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KEY WISCONSIN TITLE LITIGATION DECISIONS: RESTRICTIVE COVENANTS, ANTICIPATED PRIVATE NUISANCE, STATUTE OF LIMITATIONS APPLICABLE TO FORECLOSURES, AND STIPULATED DISMISSAL OF PRIOR FORECLOSURE

Recently, Wisconsin Courts have handed down several key decisions concerning title litigation that deal with the issues of restrictive covenants, anticipated private nuisance, the statute of limitations applicable to foreclosure actions, and stipulated dismissal of prior foreclosures.

Below is a brief summary of the most important of these court decisions.

Restrictive Covenants

The Wisconsin Supreme Court faced the question of whether the short-term rental of a residential property constitutes "commercial activity" under a restrictive covenant. In *Forshee v. Nueschwander*, a 4-3 majority of the court held that because the term "commercial activity" was ambiguous, the restrictive covenant in place did not prohibit the Nueschwanders from using their property for short-term rentals.

Lee and Mary Jo Nueschwander bought the property in question on Hayward Lake in Hayward, Wisconsin in 2014, renovated it, and began renting it out for short-term rentals to vacationers through the popular VRBO (Vacation Rental By Owner) website. The Nueschwanders' neighbors sued in Sawyer County Circuit Court to enforce the covenant, contending that the short-term rentals were "commercial activity" under a restrictive covenant that provided, "There shall be no commercial activity allowed on any of the lots."

The circuit court agreed with the neighbors and granted an injunction to stop the Nueschwanders' rental activity; the Court of Appeals reversed the circuit court's decision and lifted the injunction.

On appeal, writing for the majority, Chief Justice Patience Drake Roggensack reasoned that

public policy favors the free and unrestricted use of property. Moreover, wrote Justice Roggensack, deed restrictions "must be expressed in clear, unambiguous, and preemptory terms" and strictly construed to favor free use.

Turning to the covenant at hand, the court found that "commercial activity" was undefined and ambiguous as written. Accordingly, the court ruled that the term should be construed in favor of free use and affirmed the appellate court's decision to lift the injunction.

Justice Shirley Abrahamson concurred, writing that the term "commercial activity" was unambiguous and that it meant activity undertaken for profit. Justice Abrahamson focused on the occupants' activities on the property and concluded that no "commercial activity" was conducted on the property.

Justice Daniel Kelly's concurrence, which was joined by Justice Rebecca Bradley, also focused on the occupants' activities on the property but found that the renters were not engaging in "commercial activity" on the property. Justice Kelly also wrote that the covenant does not preclude renting out the property.

In dissent, Justice Ann Walsh Bradley found that the term "commercial activity" was not ambiguous and that it means "of or relating to commerce." Justice Bradley noted that the Nueschwanders made $56,000 renting out the property in 2015, which made it a lucrative enterprise and, therefore, a "commercial activity." She openly questioned whether the numerous covenants that use the same term or a similar term will be enforceable in the burgeoning short-term rental industry.

Also in restrictive covenant news, the Wisconsin Court of Appeals held that a treehouse was a "structure" covered by a restrictive covenant that provided, "All structures to be place or constructed upon lots . . . shall, prior to construction, be approved in writing, by C&B Investments."

In *C and B Investments v. Murphy*, James Murphy and Rebecca Richards-Bria were homeowners in a subdivision developed by C and B Investments. In June 2015, without the approval of C and B, Murphy began building a treehouse that would be 10 feet long by 8 feet wide by 7 feet high at its completion. C and B filed suit to enforce the covenant requiring its consent to construct "structures" on its property.

The Circuit Court of Juneau County ruled that the treehouse was not a "structure," and C and B appealed the decision. The Court of Appeals, in a per curiam opinion, reversed the circuit court, finding that the term "structure" was unambiguous and means something that is built or constructed. As the covenant applied to "all structures," it covered a treehouse, according to the appellate court.

Anticipated Private Nuisance

In *Krueger v. AllEnergy Hilton, LLC*, the Court of Appeals addressed whether Wisconsin recognizes a cause of action for anticipated private nuisance. The appellate court held that the state does recognize such a claim but that the complaint in the case before it was deficient.

AllEnergy sought to construct a frac sand mine in the town of Hixton, but town landowners, including Greg Krueger the lead plaintiff, sought a permanent injunction to stop that from happening.

The group of landowners alleged that the proposed mine would operate 24 hours a day, 7 days a week, and would cause air, water, noise, and light pollution as well as vibration. Moreover, they alleged, the mine would deplete ground water, interfere with quiet, peaceful enjoyment, and also cause a drop in property values and an increase in traffic congestion and road damage.

The Circuit Court of Jackson County granted AllEnergy's motion to dismiss the case, and the Court of Appeals affirmed. The court held that Wisconsin does, indeed, recognize a cause of action for anticipated nuisance, and laid out the elements:

(1) Defendant's proposed conduct will "necessarily" or "certainly" create a nuisance; and

(2) The resulting nuisance will cause the claimant harm that is "inevitable and undoubted."

Turning to the case at hand, the Court of Appeals affirmed the circuit court and ruled that the complaint failed to state a claim because the allegations contained within it were "too sparse" and did not support the conclusion that the mine would necessarily create a nuisance and inevitably result in harm.

Statute of Limitations Applicable to Foreclosure Actions

In 2018 in *Bank of New York Mellon v. Klomsten*, the Court of Appeals faced the question of whether Wisconsin's six-year statute of limitations for contract actions bars a mortgage foreclosure action.

Gloria J. and Steven S. Klomsten executed a note and mortgage in 2003 and defaulted in 2005. A foreclosure action against them was not filed until 2016. The Klomstens moved to dismiss while the bank requested summary judgment. The Jefferson County Circuit Court sided with the bank, granted summary judgment, and denied the Klomstens' motion to dismiss. The Klomstens appealed.

The Court of Appeals affirmed the circuit court. The appellate court ruled that while action on the note was barred by the six-year statute of limitations in Wis. Stat. § 893.43, the 30-year limitations period under Wis. Stat. § 893.33 applies, allowing foreclosure of the mortgage.

Stipulated Dismissal of Prior Foreclosure

In *Deutsche Bank Nat'l Trust Co. v. Buboltz*, the Court of Appeals reversed the Milwaukee County Circuit Court and held that the stipulated dismissal of a prior foreclosure action did not bar a lender from filing a subsequent foreclosure action.

In 2006, Alexander Groysman purchased a residential property for which he secured a mortgage with Bank United, FSB. He then deeded the property to EAG Investments, LLC. Bank United assigned the note and mortgage to OneWest Bank, the predecessor of Deutsche Bank.

Payments on the mortgage stopped in 2008 and OneWest Bank filed a foreclosure action in June 2009. In April 2013, a foreclosure judgment was entered. Two years later, in April 2015, the foreclosure was reopened and dismissed without prejudice by stipulation, which stated that the stipulation and order was "due to payoff of the loan."

The loan had not been paid off, however, and OneWest assigned the mortgage to Deutsche in June 2016. In April 2016, Groysman/EAG sold the property, and the title company discovered the unsatisfied mortgage and requested from Groysman the loan number and contact information for the bank. In response, Groysman provided an old letter from the bank that said the load was paid off "contingent" on final audit of Groysman's check, but no payment had actually been made.

Deutsche filed a foreclosure action on May 12, 2017. The purchasers filed a summary judgment motion seeking dismissal of the action, arguing that the prior foreclosure was "dismissed due to payoff of loan," and therefore Deutsche's only option would have been to reopen the old dismissed case, but it was too late under Wis. Stat. § 806.07(2).

The bank countered that the prior case was dismissed without prejudice, allowing the bank to file a new case of its own.

Judge Rothstein in the circuit court dismissed the foreclosure action, and the bank appealed. The Court of Appeals reversed and remanded the case, concluding that a dismissal without prejudice is not final on the merits and "by definition" allows a plaintiff to sue again. The court therefore ruled that the bank was not barred by Wis. Stat. § 806.07 from filing a new foreclosure action.

If you have questions about these cases or title litigation in Wisconsin contact Steve Slawinski at 414-276-5000 or steve.slawinski@wilaw.com.