

5C-12-8950

**ONTARIO
SUPERIOR COURT OF JUSTICE
TORONTO SMALL CLAIMS COURT**



BETWEEN

RICHARD BLACK AND SCOTT LAMACROFT

Plaintiffs

and

GERALD OWEN AND KATHERIN ANDERSON

Defendants

JUDGEMENT

The Plaintiffs, Richard Black and Scott Lamacroft [Plaintiffs], Trustees of the Trust, whereby the area known as Wychwood Park purports to be governed, claim the sum of \$12,799.81 from the Defendants , Gerard Owen and Catherine Anderson [Defendants]. The Defendants are the owners of the property known as 49 Alcina Ave., Toronto, which the Plaintiffs contend is included in the area known as Wychwood Park.

In 1891, the original owners of the lands registered a plan of subdivision for the area generally bounded by St. Clair Avenue to the north, Davenport Road to the south, west of Bathurst Street, all in the city of Toronto. The original owners also drafted a Trust Deed to govern the private roads and park area, which were to be for the benefit of all of the owners of the property encompassed by the Trust Deed. Said Trust Deed allowed for the imposition of a levy by the Trustees of the Trust for the maintenance of the common lands to be imposed upon all of the owners from time to time of the lands encompassed by the Trust Deed.

The practice has been for the Trustees of the Trust to determine the amount of monies required to maintain the common areas and to determine the levy for each homeowner. The proportion of the total amount required to maintain these common areas for each home owner is based upon the land assessment for each home in the Wychwood Park area divided by the total land assessment for all of the homeowners that were subject to the original Trust Deed. I would add that not all of the lands which were included in the original Trust are included in the present day Trust. From time to time, certain properties were sold off by the original owners and excluded from the obligation to maintain the common areas. The exclusion of these lands from the obligation to maintain the common areas has resulted in a greater obligation on each of the properties still deemed to be part of the Trust.

The land assessment used to calculate each owner's levy is based upon the most recent land assessment for the City of Toronto, being those values determined in 1974.

The Plaintiffs have argued that By-law 421-85, enacted by the City of Toronto in 1985, that designated Wychwood Park as a Heritage Conservation District has some bearing on the case at hand but I find that this By-law has no bearing on the rights and obligations of the homeowners with regard to the payment of levies for the upkeep of the common areas.

The Plaintiffs have argued that 49 Alcina Ave. falls within the boundaries of Plan 1092, and, in this I concur.

The Defendants do not deny that they have not paid the annual levies for the years 2010-2014. They do deny that they have any obligation to pay the said levies.

It is the contention of the Plaintiffs that in a prior action against the father of one of the Defendants, Deputy Judge Killian found that the then owner of 49 Alcina Ave., Toronto was bound by the Trust and was ordered to pay the levies for 2008 and 2009. The Plaintiffs have argued that it is disingenuous of the Defendants to argue that they are not bound by the decision of Deputy Judge Killian and the Divisional Court because the parties were different in those proceedings. I find the Plaintiffs argument in this regard to be completely without merit. The fact that Gerald Owen, acting as agent for the defendant in a previous action, had knowledge of the judgment in previous proceedings, by itself does not preclude Mr. Owen from defending an action against him [and others] in the present proceeding.

The Plaintiffs have also argued that a final order made by a court of competent jurisdiction should not be brought into question in a subsequent proceeding and that to do so

would be an abuse of process. The Plaintiffs are suing the Defendants for monies, which the Plaintiffs claim, are owed to them. The Defendants are entitled to defend the claim vigorously although they are bound by rulings of a court of competent jurisdiction as they pertain to specific findings based upon the matters argued and decided previously.

The Plaintiffs, in their submissions, argued that Deputy Judge Killian made the following findings:

1. The defendants derive a benefit under the Trust Deed.
2. The defendants are liable to pay the levies despite the fact that the Trust Deed is not registered on title.

In the within matter, the Defendants have not and would be precluded from arguing that they had no knowledge of the Trust and its obligations but the question is still outstanding as to whether someone who purchased a property within the area purportedly governed by the Trust would be bound by the obligations imposed by the Trust Deed if they had no knowledge of same. I do determine that the registration of the Heritage Conservation District By-law by the City of Toronto would not operate to put a purchaser on notice of any obligations an owner might have other than those imposed by the By-law.

The Defendants have argued that it is well settled law that affirmative or positive covenants requiring the expenditure of money or the performance of some act do not run with the land. The Plaintiffs argue that Deputy Judge Killian found that the purpose of the Trust was for the benefit of all the property owners and that the Defendants in the prior action derived a benefit from the Trust and that they

therefore must pay their proportionate share to upkeep the trust properties. With all due respect to Deputy Judge Killian, it does not appear that the positive covenant defense was argued in the prior matter. The case law with regard to the enforceability of positive covenants has been argued at length but I find that the present status of the law is that positive covenants do not run with the land. The Plaintiffs, in their submissions, admit that the Court of Appeal in *Durham Condominium Corporation Number 123 versus Amberwood Investments Limited*, 2002 CanLit4493 (ONCA) did not apply the principle of benefit and burden as an exception to the rule against positive covenants running with the land and have brought forth no clear evidence that the Ontario Courts have recognized the principle of benefit and burden as an exception to the principle of positive covenants not running with the land.

The Plaintiffs have also argued that this Court has no jurisdiction to issue a declaration that the Defendants are not beneficiaries of the Trust. Again, with all due respect to Deputy Judge Killian, I find that this Court also has no jurisdiction to issue a declaration that the Defendants are beneficiaries of the Trust. This Court does have the jurisdiction to decide whether the provisions of the Trust are enforceable under current law in Ontario. The Plaintiffs, in item 50 of their submissions, have argued that the Divisional Court in the appeal of the previous decision by Deputy Judge Killian found "moreover, this issue, if resolved as the appellant argues, would call into question the binding nature of the Trust Deed not only for the Owen property, but for the other properties in the park as well. If this issue is to be litigated, it should be done in a manner that gives clear notice to the Trustees and, through them, the owners of the

community who are likely to be affected". I find that in raising these defenses to an action brought by said Trustees, including the defense that the positive covenants in the Trust Deed cannot be enforced, the Defendants have met the requirements of the Divisional Court in this regard.

I cannot accept the argument that this Court has no jurisdiction to apply existing law to the matter at hand, namely that positive covenants do not run with the land.

The Defendants, in their submissions, have argued that the Trustees do not have the power to levy more than \$500 in total without a meeting of two thirds of the owners in number and over one half of the owners by value having approved same. The Plaintiffs have not provided evidence to this Court that the meetings, which approved the levees that are the subject matter of this action, met such criteria. More specifically, they have not provided evidence that the amounts being sought by the Plaintiffs meets the criteria set out in the Trust Deed. The Plaintiffs provided by way of evidence, a document that set out the property assessment of the Defendants' property being \$4940 but failed to provide evidence as to the total property assessment of all the properties set out in the Trust Deed. Thus, they have not proven that the assessments claimed for the years 2010-2014 have been made in accordance with the provisions of the Trust Deed.

For the above reasons, I find that the Plaintiffs have failed to prove their Claim and therefore the Plaintiffs' Claim is dismissed.

Defendants to have until the 14th day of December 2014 to

make submissions as to costs and Plaintiffs will then have
until the 24th day of December 2014 to respond.

Dated this 4th day of December, 2014

Robert Caplan DJ

A handwritten signature in cursive script that reads "Robert Caplan DJ". The signature is written in black ink and is positioned above the printed name.

Robert Caplan