[Cite as *Cianciola v. Johnson's Island Property Owners' Assn.*, 2012-Ohio-5261.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Elizabeth J. Cianciola, et al.	Court of Appeals No. OT-11-031
Appellees	Trial Court Nos. 10CV232H 10CV366H
v.	
Johnson's Island Property Owner's Assn.	**DECISION AND JUDGMENT**
Appellant	Decided: November 9, 2012

* * * * *

Richard R. Gillum and James C. Barney, for appellees Cianciola.

George C. Wilber, for appellees Bode.

D. Jeffery Rengel and Thomas R. Lucas, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Defendant-appellant, Johnson's Island Property Owners' Association (JIPOA), appeals from the judgment of the Ottawa County Common Pleas Court granting summary judgment in favor of plaintiffs-appellees, Elizabeth J. Cianciola, et al. The trial

court granted summary judgment on the grounds that JIPOA's code of regulations was unenforceable against appellees since it is not in appellees' chains of title. For the reasons that follow, we affirm.

A. Facts and Procedural Background

{¶ 2} Johnson's Island is situated on Sandusky Bay off the southern coast of the Marblehead Peninsula near Lake Erie in Ottawa County. In 1956, Johnson's Island was purchased by Johnson's Island, Inc., a for-profit Ohio corporation.

{¶ 3} Thereafter, Johnson's Island, Inc. recorded a plat map which divided the island into building lots and dedicated two roadways. Prior to subdivision and subsequent sale of the lots, Johnson's Island, Inc. recorded a declaration of restrictions restricting the use of lots 26-53, 61-170, and 173-376 on the island.

{¶ 4} Appellees are record owners of several lots purportedly restricted by the declaration of restrictions. Appellees purchased their respective lots at various times ranging from as early as 1957 to as recent as 2006. Appellees' deeds include language that subjects the property to, inter alia, "conditions and restrictions of record."

{¶ 5} The declaration of restrictions sets forth several terms pertaining to the use of property. However, the declaration of restrictions does not compel membership in any homeowners' association, nor does it include language regarding the formation of a homeowners' association, or any mention of assessment of dues. Further, the declaration of restrictions is silent on the issue of amendment and future revision.

{¶ 6} JIPOA is an Ohio not-for-profit corporation that was formed in 1956. When initially formed, the company's name was Johnson's Island Club, Inc. However, in 1983, the name was changed to Johnson's Island Property Owners' Association. Upon formation, JIPOA filed its code of regulations with the Secretary of State. The code of regulations provided, in part, the following purposes for which JIPOA was formed:

> To promote the development of the common facilities on Johnson's Island * * * for the use and benefit of all lot owners thereof; to operate and maintain said facilities and to adopt and enforce regulations governing the conditions of use thereof; to provide service on or to the island for the members as required or desired; * * * to maintain standards for the admission of members thereto * * *.

JIPOA's code of regulations also allowed amendment by a majority vote of its members.

{¶ 7} JIPOA adopted an amended code of regulations in 2009 giving itself authority, for the first time, to impose assessments upon appellees by virtue of their ownership of property on Johnson's Island. Appellees objected to the enforcement of JIPOA's code of regulations, and filed suit with the Ottawa County Court of Common Pleas seeking a declaratory judgment to quiet title and an injunction to prevent enforcement of the code of regulations.

{¶ 8} The trial court granted appellees' summary judgment motion and determined that JIPOA's code of regulations was unenforceable against appellees since it is not in their chains of title.

B. Assignments of Error

{¶ 9} JIPOA assigns the following two errors for our review:

> 1) The trial court erred when it held that JIPOA's Code of Regulations, and amendments thereto, are not part of the deed restrictions; not restrictive covenants in plaintiffs-appellees' chain of title and not enforceable; contrary to this court's holding in *Johnson's Island Property Owners' Association v. Nachman*, 6th Dist. No. OT-98-043, 1999 WL 1048235 (Jan. 19, 1999).
>
> 2) The trial court erred when it held that JIPOA was "restrained and enjoined from making any filings or publications that may cloud plaintiffs' title" thereby preventing JIPOA from enforcing its rights granted by the deed restrictions and this Court's *Nachman* decision.

II. Standard of Review

{¶ 10} We begin by noting that an appellate court reviews summary judgment rulings de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under Civ.R. 56(C), summary judgment is appropriate where (1) no genuine issue as to any material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor

of the nonmoving party, that conclusion is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

III. Analysis

{¶ 11} In arguing its first assignment of error, JIPOA points to two reasons why the trial court erred when it held that JIPOA's code of regulations were not part of the deed restrictions and not enforceable restrictive covenants in appellees' chain of title. First, JIPOA argues that relitigation is barred by the doctrine of collateral estoppel. Alternatively, JIPOA asserts that, contrary to the trial court's finding, the code of regulations is a valid and enforceable restrictive covenant that runs with the land and is therefore binding upon appellees' property. We address each of these arguments separately.

A. Collateral Estoppel

{¶ 12} JIPOA argues that the doctrine of collateral estoppel applies and bars relitigation of these issues. JIPOA claims that *Nachman* is res judicata as to the determination of whether JIPOA's code of regulations is in appellees' chain of title. JIPOA also argues that *Bremenour, et al. v. Johnson's Island Property Owners' Assn.*, Ottawa C.P. No. 23134 (Jul. 30, 1986) is res judicata as to JIPOA's authority to file liens against appellees' property. Appellees argue that collateral estoppel should not apply with respect to these decisions since there is no privity between the parties and the issues here are substantially different than those in *Nachman* and *Bremenour*.

{¶ 13} The doctrine of collateral estoppel bars subsequent parties in privity with the original party from relitigating identical issues in subsequent actions. The following four elements must be met before collateral estoppel will apply:

> (1) The party against whom estoppel is sought was a party or in privity with a party to the prior action; * * * (2) There was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; * * * (3) The issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and * * * (4) The issue must have been identical to the issue involved in the prior suit. *Monahan v. Eagle Picher Indus., Inc.*, 21 Ohio App.3d 179, 180-181, 486 N.E.2d 1165 (1st Dist.1984).

We determine that collateral estoppel does not apply here, since the first element is not satisfied.

{¶ 14} The appellees here were not parties to *Nachman* or *Bremenour*. Therefore, they must be in privity with the parties in those actions in order to satisfy the first element. A party is in privity with another party if he succeeds to an estate or an interest formerly held by the other. *Whitehead v. General Tel. Co.*, 20 Ohio St.2d 108, 115, 254 N.E.2d 10 (1969). Here, the parcels owned by appellees are different from those at issue in *Nachman* and *Bremenour*. Appellees have no relationship with the property owners in those cases aside from being landowners in the same subdivision. The lots owned by appellees have different characteristics and different chains of title. Because the parties

here are different from those represented in *Nachman* and *Bremenour*, collateral estoppel does not apply.

{¶ 15} Collateral estoppel is also inappropriate here because the issues at stake are different than those in the prior actions. In order to assert collateral estoppel the asserting party "must prove that the *identical* issue was actually litigated, directly determined, and essential to the judgment in the prior action." (Emphasis added.) *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193, 201, 443 N.E.2d 978 (1983). The issue in *Bremenour* was whether principles of equity (i.e. unjust enrichment) required members of JIPOA to contribute to JIPOA's operational costs. The res judicata effect of that decision was set forth in this court's decision in *Nachman*, where we stated that "*Bremenour* is *res judicata* only on the issue of the [property owners'] obligation to contribute their fair share of JIPOA's operational costs." *Nachman*, 1999 WL 1048235 at *8. In *Nachman*, we addressed whether the Nachmans were required to become members of JIPOA and whether they were obligated to pay for a share of JIPOA's legal fees. *Id.* Here, however, we are addressing neither of the above-mentioned issues. Rather, we are addressing the issue of whether the most recent version of JIPOA's code of regulations, created after the decisions in *Nachman* and *Bremenour*, function as restrictive covenants running with appellees' land. Since that issue is not identical to the issues addressed in *Nachman* and *Bremenour*, collateral estoppel does not apply.

B. JIPOA's Code of Regulations as Restrictive Covenants

{¶ 16} Having concluded that the instant action is not barred by the doctrine of collateral estoppel, we turn next to the question of whether the code of regulations operates as a restrictive covenant that runs with the land and is therefore binding upon appellees' property.

{¶ 17} The Ohio Supreme Court held in *Bove v. Giebel*, 169 Ohio St. 325, 159 N.E.2d 425 (1959), paragraph one of the syllabus:

> The general rule, with respect to construing agreements restricting the use of real estate, is that such agreements are strictly construed against limitations upon such use, and that all doubts should be resolved against a possible construction thereof which would increase the restriction upon the use of such real estate.

{¶ 18} Although restrictive covenants are generally disfavored, parties are free to establish such covenants so long as they meet certain requirements. Here, we are not convinced that the code of regulations meets the very definition of a restrictive covenant. In *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, the Ohio Supreme Court quoted Black's Law Dictionary and stated: "A 'restrictive covenant' is a 'private *agreement*, [usually] in a deed or lease, that restricts the use or occupancy of real property, [especially] by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put.'" (Emphasis added.) *Id.* at ¶ 28. Fundamental to any restrictive covenant is an agreement between the grantor and the grantee. Here, the

code of regulations fails to meet this definition for two reasons. First, neither appellees nor their predecessors ever agreed to be bound by the restrictions contained in the code of regulations. Second, JIPOA never owned any of the land in question and, therefore, was not a grantor in the first place.

{¶ 19} The facts of this case are similar to those in *Sandy Beach Apt. Ltd. v. Mitiwanga Park Co.*, 6th Dist. Nos. E-06-041, E-06-040, and E-06-042, 2008-Ohio-606. In *Sandy Beach*, several property owners filed suit against a corporation (Mitiwanga) engaged in the maintenance and upkeep of a subdivision. The owners sought a declaratory judgment that the corporation's bylaws were unenforceable. *Id.* at ¶ 15. In its bylaws, Mitiwanga sought to "control the use of the common areas and private lots and to impose assessments and fines related to their use." *Id.* at ¶ 21. Rather than claiming that the bylaws were restrictive covenants, Mitiwanga argued that the bylaws were merely contractual restrictions on the use of land. *Id.* ¶ 23. However, Mitiwanga used language such as "actual notice" and "constructive notice" and pointed to the restrictive language in the property owners' deeds to support their argument. *Id.* At the outset, this court pointed out that Mitiwanga did not appear in the chain of title for any of the lots at issue, and that the property owners never agreed to make their property subject to Mitiwanga's bylaws. However, Mitiwanga asserted that the bylaws were enforceable since the deeds stated that the lots would be subject to "restrictions of record" and the bylaws were recorded. *Id.* at ¶ 30. Because we determined that Mitiwanga never owned any of the lots at issue, we concluded that the bylaws were not restrictive covenants in the

first place. *Id.* at ¶ 37. Further, we dismissed Mitiwanga's notice argument and stated that notice of the bylaws was irrelevant. *Id.*

{¶ 20} The facts in *Sandy Beach* are strikingly similar to those in this case. As with Mitiwanga, JIPOA has never held an ownership interest in appellees' property. JIPOA tries to circumvent this problem by asserting ownership through Johnson's Island, Inc., the entity that initially developed the island and sold the lots at issue. Although it may be true that JIPOA and Johnson's Island, Inc. are related to one another,[1] the fact remains that they are not one in the same. Accordingly, JIPOA never stood in the shoes of a grantor capable of creating a restrictive covenant and, even if it had, no such agreement was ever reached involving JIPOA.

{¶ 21} JIPOA uses the terms "actual notice" and "constructive notice" frequently in its briefs. However, as we stated in *Sandy Beach*, notice of the code of regulations is irrelevant to their enforceability. *Id.* Because the code of regulations is not a restrictive covenant in the first place, it does not matter whether appellees acquired their property with notice.

{¶ 22} Since the bylaws are not restrictive covenants, JIPOA has no authority to require appellees to become members or to contribute to JIPOA's costs in the form of dues. *Id.* at ¶ 38. JIPOA attempts to distinguish *Sandy Beach* by pointing to the fact that the bylaws at issue in that case were not recorded until *after* the lots were initially sold by

[1] JIPOA asserts that Johnson's Island, Inc. was initially the sole shareholder of JIPOA. However, we cannot verify the validity of this statement based on our review of the record.

the developer. However, this distinction is irrelevant since our conclusion in *Sandy Beach* rested on the idea that a corporation cannot restrict the use of land it never owned by simply recording bylaws that purport to bind the landowners. It makes no difference *when* the bylaws were recorded, as that fact applies in the context of notice. The notice inquiry is only necessary when analyzing the validity of restrictive covenants. Since we conclude the code of regulations is not a restrictive covenant, we need not address the notice question.

{¶ 23} JIPOA further argues that its authority to restrict the use of appellees' property stems from the declaration of restrictions filed by Johnson's Island, Inc. JIPOA claims that its code of regulations are merely enforcement tools to carry out the rights given to it under the declaration of restrictions. However, our review of both the code of regulations and the declaration of restrictions reveals that JIPOA is not enforcing, but rather is expanding the scope of their authority beyond that granted by the declaration of restrictions.

{¶ 24} The declaration of restrictions vests JIPOA with certain limited powers, including: (1) the determination as to whether a particular use constitutes a nuisance; (2) the right to approve fencing that varies with the restrictions; (3) the right to approve sales or transfers of property on the island; (4) the right to waive restrictions contained in the declaration of restrictions for the benefit of the island's development; and (5) the right to enforce the declaration of restrictions. Notably, the declaration of restrictions does not provide JIPOA with authority to levy assessments on property owners in order to fund its

efforts to maintain common areas. Further, the declaration of restrictions does not establish a homeowners' association or any other organization to which property owners automatically belong by virtue of their ownership on the island. Accordingly, JIPOA's argument that the declaration of restrictions authorizes JIPOA to adopt sweeping restrictions such as those promulgated in its code of regulations is misplaced.

{¶ 25} Rather than a restrictive covenant, the code of regulations is merely a document governing the affairs of JIPOA and its members. *Baldwin's Oh. Prac. Bus. Org.* Section 20:1 (2012) (defining a code of regulations as "rules adopted by shareholders to regulate the internal procedural affairs of a corporation"). The initial declaration of restrictions may create a restrictive covenant running with appellees' land. However, this does not mean that all corporate governance documents promulgated by JIPOA also become part of the restrictive covenant created by the declaration of restrictions simply by its reference to JIPOA. Indeed, the declaration of restrictions makes little mention of JIPOA except to grant JIPOA certain limited rights with respect to the restrictions contained therein. The declaration of restrictions says nothing about incorporating JIPOA's code of regulations into the restrictive covenant. In addition, the declaration of restrictions does not provide for any amendment that would allow such incorporation at a later date.

{¶ 26} For the reasons stated above, we conclude that JIPOA's code of regulations is not a restrictive covenant and, further, is not a set of regulations designed to carry out responsibilities delegated to JIPOA through the declaration of restrictions. Having also

concluded that collateral estoppel does not bar relitigation of these issues, we find JIPOA's first assignment of error not well-taken.

C. Injunction against JIPOA

{¶ 27} In its second assignment of error, JIPOA maintains that the trial court erred when it enjoined JIPOA from taking any action that would cloud appellees' title. Essentially, JIPOA's argument centers on a misplaced notion that the trial court's injunction prevents JIPOA from enforcing any of its rights under the declaration of restrictions. However, the language of the trial court's judgment entry, when read in context, says otherwise. The relevant text of the entry reads:

> 2. JIPOA and others acting in concert with JIPOA are hereby restrained and enjoined from directly or indirectly attempting to enforce the Amended Code of Regulations or the Operating Agreement against Plaintiffs and is further restrained and enjoined from making any filings or publications that may cloud Plaintiffs' titles.

{¶ 28} The entry prevents JIPOA from taking any action that would cloud appellees' title pursuant to the code of regulations or the operating agreement. It does not prevent JIPOA from acting in accordance with rights granted by the declaration of restrictions. The entry is a natural conclusion flowing from the determination that the code of regulations and the operating agreement are not valid restrictive covenants. Since they are not restrictive covenants, they provide no authority to JIPOA to take action that would cloud appellees' title.

{¶ 29} JIPOA also argues that the trial court, in granting the injunction, ignored its decision in *Johnson's Island Property Owners' Assn. v. Desmond*, Ottawa C.P. No. 92-CVH-315 (July 16, 1993). In *Desmond*, the trial court granted an injunction to prevent Desmond from leasing his property without JIPOA's consent pursuant to JIPOA's authority under the declaration of restrictions. Since the injunction granted in the case sub judice prevents JIPOA from taking action pursuant to the code of regulations and operating agreement, the decision of the trial court in *Desmond* remains unaffected.

{¶ 30} Finally, JIPOA claims that the trial court's injunction conflicts with its prior decision in *Baycliffs Homeowner's Assn., Inc. v. JIPOA*, Ottawa C.P. No. 04-CVH-202 (June 7, 2007). In that case, the trial court entered a consent judgment entry whereby a road commission was established for maintenance and upkeep of the island roadways. The consent judgment entry authorized JIPOA to bill and collect all assessments to fund the road commission's work from all owners of island property. In addition, the consent judgment entry incorporated the terms of a joint operating agreement between JIPOA and Baycliffs Homeowner's Association (BHOA), a neighboring subdivision association, governing maintenance of the common roads. The entry purported to bind all owners of island property and stated that the defendants "have ably represented those owners of property on Johnson's Island who may not be members of either BHOA or JIPOA."

{¶ 31} JIPOA argues that appellees are bound by the decision in *Baycliffs*. We disagree. Appellees are not bound by the judgment in *Baycliffs* since they were not made parties and were not in privity with a party in that proceeding. *See West Hill Baptist*

Church v. Abbate, 24 Ohio Misc. 66, 261 N.E.2d 196 (C.P.1969) (refusing to base a determination as to the validity of restrictive covenants on a prior decision holding restrictive covenants invalid since the parties in the prior action were different from the parties in the present action).

{¶ 32} Contrary to JIPOA's expansive interpretation of the trial court's injunction, we understand the injunction to apply to actions taken pursuant to the code of regulations and the operating agreement and not enforcement actions taken pursuant to the declaration of restrictions. Accordingly, JIPOA's second assignment of error is not well-taken.

IV. Conclusion

{¶ 33} Having found JIPOA's assignments of error not well-taken, we hereby affirm the judgment of the Ottawa County Court of Common Pleas. Costs are assessed to JIPOA in accordance with App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Arlene Singer, P.J.

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JUDGE

Stephen A. Yarbrough, J.
CONCUR.

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JUDGE