

Montgomery County, Maryland
COMMISSION ON COMMON OWNERSHIP COMMUNITIES

Pengnian Lin and Li Yang
Complainants,

v.

Case No. 04-15
February 26, 2016

Fallsreach Homeowners Association,
Respondent

DECISION AND ORDER

(Before Ethier, Coyle and Brandes)

Summary

Pengnian Lin and Li Yang (Complainants), owners of a house and lot located within the Fallsreach Homeowners Association (Respondent), filed this dispute with the Commission challenging the decision of the Respondent's board of directors to allow the Complainants' neighbors to install a privacy fence along the side and rear boundaries of the neighbors' lot. Complainants alleged that the board's decision violated the Respondent's declaration of covenants and was therefore not valid. The neighbor was not a party to this dispute. The parties, including the neighbor, attempted to resolve this dispute in mediation but were not successful. While this case was pending the Respondent moved to dismiss on the grounds that the Commission lacked jurisdiction over it on the grounds that the Respondent's decision was protected by the "business judgment" rule as embodied in Section 10B-8(5)(E) of the Montgomery County Code. Finding that no facts were in dispute, and that the matter was entirely one of law, the hearing panel cancelled the hearing and proceeded to judgment based on the undisputed facts of record.

Findings of Fact

1. The Complainants, Pengnian Lin and Li Yang, are the owners of , and reside at 9324 Reach Road, Potomac, Maryland. This address is part of the Fallsreach Homeowners Association which is the Respondent. Respondent is a homeowners association as defined by the Maryland Homeowners Association Act, Section 11B-101 of the Real Property Article of the Code of Maryland.

2. Adjacent to Complainants' lot is lot 9320 Reach Road. In 2014, the owners of that lot, who are Complainants' neighbors, applied to the Respondent's Architectural and Environmental Control Committee (the Committee) for permission to construct a privacy fence on the rear of their property. The fence would not extend past the front of the neighbors' house, but it would extend past the front line of the Complainant's house.

3. The two lots involved in this dispute, 9320 and 9324 Reach Road, are not parallel to each other, and face in different directions at right angles to each other. Consequently, 9324 Reach Road adjoins the rear of 9320 Reach Road, not its side.

4. The Committee granted the neighbors' request and the fence was constructed as planned.

5. The Complainants were not informed of the neighbors' fence application nor of the Committee's approval, and were not aware of the project until the fence was constructed.

6. After learning of the construction of the fence, the Complainants appealed the Committee's decision on the grounds that it violated Article VI, Section 9, of the Respondent's Declaration of Covenants, which in part reads as follows:

Section 9. Fences. Any fence constructed upon the Property shall be either horizontal, rustic, unfinished split rail or vertical split sapling, or vertical board and *shall not extend beyond the front building line of the dwelling on the Lot upon which any such fence is erected or the front building line of the dwellings on immediately adjacent Lots . . .*

(Emphasis added.)

7. In an email to Complainants, the chair of the Committee explained the Committee's action as follow:

An application submitted by the Wilsons [the Complainants' neighbors] for a scallop design board on board fence was received, reviewed and approved by [the Committee] in mid-July. [The Committee] does not require contiguous property owner approval for fence approvals., having some 34 years ago (while still under builder control) and affirmed many times in the interim, that homeowners have a right to fence their yards, subject to prohibitions under our covenants and restrictions (like chain link, plastic, metal or other non-natural wood materials, etc.) within covenant stipulated location restrictions and within the Committee's authority.

The provision you cite, Article VII, Section 9, (which is also subject to Article VII) states that fences may not extend beyond the front building Line of the dwelling upon the lot upon which such fence is erected. As

you indicated, it also indicates the same restriction with respect to the front building line of the dwellings on immediately adjacent lots. However, with respect to the second part of this provision, the Committee considers this provision as inapplicable in pipestem situations because, by definition the front yards of homes at the rear of the pipestem are in the back yard of homes fronting forward on the pipestem. The Committee has taken the position that these homes are not denied the right to erect a privacy fence, consistent with the rights of all other homeowners in Fallsreach to install such fences.

8. Respondent's board of directors conducted a hearing on Complainants' dispute and denied their claim.

9. Complainants subsequently filed this action with the Commission on Common Ownership Communities (the Commission) alleging that the Respondent's decision "ignored the plain language of Article VII, Section 9 . . ."

10. Respondent filed a Motion to Dismiss or in the Alternative Respondent's Answer, in which it stated that the "Board of Directors rendered its decision without fraud or bad faith. As such, pursuant to the well-established principle under the business judgment rule, the Board properly rendered a decision denying the Complainants' request to overturn the decision of [the Committee] for their approval of the neighbor's request to build a fence. As a threshold matter, because the [Respondent's] decision is predicated upon the business judgment rule, the Complaint should be dismissed with prejudice for lack of jurisdiction."

Discussion

The facts in this case are almost identical to those of *Black v. Fox Hills North Community Association*, 90 Md.App. 75 (1992).

In *Black*, the appellants had initially brought an action against their neighbors, the Kupersmiths, and against their association within with the lots of both parties were located. They challenged a decision of the association's Architectural and Environmental Committee which approved the fence which the Kupersmiths constructed along the sides and rear of their property. They argued that the decision violated Article VII, Section 9, of the association's Declaration of Covenants, which in pertinent part read as follows:

Fences. Any fence constructed upon the Property shall not extend beyond the front building line of the dwelling on the lot upon which any such fence is erected or the front building line of the dwellings on all immediately adjacent lots.

This case and the *Black* case both involve what are called "panhandle" or "pipestem" lots, in which the adjacent houses are often built facing different directions. The Kupersmiths' fence extended beyond the front building line of the house on the

adjacent "pipestem" lot. The Blacks also alleged that the association had been advised by its attorney that its Declaration of Covenants prohibited the Kupersmiths' fence.

The Montgomery County Circuit Court upheld the association's decision, however, and dismissed the complaint, and awarded attorney fees to the association. The Blacks appealed. On appeal, the Court of Special Appeals found that "the decision which the association made to approve the Kupersmiths fence was a decision which it was authorized to make. Whether that decision was right or wrong, the decision fell within the legitimate range of the association's discretion . . . There was no allegation in the complaint of any fraud or bad faith. Absent fraud or bad faith the decision to approve the fence was a business judgment with which a court will not interfere."

We believe this dispute is governed by the principle enunciated in *Black*. Our ruling should not, however, be interpreted as a finding that the this association, or any other association, can systematically ignore or violate its own governing documents. If an association finds a provision in its documents obsolete or unnecessary, it must amend the documents accordingly. We do find that an association has the discretion on how, and to what extent, a rule should be enforced in specific circumstances, as it did here.

Conclusions of Law

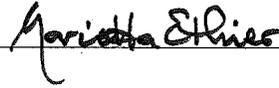
1. Respondent is a homeowners association as defined by Section 11B-101 of the Real Property Article of the Code of Maryland, and the Complainants are members of the Respondent.
2. This case is governed by the holding of *Black v. Fox Hills North Community Association, supra*.
3. Although the Complainants' were not given notice by their neighbors or by the Respondent of the fence application before the fence was approved and built, we find no legal obligation in the law or in the Respondent's governing documents that required such notice.
4. There are no allegations or facts in the record to show that Respondent acted in bad faith or without a factual basis.
5. The panel concludes it has no choice but to dismiss this complaint with prejudice.

ORDER

1. This complaint is dismissed with prejudice.

Commissioners James Coyle and Richard Brandes concur.

Any party aggrieved by this decision may appeal it to the Circuit Court of Montgomery within 30 days after the date of this decision, according to the Rules of Court for Appeals from Decisions of Administrative Agencies.

A handwritten signature in black ink, reading "Marietta Ethier", written over a horizontal line.

MARIETTA ETHIER, Panel Chair