IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

COURTYARDS OF CRYSTAL LAKE HOMEOWNERS ASSOCIATION	)	CASE NO. CV 06-605407
	)	
	)	JUDGE JOHN P. O'DONNELL
Plaintiffs	)	
	)	
-vs-	)	**JOURNAL ENTRY AND ORDER**
	)	
DEBRA BRADESCA	)	
	)	
Defendant	)	

John P. O'Donnell, J.:

The plaintiff's complaint for declaratory judgment and monetary damages was tried to the court on May 14 and 15, 2007. Upon the evidence presented, the court finds as follows:

I. FACTS

On October 13, 2004, Defendant Debra Bradesca was granted a warranty deed for the premises at 15583 Foxglove Lane, Middleburg Heights. (See plaintiff's Exhibit 39, warranty deed.) The property at 15583 Foxglove is part of a master association known as the Greens at Misty Lake Homeowners Association, Inc., and a sub-association known as the Courtyards of Crystal Lake Homeowners Association. (*Id.*) The deed shows that it was granted to the defendant by an Ohio general partnership known as Crystal Lakes. The defendant's testimony at trial described her dealings as being with the property developer, Gross Builders.

Both homeowners associations are governed by separate declarations of covenants, conditions and restrictions. (See plaintiff's Exhibits 1, the declarations for Crystal Lake Homeowners Association, and 2, the declarations for the Greens at Misty Lake Homeowners

Association.) The warranty deed makes clear that the property at 15583 Foxglove is subject to the covenants, conditions and restrictions of both associations by the following provision:

> . . .(T)he premises . . . are free from all liens and encumbrances whatsoever except . . . all matters contained in or disclosed by (i) the Declaration of Covenants, Conditions and Restrictions for Courtyards of Crystal Lake Homeowners Association . . . (the) Declaration of Covenants and Restrictions of The Greens at Misty Lake . . . (and) the Third Amendment to the aforesaid Misty Lake Declaration.
> (Plaintiff's Exhibit 39.)

The defendant testified that shortly before purchasing the property she expected to buy a puppy from a dog breeder. The puppy she planned to buy was apparently *in utero* at the time the defendant became the owner of the house. She asked the seller whether, given that her home was a member of a homeowners association, she would be able to own a dog. The defendant testified that she was reassured by the seller that she could have a dog as long as that fact was made known on a form the defendant filled out as part of the overall transaction. Neither party introduced the form into evidence and the purpose of the form remains unclear.

Meanwhile, the puppy the defendant expected to purchase was stillborn. The breeder offered the defendant the first puppy from the breeding dog's next litter. That puppy – a boxer the defendant named Diesel – was born around February 12, 2005, several months after the defendant became an owner of the property at Foxglove.

Both declarations have provisions relating to the ownership of pets. The original declarations of the Greens at Misty Lake, made December 30, 1987, do not mention dogs or pets. However, those declarations were amended by a document that was recorded on August 21, 1997, as follows:

> Section 14. Except as hereinafter provided, no dogs shall be permitted in any Living Unit except dogs owned by the initial Owner of any Living Unit where such Owner had the dog at the time of the purchase of such Living Unit; provided, however, upon the death or loss of any such permitted dog, the Owner may not replace such dog.
> (Plaintiff's Exhibit 3, page 2.)

The declarations of the Courtyards of Crystal Lake Homeowners Association were then created on March 1, 1998, and recorded May 1, 1998. Those declarations provide, in pertinent part:

> **ARTICLE XII RESTRICTIONS** . . . The following restrictions are in addition to the "General Restrictions As To The Properties" contained in Article VII of the Greens Declaration . . .
>
> * * *
>
> Section 3. Animals and Pets. . . . One (1) dog owned by the initial Owner of a Unit shall be permitted; provided, however, upon the death or loss of any such permitted dog, the dog may not be replaced. No pets are permitted to roam free; those which, in the sole discretion of the Board, endanger the health, make objectionable noise or odors, or constitute a nuisance or inconvenience shall be removed upon request of the Board. . .
> (Plaintiff's Exhibit 1, p. 29-30.)

These two restrictions are inconsistent. The first allows a dog only where the initial owner possessed the dog when he or she bought the property. The second allows "one dog owned by the initial owner" without express reference to when the dog was acquired. (There is no dispute that Debra Bradesca is an initial owner of the premises at 15583 Foxglove.) To complicate matters, the Courtyards of Crystal Lake Homeowners Association issued a handbook of rules and regulations to its members. The handbook was introduced into evidence as defendant's Exhibit A and notes that it "contains rules and regulations" that homeowners are expected to follow. Those rules and regulations include, at page 11, the following:

> VIII. PETS. . . . 3. One (1) dog may be owned by the initial Owner of a home, and registered with the Association as of 2/1/06; however, upon the death or loss of the permitted dog, the dog may not be replaced.
> (Defendant's Exhibit A, page 11.)

Evidence at trial showed that throughout 2005 the defendant had two dogs. The management company of the association made several attempts to communicate with the defendant to remind her that only one dog is allowed. The meeting minutes of the association's board reflect these efforts.

For example, the minutes of the November 30, 2005, meeting note that "(t)here has been problems with the owners at 15583 Foxglove who have two dogs and are never leashed." (Plaintiff's Exhibit 8.) The January 11, 2006, minutes record that "the owners at 15583 Foxglove, Bradesca, will be receiving a letter from Ott & Associates regarding the two dogs and the fact that they roam the area." (Plaintiff's exhibit 9.)

The defendant never responded to any of the letters sent in an attempt to address the situation. Eventually, on March 16, 2006, the board held a hearing to allow the defendant an opportunity to present evidence why she should not be found in violation of the association's restrictions. The minutes of that hearing read as follows:

> The meeting was called to order . . . for the purpose of providing a hearing for owner Debra Bradesca regarding the two dogs . . . Testimony was given by several neighbors either in writing, or by documented phone calls to management of the presence of two dogs at all times and allowance of these dogs to roam the area unleashed. The Board discussed and voted to provide Ms. Bradesca final written demand to remove one of the dogs from the property by March 31, 2006, and leash and clean up after the remaining dog immediately or further legal action will be necessary.
> (Plaintiff's Exhibit 11.)

The fact that the homeowners association was primarily concerned with the presence of two dogs is also supported by both pre- and post-hearing correspondence to the defendant. A letter from the management company dated December 1, 2005, reminds the defendant "that only one dog is permitted at each home." (Plaintiff's Exhibit 20.) The letter goes on to say that "you are required to have one (1) dog removed from the property and the dog that remains is required to be on a leash when outside the home." (*Id.*) The February 16, 2006, notice of hearing by the management company informs the defendant that the hearing is scheduled "so you may provide the Board with your information and supporting evidence as to the two dogs which occupy your home." (Plaintiff's Exhibit 23.) After the hearing, on March 20, 2006, the property manager corresponded to the defendant as follows:

> At the meeting it was discussed and documented that you are in possession of two dogs, a small white dog and larger multi colored dog that roam freely, unleashed and the dog waste is not cleaned on a regular basis. It was further documented that the Association's governing documents states that *original owners are permitted one dog* and must be leashed and held by a responsible person when outside the unit and must immediately clean up after their pet.
>
> The Board reviewed all documented complaints and supporting information and voted to require you to remove one of the dogs from the property by March 31, 2006 and a fine not to exceed $50 per occurrence may be imposed any and all times it is reported and documented that you have your remaining dog outside of the unit unleashed and the dog waste is not immediately cleaned.
> (Plaintiff's Exhibit 26; emphasis added.)

That same letter also included an "acknowledgement of compliance" form that the association asked the defendant to sign. The proposed acknowledgement asserts that the defendant has "complied with the governing provisions of the Courtyards of Crystal Lake Homeowners Association and the Greens at Misty Lake Master Association regarding the dog restriction and have removed ONE of the dogs in my possession from the association premises." (*Id.*)

Testimony about the white dog established that it belonged to the defendant's mother and was removed by the defendant from the house at Foxglove.

The original declarations of the master association do not provide that the association may fine a homeowner for a violation of the general restrictions set forth in Article VII. However, that declaration does allow for enforcement "by any proceeding at law or in equity against any person . . . violating . . . any covenant or restriction." (See Exhibit 2 at p. 10, Article VIII, Section 3.) The 1997 amendment that specifically addressed the ownership of dogs also does not provide for the imposition of a fee or fine for a violation of the restrictions.

However, the 1998 declaration of the Courtyards of Crystal Lake Homeowners Association, in its by-laws, provides that the sub-association may impose "reasonable fines not

to exceed $75 for each violation of any duty imposed under the declarations" and that a fine shall constitute a lien upon the violating owner's property. (See Exhibit 1, at page 9, section 17 of the by-laws.) By section 17 of the by-laws the plaintiff further asserts that it is entitled to recover costs and attorneys' fees when a restriction needs to be enforced by way of litigation. (See *Id.*) Moreover, unpaid fines may be liened against the violating owner's premises. (See *Id.*)

The plaintiff's property manager, Laura Dulach, testified that at the March, 2006, violation hearing a total of six separate violations were found and that the defendant was assessed a $25 fine for each violation, resulting in fines amounting to $150. However, plaintiff's Exhibit 38 (the management company's resident ledger summary report for Ms. Bradesca) shows that the defendant was assessed $25 for a rules violation in December, 2005 and $100 for a rules violation in February, 2006. No testimony was given about why those fines were imposed, yet they cannot be for the violations found at the March 2006 board meeting because they both pre-date that meeting.

Charges on Exhibit 38 that are claimed to be related to the defendant's violations of the restrictions also include:

February, 2006 legal fees	$ 65.00
March, 2006 legal fees	$ 50.00
August, 2006, legal fees	$ 465.00
October, 2006, legal fees	$ 100.00
November, 2006 legal fees	$ 269.50
December, 2006 legal fees	$ 990.00
January, 2007 legal fees	$1,380.00
February, 2007 legal fees	$ 405.00
March, 2007 legal fees	$ 960.00
April, 2007 legal fees	$ 465.00
May, 2007 legal fees	$2,752.50
TOTAL:	$7,902.00

On October 12, 2006, the plaintiff filed a certificate of lien with the county recorder's office. (Plaintiff's Exhibit 29.) The certificate shows the amount of lien as $817 on August 1,

2006. (*Id.*) By that date the total violation-related assessment could not have been more than $240 ($125 in fines and $115 in legal fees) even if the $125 in fines imposed before the March 2006 board meeting are accepted as having been properly assessed for a violation relating to the dog restrictions. Moreover, the plaintiff had credited the defendant with payments toward the rules violations totaling $82 in April and May, 2006, leaving a maximum possible violation-related balance, as of August 1, 2006, of no more than $158. Finally, it is worth noting that Exhibit 38 shows an outstanding balance of all assessments – violation-related and otherwise – as of August 1, 2006 in the total amount of $320. (The other $162 is apparently an "operating expense" charge for which the defendant had been carrying a balance since at least November, 2005.) This evidence does not support a lien amount of $817.

II. LAW, ARGUMENT AND DECISION

The defendant initially argues that neither of the competing restrictive covenants applies to her dog since she had a contract with a breeder to purchase a puppy before she ever was granted the deed to the property. This argument is presumably not serious. Diesel was not born until mid-February of 2005, about four months after the defendant moved to Foxglove. A contract to purchase a puppy to be born in the future is hardly the same as owning that puppy. Moreover, taking judicial notice that the typical canine gestation period is about 63 days, Diesel had not even been conceived when the defendant moved into Foxglove.

Because the defendant did not own the dog "at the time of the purchase of" her home she is therefore in violation of the deed restriction put into place by the August 21, 1997, amendment at Article VII, Section 14. (Exhibit 3.) But the inquiry does not end there because the sub-association's May 1, 1998, restriction is in conflict with the restriction imposed by the 1997 amendment.

The sub-association's restriction at Article XII, Section 3, provides that "one dog owned by the initial owner of a unit shall be permitted." (Exhibit 1, page 30.) Unlike the first declarations, this restriction does not limit an owner to having a dog that he or she owned at the time of purchase of the unit.

The plaintiff urges that these conflicting provisions be read in *pari materia* and both be enforced. However, this is impossible since both provisions are directly in conflict. One provision would allow the defendant to have Diesel and the other would not. To apply the restriction in the master declarations would require ignoring the language of the sub-association restriction and *vice versa.* Both restrictions cannot be given effect.

Nor can the conflict be decided by applying the provision in the sub-association declarations that "in the event of any conflict between the provisions" of the master declarations and the sub-association declarations "the provisions of the Greens at Misty Lake Declaration shall control" (Exhibit 1, page 5, section 17) since that would require a conclusion that the dog provisions of the sub-association, enacted almost a year after the dog provision amendment to the master association declarations, were merely surplus verbiage. This court is not willing to make that conclusion; the different language in the sub-association declarations was presumably used for a reason, and it is the court's duty to find the reason and give effect to it.

Generally, restrictions on the free use of land are disfavored. *Driscoll v. Austintown Assoc.* (1975), 42 Ohio St.2d 263, 276-77. If a covenant's language is indefinite, doubtful, and capable of contradictory interpretations, the court must construe the covenant in favor of the free use of land. *Houk v. Ross* (1973), 34 Ohio St.2d, 77, ¶ 2 of the syllabus. Furthermore, the goal of interpreting the language of a restrictive covenant is to determine the intent of the parties as reflected by the language used in the restriction. *Hitz v. Flower* (1922), 104 Ohio St.47, 57.

In this case the master association created a restriction in 1997 that was eased by the sub-association's restriction in 1998. From the timing, it can be inferred that the intent in crafting the sub-association's restriction was to be more flexible in allowing an initial unit owner to own a dog. This intent can also be inferred from the homeowners association's own interpretation of the restriction as reflected in the handbook provided to the defendant and other new residents. Finally, an interpretation allowing the defendant to own Diesel is consistent with construing the covenant in favor of the free use of land.

Therefore, the defendant, as an initial unit owner, is allowed to own Diesel. However, Diesel is the only dog she may own and keep at the premises since it is unambiguous that "the dog may not be replaced" upon its death or loss. (Exhibit 1, page 30.)

Although the defendant has the right to keep Diesel on the premises, the dog may still be excluded as a nuisance. Article XII, Section 4, of the sub-association's declarations provides that no "thing" is allowed to be "kept upon any portion of the Courtyards of Crystal Lake area that will emit foul or obnoxious odors or that will cause any noise or other condition that will or might disturb the peace, quiet, safety, comfort, or serenity of the occupants of surrounding property. . . . There shall not be maintained any plants or animals . . . whose activities or existence in any way is noxious, dangerous, unsightly, unpleasant, or of a nature as may diminish or destroy the enjoyment or value of the Courtyards of Crystal Lake area." (Exhibit 1, page 30.) The declarations go on to provide that the association may seek to have a nuisance enjoined by filing a lawsuit similar to this one.

There is some evidence – mostly through the meeting minutes - that the defendant is not a responsible dog owner. Both dogs were off their leashes and would defecate wherever they pleased. The defendant was not known to clean up after either dog nor would she even address complaints made to her about the dogs. Despite that, it appears that the association was willing

to tolerate some of these offenses when it agreed, through the declarations, to allow some dogs in the first place, and then again when it cited her only for having multiple dogs, not for Diesel's specific bad habits. Reading the restrictions on animals and nuisance in *pari materia,* since dogs are allowed by the first restriction they cannot be excluded as nuisances by the second restriction unless the conduct of the dog, or its owner, goes beyond what might be considered normal dog behavior.

In this case, the evidence was insufficient to show that the dog currently constitutes a nuisance as defined in Article XII, Section 4 of the restrictions.

Based upon the foregoing, the court hereby declares that the defendant's ownership of Diesel while at 15583 Foxglove may continue until such time as the dog dies, after which it may not be replaced. The defendant, however, is required to have her dog on a leash when outside her house, to be with the dog when it is outside, and to clean up after her dog. The dog remains subject to being removed as a nuisance upon proper evidence and upon a proper procedure under the declarations and by-laws, but the court declines to declare the dog to be a nuisance because of a lack of supporting evidence. As such, the court finds in favor of the defendant on the plaintiff's claim for costs and attorney fees.

Although it appears that the assessment to the defendant for "operating expense" was properly the subject of a lien, the defendant's counterclaim for "severe emotional distress" and "slander and libel and damage to her credit rating" was not fully litigated at trial and remains pending for adjudication. The trial schedule on that claim will be subject to a separate entry by the court.

IT IS SO ORDERED.

_____ _____

Date JOHN P. O'DONNELL, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing Judgment Entry was sent by regular U.S. Mail this _____ day of _____, 2007, to the following:

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