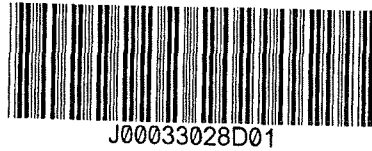


IN THE DISTRICT COURT OF



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SHERRI ARNETT, et. al.,  
Plaintiffs,  
vs.  
EDWARD M. CUMMINGS, et. al.,  
Defendants.

Doc. 1093 No. 530

ORDER

FILED  
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CLERK DISTRICT COURT

THIS MATTER CAME ON FOR TRIAL on March 16, 2011, March 17, 2011, July 19, 2011, and October 14, 2011. Plaintiffs appeared with their attorney, Brian Doyle, and Defendants appeared with their attorney Jay Ferguson. Evidence adduced and both parties rested. A briefing schedule was set and all briefs have been received. This Court being advised in the premises hereinafter sets forth its findings and Order.

**BACKGROUND**

This lawsuit involves residents and land near 156<sup>th</sup> and Dodge Streets in Omaha, Douglas County, Nebraska. This land began to be developed in approximately 1978. The Greenfields Homes Association ("GHA") began on January 24, 1978, and its Articles of Incorporation were filed with the Secretary of State on April 5, 1979. Covenants for GHA were filed with the Register of Deeds of Douglas County, Nebraska in 1980. GHA and the Covenants were to control this land being developed.

The GHA is composed of approximately 60 homes or lots that surround a large common area. The GHA is a part of the larger homeowners association known as Greenfields Residence Association, which is composed of over 200 homes or lots in this area. Pursuant to the Covenants of GHA, only its lot owners have access to this large common area that is surrounded by the lots. These Covenants of GHA

provided that every lot owner "has a right and easement of enjoyment to the Common Area".

Early on, the homeowners of GHA had concerns with this Common Area. In the minutes of the October 27, 1983 meeting of the GHA, it reflects that lot owners were concerned about the use of the Common Area as there were drainage problems, fallen limbs and branches. People were also dumping trash in the ravine in this Common Area. In the minutes of the various meetings of the GHA in May and June of 1984, the lot owners continued to have problems with grass clippings being dumped in the Common Area, trees and limbs being cut down.

Safety concerns were a major issue for the GHA as the Common Area had a large ravine, which could be a danger for anyone, especially for children and trespassers. To protect the lot owners from liability, the GHA tried to purchase liability insurance for this Common Area. Either the insurance was too expensive or not available if this Common Area was accessible by the public or the lot owners because of the safety risks. As a result, the GHA began looking at other ways to obtain insurance. This required, among other things, no trespassing signs and fences surrounding the Common Area. The idea of a nature sanctuary was discussed in the early 1990's. The nature sanctuary would own or control this Common Area. This plan would provide reasonable access to insurance and control over this Common Area.

In 1994, 77% of the homeowners in GHA voted to create a non-profit corporation that would own or control this Common Area. The steps were then begun to form the non-profit corporation of Greenfields Nature Sanctuary d/b/a Greenfields Homes Association. This non-profit corporation was not formed until August of 2003. The IRS approved its 501(c)(3) application status in 2003, and the documents were filed with the Nebraska Secretary of State on August 13, 2003.

On December 9, 2005, "Additions, Revisions, and Amendments to Greenfields Homes Association Declaration of Covenants, Conditions and

Restrictions Book 631, Page 489-494”, were filed with the Douglas County Register of Deeds. These Amendments basically placed exclusive control of the Common Area with the Greenfields Nature Sanctuary and it was to be operated exclusively as a wildlife sanctuary. Although the 77% vote took place in 1994, the Amendments were not filed until 2005.

When the Articles of Incorporation were filed with the Secretary of State on August 13, 2003, the Secretary of State refused to accept the name, “Greenfields Nature Sanctuary d/b/a Greenfields Homes Association” and required that “d/b/a Greenfields Homes Association” be removed. It was removed by interlineation. The name Greenfields Homes Association was then registered by Greenfields Nature Sanctuary as a trade name on that day. This could be done as the Board of Directors of GHA allowed the corporation to lapse in 1998 when it failed to pay the occupation tax to keep the corporation active and in good standing with the Secretary of State.

Pursuant to the original Covenants that were filed with the Register of Deeds for this land (Exhibit 5, “Declaration of Covenants, Conditions and Restrictions” filed at Book 631 Page 489), Section 1, “Owners’ Easements of Enjoyment” it stated: “Every owner shall have a right and easement of enjoyment in and to the Common Area which shall be appurtenant to and shall pass with title to every Lot, subject to the following provisions . . . .”

Article IX, Section 3, of the Covenants set forth how the Covenants could be amended. It stated: “This Declaration may be amended during the first twenty (20) year period by an instrument signed by the Owners of not less than (90%) of the Lots, and thereafter by an instrument signed by the Owners of not less than seventy-five (75%) of the Lots.”

On April 28, 2009, this Court signed a Partial Summary Judgment Order, which found and ordered “that the 2005 Declaration (Exhibit 10) filed in the Douglas County Register of Deeds at 2005155319 is a nullity, of no further effect, . . . .” The Order also found and ordered “that the lot

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owners of Greenfields, except incorporator Edward M. Cumming, are not members of Greenfields Nature Sanctuary d/b/a Greenfields Homes Association.”

The purpose of this lawsuit by the Plaintiffs is to remove all control over the Common Area from the Defendants and to restore to the lot owners the association name of Greenfields Homes Association. In their counterclaim, the Defendants want their actions of amending the Covenants and transferring control of the Common Area affirmed and they want an order keeping the lot owners out of the Nature Sanctuary, which is the Common Area.

### **ISSUES**

The following are the issues as set forth by the parties' pleadings.

Plaintiff has Four Causes of Action:

1. Declaratory Relief from the 2005 Covenants;
2. Slander of Title;
3. Misappropriation of Trade Name and Common Law Trade Name Infringement; and
4. Declaratory Relief from Greenfields Homes Association.

The Defendant sets forth Four Causes of Action in their counterclaim. These Causes of Action are as follows:

1. Injunctive Relief Preventing the Plaintiffs of Right of Easement in the Common Area;
2. Injunctive Relief Preventing Plaintiffs from Entering onto the Common Area; and
3. Relief in the Form of the Damages Incurred by the Defendants Including Attorney Fees; and
4. Injunctive Relief Preventing the Plaintiffs from Wrongfully Holding Themselves out as Greenfields Homes Association and Wrongfully Using the Name Greenfields Homes Association and, or Names that are Similar Thereto.

## **ANALYSIS**

As noted above, the lot owners of GHA had a serious problem as to how to resolve the liability issue with the Common Area. Because each lot owner was also an owner of the Common Area, each lot owner could also be responsible for its upkeep and safety. If someone was injured in the Common Area, all the lot owners of GSA could be liable. Thus, obtaining liability insurance was paramount.

In determining the solution for the Common Area, the lot owners were bound by the 1980 Covenants, which provided that every lot owner "has a right and easement of enjoyment to the Common Area". Therefore, any solution to the Common Area problem had to respect this provision of the Covenants unless the Covenants were amended. According to the Covenants, the Covenants could be amended by a vote of 90% of the lots in the first 20 years, and thereafter, by a vote of 75% of the lots.

A vote was taken in 1994 to amend the Covenants to allow the transfer of the control of the Common Area to a nature sanctuary. The amendments were approved by 77% of the lots, which was much less than the 90% required. Thereafter in 2003, the Board of Directors for GHA acted upon this vote and began the process of transferring control of the Common Area to the nature sanctuary. The nature sanctuary corporation was formed in August of 2003 and the Amendments to the Covenants were filed with the Register of Deeds on December 9, 2005.

Pursuant to Plaintiffs' Motion for Partial Summary Judgment, this Court on April 28, 2009, found that the vote in 1994 was inadequate to amend the Covenants as it needed 90% of the lots and only received 77%. This Court found that these amendments, which were filed with the Register of Deeds, were a nullity and had no effect.

Defendants argue that the statute of limitations has run and it is too late for the Plaintiffs to now complain about these amendments to the Covenants. Assuming, as alleged by the Defendants, that the statute of

limitations is four years, the commencement of the statute of limitations would have been when the Amendments to the Covenants were filed with the Register of Deeds of Douglas County, which would have provided notice to the world. This was done on December 9, 2005. Plaintiffs' lawsuit in this matter was filed on March 20, 2009, well within the four years. However, the Defendants argue that the commencement date for the statute of limitations was on August 13, 2003, when the Articles of Incorporation for the Greenfields Nature Sanctuary were filed with the Secretary of State, which would have provided notice to the Plaintiffs of the actions of the Defendants.

This Court disagrees as this action of filing the Articles of Incorporation did not take any property or limit the rights of the Plaintiffs. The taking or limitation began when the Amendments to the Covenants were file with the Register of Deeds, which was on December 9, 2005. The Court also disagrees as to the length of the statute of limitations. Because the actions of the Defendants were not done according to the Covenants, any actions taken by the Defendants would have been akin to an adverse possession claim, which statute of limitations period is ten years. Thus, even if the commencement date was in 2003, then ten years had not expired prior to the Plaintiffs filing this lawsuit.

Therefore, this Court hereby affirms its Order of April 28, 2009, as the actions of GHA of transferring control of the Common Area to the Nature Sanctuary were and are invalid as it required at least 90% of the lots to approve these amendments and only a vote of 77% of the lots was obtained. Even though these amendments to the Covenants were not completed or acted upon until 2003, these actions were invalid as the 1994 vote of 77% was insufficient to amend the covenants as the necessary percentage, at that time, was 90%. As such, the Plaintiff's Cause of Action for Declaratory Relief as to the 2005 Amendment to the

Covenants is granted and this Court affirms its Order of April 28, 2009, and declares these Amendments to the 1980 Covenants void and invalid.

This ruling also denies the Defendants' Injunctive Relief of preventing the Plaintiffs and lot owners a right of easement into the Common Area and the Defendants' request for Injunctive Relief preventing the Plaintiffs and lot owners from entering the Common Area. Because the amendments to the covenants of 2005 are invalid, the original 1980 Covenants remain in full force and effect and these Covenants allow for these lot owners to have entry into the Common Area.

The next Cause of Action of the Plaintiff is the Slander of Title. Pursuant to *Neb. Rev. Stat. § 76-296*, for there to be a slander of title, it must be intentional and only for the purpose of slandering a title. In this case, the actions of GHA and the Defendants were done in good faith with the intent to resolve the liability issue of the Common Area. As such, this Court does not find that the actions of the Defendants were a slander of title. Therefore, this Cause of Action of the Plaintiffs is dismissed.

The next Cause of Action of the Plaintiffs is Misappropriation of the Trade Name and Common Law Tradename Infringement. The Plaintiffs complain that the Defendants now have sole use of the name of their homeowners association, which is Greenfields Homes Association. This Association was dissolved by failure to pay the occupation tax in the late 1990's. Because this occupation tax was not paid, the homeowners association as a corporation was dissolved by rule of law. It could have been reinstated by the Board of Directors of GHA, however, it was never done prior to the 501(c)(3) corporation, Defendant Greenfields Nature Sanctuary, being formed and from acquiring the tradename of Greenfield Homes Association, which was on August 13, 2003. Once the tradename was obtained by Greenfields Nature Sanctuary and registered with the Secretary of State, it was notice to the public. The Plaintiffs filed this

lawsuit on March 20, 2009, approximately five years, nine months after August 13, 2003. The statute of limitations for misappropriation of trade name is four years. Thus, on its face, the Plaintiffs missed that statute of limitations unless the statute of limitations was stayed or tolled. There was nothing in the evidence in the trial that would justify or support a finding of a stay or tolling of the statute of limitations. This Court finds that these actions of the Defendants were done properly and legally, even though many of the lot owners were unaware of this occurrence. As such, this Court denies the Plaintiffs' Cause of Action for Misappropriation of Tradename and Common Law Tradename Infringement. This results in the Defendant, Greenfield Nature Sanctuary, having the right to the use of the tradename of Greenfields Homes Association.

By this ruling, this Court grants the Defendants' Counter-Claim which requests an Injunction against the Plaintiffs from using the tradename of Greenfields Homes Association. This ruling does not go any further as to prohibit the Plaintiffs from using a name similar to Greenfields Homes Association. Any name that may be used by the Plaintiffs in the future must be reviewed at that time.

Since this name is now owned by the Defendant Greenfields Nature Sanctuary, it is its sole prerogative as to how it wishes the name to be used. If it does not wish the homeowners or lot owners to use this name, it has that discretion. It would seem reasonable that Greenfield Nature Sanctuary would transfer this name to the lot owners as this name has always been used by and associated with the lot owners, and the Defendant may have no need for the this name as it has no control over this Common Area. However, that is at the discretion of the Greenfields Nature Sanctuary.

All other causes of action of the Defendants are denied.



## CONCLUSION

For the reasons set forth in this Order, the Court sustains the Plaintiff's Cause of Action for Declaratory Relief from the 2005 covenants as this Court declares these covenants void and invalid. The Court denies the Plaintiff's Request for Judgment for Slander of Title, Misappropriation of Tradename, and Declaratory Relief from Greenfields Homes Association.

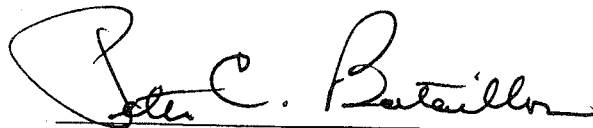
As to the Defendants' Counter-Claim, the Court denies the Defendants' Request for Injunctive Relief preventing the Plaintiffs from the right of easement into the Common Area and preventing the Plaintiffs from entering the Common Area. The Court grants the Defendants' Counter-Claim which prevents the Plaintiff from using the specific name of Greenfields Homes Association. All other claims of the Defendants are denied.

Costs are taxed to the Defendants.

IT IS SO ORDERED.

Dated this 10<sup>th</sup> day of May, 2012.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Peter C. Bataillon". The signature is written in a cursive style with a large initial "P".

Hon. Peter C. Bataillon

cc: Brian C. Doyle, Esq.  
Jay A. Ferguson, Esq.