAUBING,  
Defendants.

2014  
DECISION  
AND  
ORDER

Index No. 77237

Lacy, Katzen, LLP  
Michael Wegman, Esq., of Counsel  
Attorney for the Plaintiffs

Kaman, Berlove, Marafioti, Jacobstein & Goldman, LLP  
John L. Bulger, Esq., of Counsel  
Attorneys for the Defendants

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SUPREME COURT  
WAYNE COUNTY

The Plaintiffs Thomas E. Piekunka, John A. Hinsman, Jr., and Glenda L. Hinsman have moved for an Order granting summary judgment against the Defendants C. Robert Straubing and Corinne V. Straubing, and directing the Defendants to "dismantle and remove a covered, partially enclosed deck constructed on real property owned by the Defendants, commonly known as 8642 Greig Street, Sodus Point, New York". In the event that this motion is denied, the Plaintiffs also request an Order precluding the Defendants from offering expert witness testimony. The Defendants have opposed the motion in its entirety, maintaining that there are material issues of fact which

must await resolution at trial.

The Plaintiffs' claim in this action arise from the Defendants' construction of a covered deck, including a fireplace and privacy walls, connected to the south side of the Defendants' house, extending out toward Sodus Bay. The Plaintiffs are neighbors of the Defendants; Piekunka is the owner of premises known as 8646 Greig Street, Sodus Point, New York, and Hinsman is the owner of premises known as 8462 Greig Street, Sodus Point, New York. The Plaintiffs maintain that the covered deck in its present form violates the restrictive covenants which burden all three properties, which were conveyed to the respective parties by a common grantor known as Sand Point Development Company. The deck, which was in existence at the time the Straubings purchased the property, was modified in 2011, following discussions between the parties regarding the proposed changes. Subsequent modifications, including the construction of the roof, were completed on or about June 6, 2014. This action ensued, in which the Plaintiffs contend that the Defendants' actions in violating the restrictive covenants obstruct their view of the bay and otherwise impede their enjoyment of their respective properties.

The Plaintiffs commenced the instant action by filing a Summons and Complaint in the Wayne County Clerk's Office on June 4, 2014. The

Defendants have filed and served an Answer with four Affirmative Defenses. Discovery has gone forward, and depositions of all parties (except Corinne Straubing) have been conducted.

The restrictive covenant states in part as follows:

“This conveyance is made SUBJECT to the following covenants and restrictions which are to run with the title to the land:

The porch line of the dwelling to be erected on said lot facing the bay shall be not more that 90 (ninety) feet southerly distant from and parallel to the southern curb of the road-way as designated on said map, and no part of such building shall extend northerly nearer than a line parallel to said southern curb of roadway, and (30) thirty feet southerly therefrom.

No building shall be erected on any portion of said lot except between 30 and 90 feet parallel lines above mentioned except boat and bath houses which shall have an elevation of not to exceed (6) feet above the established high water mark of Sodus Bay.”

The Deed by which Defendants acquired title to the Straubing Property recites at page 1, the second full paragraph from the bottom of that page:



“This conveyance is made and accepted subject to all public utility easements, easements, covenants and restrictions of record affecting said premises, if any.”

The Plaintiffs have presented the Court with a thoroughly-prepared record, which includes copies of survey maps, photographs, and documents in the chain of title. He has also submitted a report prepared by John H. Sciarabba, L.S., in which Mr. Sciarabba states his opinion as to the location of the “90 foot line”, with what he terms “a reasonable degree of professional certainty.”

However, the Defendants have also submitted expert opinion in the form of a report prepared by David N. Zacharias, L.S., in which he challenges the methodology and conclusions of Mr. Sciarabba. In response, counsel for the Plaintiffs has submitted an affidavit in which he rejects the report of Mr. Zacharias as flawed.

It is axiomatic that a motion for summary judgment should be granted only if the evidence presented by the moving party demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law (see, e.g. *Zuckerman v City of New York*, 49 NY2d 557 (1980)). When the parties present conflicting expert opinions which create material issues of fact, the Courts have consistently held that

the issues of credibility and weight must be left for determination by the trier of fact. (see, e.g. Fonseca v Cronk, 104 AD3d 1154 (4<sup>th</sup> Dept, 2013); Pittman v Rickard, 295 AD2d 1003 (4<sup>th</sup> Dept, 2002)). Such is the case here.

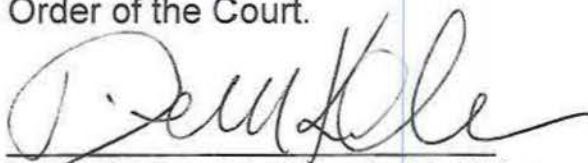
Moreover, counsel for the Defendants correctly argues that, in the interest of “free and unencumbered use of real property”, restrictive covenants have traditionally been strictly construed as against a party seeking to enforce them (see Ludwig v Chautauqua Shores Improvement Ass’n, 5 AD3d 1119 (4<sup>th</sup> Dept, 2004), lv to appeal den’d 3NY3d 601 (2004)). In order to enforce such a covenant, a party “must prove by clear and convincing evidence, the scope, as well as the existence of the restriction.” (Greek Peak v Grodner, 155 AD2d 827 (3<sup>rd</sup> Dept, 1989), affd 75 NY2d 981 (1990)). Again, this court must conclude that such a determination in these circumstances must be reached after trial.

Therefore, the Plaintiffs’ motion for summary judgment is denied, except that the Defendants’ first affirmative defense (failure to state a cause of action) and fourth affirmative defense (unclean hands) are dismissed. This decision is without prejudice to the Plaintiffs’ right to renew their motions at the time of trial. This Court also concludes that the Plaintiffs have not been prejudiced by any delay on the part of the Defendants in responding to the Plaintiffs’ demand for expert witness information, and

therefore the Plaintiffs' motion for an Order precluding the submission of expert testimony at trial by the Defendants is denied.

This Decision constitutes the Order of the Court.

Dated: January 6, 2016  
Lyons, New York

A handwritten signature in black ink, appearing to read "D. Kehoe", written over a horizontal line.

Honorable Dennis M. Kehoe  
Acting Supreme Court Justice