

Rockwell v Despart

Supreme Court, Albany County
January 29, 2025
87 Misc.3d 233
230 N.Y.S.3d 896



87 Misc.3d 233, 230 N.Y.S.3d 896, 2025 N.Y. Slip Op. 25063

*1 Elizabeth Haley Rockwell, as Executor of the Estate of Marjorie D. Rockwell, Deceased, Plaintiff,

v

Thomas W. Despart, Defendant.

Supreme Court, Albany County
903096-19
January 29, 2025

CITE TITLE AS: Rockwell v Despart**RESEARCH REFERENCES**

Am Jur 2d Covenants, Conditions, and Restrictions §§ 20, 148, 151, 163, 169–170, 234–235, 239–240, 249, 273.

Carmody-Wait 2d Complaints in Particular Actions § 29:131; Carmody-Wait 2d Injunctions § 78:87; Carmody-Wait 2d Declaratory Judgments § 147:111.

NY Jur 2d Declaratory Judgments and Agreed Case § 140; NY Jur 2d Deeds §§ 74, 115–116, 118, 121, 127–128, 152–153, 159, 163–164, 167–168, 173, 182.

New York Zoning Law and Practice (4th ed) §§ 1:5, 8:16, 15:13.

Williston on Contracts (4th ed) § 67:68.

ANNOTATION REFERENCE

See ALR Index under Covenants; Deeds and Conveyances; Sale or Transfer of Property.

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Query: "restrictive covenant" & deed & extinguish! & (conserv! OR charit!)

APPEARANCES OF COUNSEL*Gleason, Dunn, Walsh & O'Shea*, Albany (*Richard C. Reilly* of counsel), for plaintiff.*The Baynes Law Firm, PLLC*, Ravena (*Brendan F. Baynes* of counsel), for defendant.**OPINION OF THE COURT**

Denise A. Hartman, J.

*234 Plaintiff Elizabeth Haley Rockwell, as Executor of the Estate of Marjorie Doyle Rockwell, sued defendant Thomas Despart seeking a declaratory judgment and a permanent injunction to enforce a restrictive covenant that directed defendant's 26-acre parcel in Loudonville, a hamlet in the Town of Colonie, to remain "forever wild" and accessible for public use. After numerous motion decisions, the case went to bench trial in late 2023. Two issues were tried: First, whether the restrictive covenant is enforceable or should be extinguished as a matter of common-law principles that disfavor "naked" covenants. Second, whether defendant is entitled to relief under RPAPL 1951 because the preservation of the land as forever wild cannot be accomplished.

The court finds that, as laudable is the intent to create an urban wildlife preserve in *2 memory of plaintiff's forbearer, the restrictive covenant should be deemed unenforceable. Balancing the equities, the court concludes that the covenant should be extinguished pursuant to RPAPL

1951. The court acknowledges the windfall to defendant. But the impractical burden of requiring adherence to a covenant that imposes affirmative obligations on defendant and successive landowners, where the endowment has been severed from such substantial obligations, outweighs the plaintiff's attenuated interest in perpetuating the covenant, seemingly without end.

Decedent Marjorie Doyle Rockwell, in her last will and testament, authorized her executors, including plaintiff Elizabeth Haley Rockwell in her discretion, to (1) grant to one or more historical preservation or conservation "restriction[s]" in and to all or any part of her real property; (2) convey any or all of said property to one or more charitable or not-for-profit organizations, including for no consideration, upon such restrictions; and/or (3) convey any or all of said property for its fair market value, subject to any such restrictions as the executors may impose thereon, to one or more persons or organizations, including one or more adjoining landowners, with the proceeds of any such sale(s) added to the estate's residue, which, in turn, was to be distributed to named charitable organizations in accordance with a trust created by decedent. The executors were also expressly authorized to establish one or more endowments necessary to enforce the terms of any such restrictions or to provide for the maintenance and upkeep of property if conveyed.

***235** The executors thereafter engaged in discussions with the Audubon Society of New York State, Inc., a charitable corporation (see generally N-PCL 201 [c]), to establish a bequest. In 1997, the parties agreed that the Estate would convey decedent's property to the Audubon Society of New York as three parcels, each with separate deeds subject to individual conditions. Parcel A, consisting of approximately nine acres and decedent's house, was to be conveyed for the purpose of furthering the mission of the Audubon Society of New York, with the house anticipated to be used for executive offices, a research library, and event space. The Estate expressly placed no restriction on the sale of parcel A, except that, if sold, it could only be sold for use as a single-family dwelling.

Parcel B—the parcel at issue here—consists of approximately 26 acres of undeveloped land. Parcel B was to be conveyed with the restrictions that the parcel remain "forever wild" and

"be used as a research, education and management area for urban wildlife conservation and water resource protection[, with] [n]o new permanent structures greater than 100 square feet . . . constructed on the premises, excluding necessary and accessory use structures to carry out research and education projects and programs for urban wildlife management and water resource conservation efforts."

And such restriction was to "run with the land."

Parcel C, consisting of approximately 7.5 acres of vacant land, was to be deeded to the Audubon Society of New York for furtherance of its mission, and carried the restriction that, if sold, could be subdivided only into two lots.

In 1998, all three parcels were conveyed to the Audubon Society of New York subject to these restrictions. The deed for each parcel included a further restriction that the property was to be used to further the mission of the Audubon Society of New York. The Estate also distributed ***3** a substantial endowment in the amount of \$500,000 to the Audubon Society of New York.

The Audubon Society of New York sold parcels A and C in 2001 and 2002, respectively. Originally subject to all enforceable covenants and restrictions, the Estate issued corrective deeds expressly stating that no purchaser of parcel A or C from the Audubon Society of New York was required to use the property to further that organization's mission. In 2013, the Audubon ***236** Society of New York sold parcel B to defendant Thomas Despart, an adjoining property owner. The 2013 deed contained all the same restrictions as the 1998 deed to the Audubon Society of New York, but, unlike the other two parcels, no corrective deed for parcel B was issued.

Following the 2013 conveyance, defendant allegedly undertook actions on the 26-acre parcel in contravention of the forever wild restriction. This led to multiple related lawsuits, as discussed below.

Prior Proceedings and Related Litigation

In 2014, the Gormans, who purchased parcel A from the Audubon Society of New York in 2001, commenced an action against Despart seeking to enjoin his alleged disruption of parcel B. In 2017, Supreme Court (Ryba, J.) dismissed the action after concluding that the Gormans lacked standing to enforce the restrictive covenant against Despart. Affirming that decision, the Appellate Division found that, although there was some evidence that the restrictive covenant was to run with the land, the record was "bereft" of evidence that the restrictive covenant was intended to benefit parcel A (*Gorman v Despart*, 164 AD3d 1059, 1060-1061 [3d Dept 2018]). Nor, the Court reasoned, was it necessary to allow the owners of parcels A and C to enforce the covenant "because it may be enforced by the Estate or its assigns" (*id.* at 1061). The Court also rejected any argument that the Rockwell Estate created a common scheme or plan that could support the Gormans' claimed right to enforce the restrictive covenant on parcel B (see *id.* at 1061-1062). On this reasoning, the Court held that the Gormans lacked standing to enforce the forever wild restriction (*id.* at 1062).

The dismissal of the Gormans' lawsuit prompted the reopening of the Rockwell Estate and commencement of the instant action against Despart. The Estate seeks a declaration that Despart is bound by the forever wild restriction requiring parcel B to be forever maintained as an ecological preserve, and an injunction prohibiting Despart from destroying, removing or otherwise disturbing vegetation thereon. Following joinder of issue, Supreme Court (Connelly, J.) issued two decisions. The first, dated August 8, 2019, upon finding a likelihood of success and irreparable harm, granted plaintiff's request for a preliminary injunction. The second dated October 6, 2020, denied the parties' motion and cross-motion for partial summary judgment. The court first rejected plaintiff's argument ***237** that it was entitled to partial summary judgment on the ground that the Appellate Division had held in *Gorman v Despart* that the Estate would have standing to enforce the covenant. The court reasoned that the Appellate Division addressed procedural standing only, not the question of substantive enforceability. And further discovery was required to resolve questions of fact necessary to determine plaintiff's claim of enforceability and defendant's claim of extinguishment, both of which turn on the equities.

On defendant's appeal of the denial of summary judgment on his cross-motion, the Appellate Division affirmed (*Rockwell v Despart*, 205 AD3d 1165 [3d Dept 2022]). The Appellate Division held that Despart was bound by the Court's prior decision in *Gorman v Despart*, which had concluded that the Estate has standing to enforce the restrictive covenant (see *id.* at 1166-1167). The Appellate Division further held that

issues of fact precluded summary judgment on Despart's defenses that the covenant should be extinguished under the doctrine of merger or because it has no actual or substantial benefit to the Estate under RPAPL 1951 (*see id.* at 1167-1168).

In further related litigation, the Rockwell Estate in 2020 commenced an action against the Audubon Society of New York seeking declaratory and equitable relief in the form of an accounting of the Audubon Society's use of the endowment and disgorgement of same along with the right to enforce the forever wild restriction and delivery of said assets and rights to another qualified organization. The Attorney General, invoking her statutory authority to represent beneficiaries of dispositions of property for charitable purposes and oversee not-for-profit organizations, sought to intervene in both actions, to consolidate them, and to reargue the court's prior decision dismissing plaintiff's claim that the Audubon's conveyance to Despart was a nullity. Supreme Court (Lynch, J.) denied the Attorney General's motion to intervene in this action against Despart, but it permitted her to intervene in the action against the Audubon Society of New York. The court also denied consolidation and, effectively granting reargument, adhered to its prior decision dismissing as time-barred any rescission claim on the ground that the 2013 conveyance to Despart was a nullity. The Appellate Division affirmed Supreme Court's denial of the Attorney General's motion to intervene in this action against Despart, and affirmed its grant of the Attorney General's motion to intervene in the action against the Audubon *238 Society of New York. The appellate court also affirmed the denial of the motion to consolidate; and it affirmed its decision granting dismissal of any rescission claim as time-barred (*Rockwell v Despart*, 212 AD3d 27 [3d Dept 2022]).¹

Both cases were assigned to this court on remand. *Rockwell v Audubon Socy. of N.Y., Inc.* remains in discovery. *Rockwell v Despart* proceeded to trial on July 17, 18, and 19, 2023.

The Trial

Plaintiff Elizabeth Haley Rockwell was Marjorie Doyle Rockwell's granddaughter and a co-executor of her grandmother's will. As children, she and her brother visited her grandmother's Loudonville property. Before her grandmother's death the area later designated as parcel B was maintained in mostly a natural state, with trees and open areas hayed twice per year. Further evincing her love of nature, her grandmother maintained cultured gardens, a greenhouse, and her own nature library, and participated in garden clubs and nature conservancies. Plaintiff spent significant time with her grandmother during the final year of her life before she died in 1995.

Marjorie Doyle Rockwell's will, in relevant part, authorized plaintiff and her co-executors "to convey any or all of [her] Loudonville real estate to one or more charitable or non-profit organizations" under such terms and restrictions and at a price as her executors may *4 determine. The will also authorized the executors to convey a portion of her Loudonville real estate to one or more adjoining landowners at fair market value. And it authorized the executors to create an endowment for any charitable or non-profit organization to maintain or upkeep the property. But the will itself made no mention of a forever wild restriction or nature-focused charitable organization.

Based on her knowledge of her grandmother's interest in birds, flowers and natural surroundings, plaintiff, herself an attorney who at one time was admitted to practice in New York, and her two co-executors (a bank and another attorney), engaged in discussions with the Audubon Society of New York *239 to effectuate the terms of her grandmother's will—including both the conveyance of the parcels and providing an endowment to manage them. Plaintiff was not aware that the organization was not affiliated with the National Audubon Society when the Estate conveyed the three parcels with deed restrictions to the Audubon Society of New York in 1998. Nor had she visited the Loudonville property since 1995, leaving it to the Audubon Society of New York to manage it. The Estate retained no real property in the vicinity of parcel B. And after the Audubon Society of New York sold parcels A and C in 2001 and 2002, and the Estate issued corrective deeds in 2002 removing restrictions, she assumed the Audubon Society of New York would continue to manage parcel B in accordance with the forever wild and public benefit provisions of that deed. She did not become aware of the conveyance to Despart until long after parcel B was sold. She added that, in her view, the restrictions on parcel A and parcel C, and parcel B, were not connected to, or dependent on, each other.

Plaintiff explained that her understanding of the restrictive covenant on parcel B was that the parcel would remain "forever wild" and "be used as a research, education and management area for urban wildlife conservation and water resource protection." She deferred to the Audubon Society of New York, but believed the restrictive covenant would require it to maintain a wildlife habitat, and would allow it to create pathways to allow public access to the preserve, build small educational and equipment storage structures, and create a small parking lot. In 2006, the Audubon Society of New York developed a preserve concept plan for parcel B, involving the phased removal of invasive species and replacement with native and exotic species over a 32-year timeline, creation of pathways, and maintenance of the watercourse. Plaintiff testified that the concept plan was consistent with her understanding of the restrictive covenant. The Audubon Society of New York did not implement the preserve plan before it sold the parcel to Despart. But it retained the proceeds from the sale of all three parcels as well as unused endowment funds to put toward its organizational mission.

Plaintiff testified that she later became aware that Despart had been disturbing the natural features of parcel B. She submitted as exhibits aerial photographs from 2001, 2007, 2017, and 2021 showing the extent of land disturbance, and numerous photographs depicting a bulldozer on the property, *240 well-worn trails, evidence of motorized vehicles, cut-down trees, and multiple areas cleared of vegetation. The owner of parcel A, Paul Gorman, also testified to observing machinery being used on parcel B, including ATVs, a tractor, skid steer, and excavator. He admitted to funding this lawsuit on behalf of the Rockwell Estate against Despart after his own case against Despart was dismissed for lack of standing.

Plaintiff also proffered the testimony from a real property appraiser that parcel B, without restriction, would have had a fair market value of about \$520,000 in 2013 when Despart purchased the property. With the restrictive covenant, the appraiser noted that the Town's equalized assessment of the parcel is \$118,027. Despart purchased parcel B in 2013 for *5 \$150,000, paid in cash. Defendant produced no expert testimony to counter plaintiff's expert's findings and conclusions.

And plaintiff offered the deposition testimony of Fredrik Realbuto, an attorney with Audubon Society of New York who was involved to some extent with the organization's conveyance of parcel B to Despart, along with certain relevant exhibits. Despart had been pursuing the property for about a year before the Audubon Society offered it for sale to the neighboring property owners. Despart was the high bidder. In

correspondence before the sale, Despart's attorney advised Despart, after review of the deed and other materials, that he "[did] not see any restrictions which would prevent transfer of the premises . . . to a non profit corporation formed by you." He also advised that he would "want a written mission statement from the Audubon Society of New York" in light of the statement in the deed that the property must be used to further that organization's mission, and recommended that any not-for-profit organization formed by Despart should be set up to receive tax deductible donations. In subsequent correspondence to Realbuto, Despart's attorney requested "a release from the Society cancelling out the restrictive covenant in your deed about future action," adding, "[w]e realize that it will still be effective unless the Rockwells agree with us." Follow-up correspondence from the Audubon Society of New York's attorney to Despart's attorney summarized the ultimate agreement for sale, including stating, "[y]our client also agrees that the property would be conveyed subject to" the restrictive covenant to be kept forever wild and used for research, education and conservation management and protection.

Defendant Thomas Despart testified that he resides about one half mile from parcel B and also owns property at 9 Spring *241 Street, which shares a 300-foot border with parcel B, where his son resides. He purchased parcel B with knowledge of the restrictive covenant. He asked to have the restrictions removed, but was unsuccessful. He admitted to using chainsaws, a brush hog, a skid steer, and an excavator on the property to enable him to survey and access it, to remove downed and dangerous trees, to remove encroaching structures, and to redress watercourse issues. He has used dump trucks to remove debris from the property and to bring in loads of gravel and fill to develop access roadways and replace the culvert on the property. He testified that he cleaned up and widened paths to allow him to use all-terrain vehicles to monitor the property. He contended that the Audubon Society of New York never contacted him after conveying the property to him. In his view, the "forever wild" clause is not understandable, and in any event, because he has not developed the property with structures or otherwise, he does not believe he violated the "forever wild" restriction. He conceded that he has been under a preliminary injunction since 2019 to maintain the status quo of the property.

Finally, Christine Kane, executive director and chief executive officer of Audubon Society of New York International, doing business as Audubon Society of New York, testified pursuant to subpoena. The organization's mission statement asserts that its mission is "to create environmentally sustainable environments where people live, work, and play." But the organization no longer owns or maintains nature preserves open to the public, having divested itself of the Hollyhock Hollow Sanctuary, its last nature preserve, in 2017. The organization consults with members, municipalities, and golf-related properties to recommend practices and provide land management guidelines for environmentally sustainable enterprises. The organization is not formally affiliated with the National Audubon Society, but sometimes works with the national organization and similar groups for their common mission.

Plaintiff seeks a declaration that the restrictive covenant is enforceable against defendant, and a permanent injunction requiring him to adhere to the terms of the restrictive covenant. Defendant has placed several issues before the court pertinent to plaintiff's requests for relief: (1) whether the restrictive covenant cannot be enforced because it is a "naked covenant in terrorem"; (2) whether the restrictive covenant *242 cannot be enforced because its terms are not clearly definable and require subjective interpretation; (3) whether the restrictive covenant should be extinguished under RPAPL 1951 because, considering the equities, it no longer serves an actual and substantial benefit to the Estate; and (4) whether, to the extent that the restrictive covenant is enforceable, the record shows no evidence of violation.

Before addressing defendant's arguments, it is helpful to reexamine what has already been decided in prior appellate proceedings, inasmuch as those decisions bind this court. First, in the context of it holding that the Gormans lacked standing to enforce the restrictive covenant, the Appellate Division reasoned, "[n]or is enforcement of the forever wild restriction by the owners of parcels A and C necessary to ensure compliance with the stated purposes of the covenant because it may be enforced by the Estate or its assigns" (*Gorman v Despart*, 164 AD3d 1059, 1061 [3d Dept 2018], *lv dismissed* 32 NY3d 1193 [2019]). The Appellate Division recognized that the restrictive covenant not only prescribed that the 26-acre parcel remain forever wild, but also required, in order to advance the Rockwell Estate's interest in same, that the parcel "be used as a research, education and management area for urban wildlife conservation and water resource protection" (*id.*). Further, the Appellate Division held, there was no common scheme of development for all three parcels which would give the Gormans standing to enforce it (*see id.* at 1061-1062). Thus, the Gormans' litigation was dismissed.

Also, in a prior appeal in this case, the Appellate Division, after reiterating its findings in *Gorman v Despart*, noted that Despart, the defendant in both cases, was collaterally estopped from relitigating whether the Rockwell Estate has standing to enforce the restrictive covenant (*Rockwell v Despart*, 205 AD3d 1165, 1166-1167 [3d Dept 2022]). On the merits, the Appellate Division affirmed Supreme Court's denial of defendant's cross-motion for summary judgment on the grounds that the covenant was extinguished by merger or, in the alternative, has no actual or substantial benefit to the Estate (*see id.* at 1167-1168). The Court noted that the doctrine of merger is not favored in equity, and whether there is a merger of a lesser estate in a greater estate is largely a question of the intention of the parties (*see id.* at 1168). Because correspondence between the real estate lawyers for the Audubon Society and defendant confirmed the continued existence of the restrictive *243 covenant on parcel B as originally established by the Estate, the Appellate Division held that defendant failed to meet his prima facie burden for summary judgment (*see id.*).

Similarly, the Appellate Division held that Despart was not entitled to summary judgment on his defense that the covenant should be extinguished pursuant to RPAPL 1951 (1). Specifically, the Court held that Despart had not demonstrated prima facie

"that the restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason" (*Rockwell v Despart*, 205 AD3d at 1168, quoting RPAPL 1951 [1]).

The Court explained that when evaluating a restrictive covenant under RPAPL 1951 (1), "[t]he issue is not whether [the party seeking enforcement] obtains any benefit from the existence of the restriction but whether in a balancing of equities it can be said *7 to be . . . of no actual and substantial benefit" (*id.* at 1168 [internal quotation marks and citation omitted]). The Court rejected on summary judgment defendant's argument that the subsequent use and sale of parcels A and C had created "changed conditions" under RPAPL 1951 which rendered the covenant of no actual and substantial benefit to the Estate (*id.*). It likewise rejected defendant's argument of inconvenience to him as conclusory and unsupported, and his contention that the Estate had already received a tax benefit and therefore the restriction has no

remaining actual or substantial benefit, as Rockwell's last will and testament made it clear that she desired her property to be used for charitable purposes (*see id.* at 1168-1169).

The court takes from these decisions that (1) the covenant is personal to the Estate and does not run with the land such that abutting property owners may enforce it; (2) the Estate has standing to enforce the restrictive covenant because it continues to have some benefit to the Estate; and (3) the court after trial must determine facts relevant to the issue whether the restrictive covenant is subject to merger or should be extinguished upon balancing the equities pursuant to RPAPL 1951.

***244** The court declines to hold that the restrictive covenant cannot be enforced on the ground that it is a naked covenant in terrorem.

Defendant argues that, because the Estate owns no adjacent or retained lands, it owns no dominant estate; and that the Rockwells did not even know the Audubon Society of New York conveyed the parcel to him, had exhibited no interest in the property since it deeded the property to the Audubon Society of New York, and were not aware of the status of the property until they were contacted during the Gormans' lawsuit. In fact, defendant points out, the Gormans are fully funding the Estate's lawsuit, since their case was dismissed for lack of standing. Under these circumstances, defendant argues, the restrictive covenant is in effect an unenforceable naked covenant.

Defendant relies on the Appellate Division's decision in *Gorman v Despart* where it acknowledged that the "law favors free and unencumbered use of real property," and restrictive covenants "are strictly construed and restraints will be enforced only when their existence has been established by clear and convincing proof by the owner of the dominant estate" (164 AD3d at 1060, quoting *Haldeman v Teicholz*, 197 AD2d 223, 226 [3d Dept 1994]). In *Haldeman*, the Court held that the original grantor of subdivided property on which he placed a restrictive covenant lacked standing to enforce it because he was no longer the owner of a dominant estate which was intended to benefit from the restriction on the servient parcel property (*Haldeman*, 197 AD2d at 226).

While defendant's argument has some force, this court is constrained by the Appellate Division's decision that the Estate has standing to enforce the restrictive covenant because it continues to be of some benefit to the Estate to have the property continue to be used for charitable purposes. Consequently, the court declines to hold the restrictive covenant unenforceable as a matter of law on the ground it no longer provides a cognizable benefit to the original grantor.

The court rejects defendant's argument that the restrictive covenant is not enforceable because its terms are not definable and require subjective interpretation.

Defendant testified at trial that he did not understand the meaning of the phrase "forever wild." Given its ambiguity, he argues, it cannot be enforced. The court disagrees.

The phrase "forever wild," read in the context of the rest of the restrictive covenant, is ***8** sufficiently defined to permit ***245** enforcement. Both the original deed to the Audubon Society of New York and the subsequent deed to Despart contained the same language:

the parcel "shall be forever wild and shall be used as a research, education and management area for urban wildlife conservation and water resource protection[, with] [n]o new permanent structures greater than 100 square feet . . . constructed on the premises, excluding necessary and accessory use structures to carry out research and education projects and programs for urban wildlife management and water resource conservation efforts."

Clearly, "forever wild" is not used in the sense of the "Forever Wild" Clause of the New York Constitution, article IV; nor does it necessarily mean vacant, undeveloped land. Instead, the restrictive covenant contemplated active management of the property for urban wildlife conservation and water resource protection, and access to the public use for research and education. And the covenant contemplates limited accessory structures to facilitate that use. When the executors placed the restrictive covenant in the deed to the Audubon Society of New York, a member of the faculty at Siena College had a relationship with the Audubon Society of New York, and after the original conveyance, occasionally had students conduct studies on the property. Plaintiff Elizabeth Haley Rockwell agreed that the management plan put forward by the Audubon Society of New York in 2006 was consistent with the stated purpose of the restrictive covenant. On the other hand, excessive tree removal and landscaping without concern for erosion and habitat depletion, and construction of gravel roads or other wide trails to allow ATV use throughout the property would not be consistent with the express purpose of the restrictive covenant.

Accordingly, the court rejects defendant's argument that ambiguity of language in the restrictive covenant renders it unenforceable. The restrictive covenant must be extinguished under RPAPL 1951.

Defendant alternatively argues in support of his counterclaim for extinguishment pursuant to RPAPL 1951 that: (1) the purpose of the endowment and restrictions has been accomplished inasmuch as they have been or are being used to fund the Audubon Society of New York's mission; (2) there have been changes in conditions, including the sale of parcel A, ***246** which was to serve as an urban wildlife education and research center and headquarters, as well as a significant change in the focus of the Audubon Society of New York; (3) Marjorie Doyle Rockwell's will did not require conveyance to a charitable organization or specify the purpose of any charitable bequest, but left it to the discretion of the executors; (4) the Estate had been fully distributed and closed since 2002, it provided no oversight or accountability to ensure that an appropriate stewardship plan was implemented, and it was reopened nearly 20 years later only to bring this action which is entirely funded by the Gormans; (5) the executors, sophisticated parties represented by counsel, chose to effectuate their objective by selecting the Audubon Society of New York as the donee and implementing organization and by establishing restrictions by deed covenant rather than by a more durable conservation easement; and (6) the property is not capable of being maintained in accordance with the restrictive covenant for various reasons.

Plaintiff counters that defendant purchased parcel B with full knowledge of the restrictive covenant, unsuccessfully sought to have it removed before purchasing it, and obtained the property for \$150,000, far less than the value of the property without the restrictive covenant. Thus, he should not receive a windfall where any hardship is of his own making. And citing ***9** *Nature Conservancy v Congel* (296 AD2d 840 [4th Dept 2002]), plaintiff argues that there is no impediment to maintaining the land in its natural state, and that defendant therefore has not proved, and cannot prove, that the purpose of the restrictive covenant cannot be accomplished.

RPAPL 1951 (1) provides, in relevant part:

“No restriction on the use of land . . . shall . . . be declared or determined to be enforceable, if, at the time the enforceability of the restriction is brought in question, it appears that the restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason.”

Discussing the test in its summary judgment decision, the Appellate Division explained that when evaluating a restrictive covenant under RPAPL 1951 (1), “[t]he issue is not whether [the party seeking enforcement] obtains any benefit from the ^{*247} existence of the restriction but whether in a balancing of equities it can be said to be . . . of no actual and substantial benefit” (*Rockwell v Despart*, 205 AD3d at 1168, quoting *Orange & Rockland Util. v Philwold Estates*, 52 NY2d 253, 266 [1981]; see *Smith v Sheppard*, 301 AD2d 913, 914-915 [3d Dept 2003]).

After balancing the equities, this court concludes that the restrictive covenant must be extinguished. The first consideration is whether the restriction is of actual and substantial benefit to the Estate. True, as the Appellate Division has recognized, the Estate retains some interest in having this 26-acre parcel remain as an ecological preserve in memory of Marjorie Doyle Rockwell's abiding interest in the natural world sufficient to support standing. But even that interest, though laudable, is attenuated. The Rockwells no longer have connections with this geographic area. They own no property here, and they did not even know that Audubon Society of New York sold the property to defendant nor of the condition of the property under defendant's ownership. And it appears that they are not even funding this litigation; the Gormans are, as neighboring property owners.

In addition, the full purpose and intent of the covenant cannot practicably be accomplished because the Audubon Society of New York conveyed the parcel to a private individual who lacks both access to the endowment funds and the background and expertise to accomplish the purpose and intent. Merely maintaining the property in its undeveloped state does not effectuate the full purpose of the covenant. As the Appellate Division has said twice, “the language of the forever wild restriction . . . was imposed to advance [the decedent's] interest in research, education and conservation, and not for the purpose of simply maintaining undeveloped property” (*Rockwell v Despart*, 205 AD3d at 1166-1167, quoting *Gorman v Despart*, 164 AD3d at 1061). The conveyance of parcel B to a private party, and disassociation of the endowment from the new property owner, render management of the property such that it can be used for research and education in addition to urban wildlife conservation and water resource protection highly impracticable.²

Furthermore, as defendant points out, because the endowment and the proceeds of the sales of all three parcels currently ^{*248} remain with the Audubon Society of New York, the executors' purpose and intent have arguably been partially accomplished. The will of Marjorie Doyle Rockwell permitted her executors to convey the property to an unspecified charitable organization, or to a neighboring landowner. Selecting the charitable organization option, the executors' deed to the Audubon Society of New York included not only the forever wild provision but the further direction that the property was to be used to further the mission of the Audubon Society of New York. As it stands now, the proceeds from the sale of the property remain with that organization to be used in furtherance of its mission.

Weighing on the other side of the balance ledger, defendant purchased the parcel with full knowledge of the restrictive covenant, and at a greatly reduced price. Arguably, he will reap a financial windfall if the covenant is extinguished.³ And therefore, plaintiff argues, any hardship that would ensue from a determination that the covenant is enforceable was “self-created” (*Congel*, 296 AD2d at 841).

This case, however, is distinguishable from *Nature Conservancy v Congel*, where the Fourth Department denied extinguishment of a restrictive covenant which required keeping hundreds of acres in a “natural state” (*Congel*, 296 AD2d at 841). The grantor also allowed construction of five single-family homes on two 10-acre parcels; thus, the Court held, it was not a case where if the restrictive covenant was enforced, there was no use whatsoever to which the restricted land can be put by the defendants (see *id.*). Furthermore, plaintiffs in *Nature Conservancy v Congel* owned adjoining parcels which were expressly benefited by the covenant, belying defendant's argument that the covenant was of no actual and substantial benefit to them. Here, by contrast, the restrictive covenant covers the entire 26-acre parcel, and plaintiff does not own adjoining, benefitting land.

^{*249} Furthermore, the restrictive covenant here not only provides for maintaining the parcel in a natural state, but also imposes an affirmative obligation to use it for education and research, a fact that bears significant weight in balancing the equities here (see Robert H. Mann, Arthur W. Rashap & Gerald K. Smith, *Affirmative Duties Running with the Land*, 35 NYU L Rev 1344 [1960]). And the court is compelled to consider the extent of the burden imposed by this affirmative covenant that is ostensibly intended to operate in perpetuity (cf. *Nicholson v 300 Broadway Realty Corp.*, 7 NY2d 240, 246 [1959]; accord *Orange & Rockland Util.*, 52 NY2d at 264-265).

Here, the attenuated in personam interest which the plaintiff may have in enforcing the covenant, weighed against the perpetual and onerous affirmative duties which the covenant seeks to impose upon defendant, sans endowment, convinces the court that the covenant ought to be ^{*10} extinguished. To enforce such a covenant would run afoul of the policy interest of promoting the free and unencumbered use of property embodied by RPAPL 1951 (see *Orange & Rockland Util.*, 52 NY2d at 265). Thus, after balancing the equities, the court concludes they weigh in favor of extinguishing the covenant.

Based on the foregoing, it is hereby ordered, adjudged and decreed that the restrictive covenant at issue is unenforceable pursuant to RPAPL 1951; and it is further ordered, adjudged and decreed that the restrictive covenant at issue is extinguished pursuant to RPAPL 1951.

Footnotes

¹ In a separate case, *Flanagan v Despart* (Sup Ct, Albany County, Mar. 1, 2021, Lynch, J., index No. 2154-16), neighboring landowners successfully sued defendant for a declaration that certain other restrictions imposed by the Wyebrook Declaration,

pertaining to 11 acres located on the westerly part of the 26-acre property at issue here, run with the land and are enforceable against the defendant. Those restrictions include covenants that "no lot shall be used except for residential purposes"; and no building shall be erected on any lot having an area less than 30,000 square feet; and other prescriptions against nuisance-type activities.

2

Plaintiff has suggested that one goal of the Rockwell's pending lawsuit against the Audubon Society of New York, in which the Attorney General has intervened, is the disgorgement of endowment funds and properties' sales proceeds, and that if they are successful, such disgorged funds may be redirected to defendant to accomplish the full intent and purpose of the restrictive covenant. But the Appellate Division has affirmed the decision to deny consolidation of the two lawsuits, so it is speculative as to whether the endowment can be reunited with the current owner of the 26-acre parcel.

3

Although, equally arguable, Despart proceeded with the purchase after his efforts to have it removed by agreement were unsuccessful, expecting that the restrictive covenant would be adjudicated unenforceable or extinguished.

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