WELLESLEY CONSERVATION COUNCIL, INC. VS. ROBERT W. PEREIRA, SECOND, TRUSTEE,[1] & OTHERS[2]

Docket:	19-P-753
Dates:	April 1, 2020 - August 10, 2020
Present:	Vuono, Lemire, & McDonough, JJ.
County:	Norfolk
Keywords:	Real Property, Conservation restriction. Damages. Practice, Civil, Summary judgment, Damages.

Civil action commenced in the Superior Court Department on July 11, 2017.

The case was heard by Peter B. Krupp, J., on motions for summary judgment, and a motion to strike a notice of appeal was heard by him.

The case was submitted on briefs.

A. Lauren Carpenter for the plaintiff.

F. Alex Parra & Louis N. Levine for Robert W. Pereira, II, & another.

William L. Boesch, Lisa C. Goodheart, & Alessandra W. Wingerter, for The Trustees of Reservations & another, amici curiae, submitted a brief.

LEMIRE, J. Wellesley Conservation Council, Inc. (Council), holds the "perpetual right to enforce" a conservation restriction on property owned by Robert W. Pereira, II, and Cheri L. Pereira, as trustees of the 19 Pembroke Road Realty Trust (collectively, Pereiras). The Pereiras did not dispute that they violated the conservation restriction by cutting and removing mature trees and other vegetation to construct a sports court and, after the Council commenced this action to enforce the conservation restriction, they agreed to restore the property to its natural state. The Pereiras also agreed to pay the Council's reasonable attorney's fees and costs, and acquiesced to the Council's request for declaratory and injunctive relief, but they did not agree to pay damages. On cross motions for

summary judgment, a judge of the Superior Court ordered the Pereiras to remediate the property but concluded that the Council's right to enforcement did not include a right to obtain monetary damages. As a result, summary judgment entered in favor of the Council on most of its claims, and in favor of the Pereiras on those counts of the Council's complaint that sought damages for the permanent loss of the trees. Because we conclude that the right to enforce the restriction encompasses a right to recover money damages in an appropriate case, we reverse the judgment in part.[3]

Background. 1. Conservation restriction. The following facts are undisputed. In 2013, the Pereiras purchased the home where they now live at 19 Pembroke Road in Wellesley. Two years later, in 2015, they purchased an abutting parcel of land consisting of 2.755 acres. The parcel is designated as 15R Pembroke Road (locus). At the time of the purchase, the locus was burdened by a conservation restriction[4] pursuant to G. L. c. 184, §§ 31-33. The conservation restriction's stated purpose was to preserve the locus "in its natural, scenic and open condition."[5] The conservation restriction grants to the Council, a private, nonprofit entity whose purposes include conservation of land in and around the town of Wellesley, the perpetual right to enforce the restriction.

Although the Pereiras were aware of the restriction and its terms and requirements, within a year of purchasing the locus, they violated the restriction by clearing trees and vegetation, including destroying over twenty-three mature red oak and white pine trees, excavating and grading a portion of the land, and installing a large sports court with fencing and lighting.

When communications between the Pereiras and the Council did not result in resolution of their issues, the Council commenced this action claiming in count I that the Pereiras had committed a breach of the conservation restriction, in count II that they had wrongfully cut trees pursuant to G. L. c. 242, § 7, in count III that the Pereiras had been unjustly enriched, in count IV that the Council is entitled to declaratory relief, and in count V that the Council is entitled to a permanent injunction. The Council sought orders requiring the Pereiras to restore the locus as closely as possible to its prior condition, pay damages as permitted by law, including treble damages under G. L. c. 242, § 7, and pay costs and attorney's fees as provided by law, including G. L. c. 184, § 32.

As previously noted, the Pereiras admitted that the locus is burdened by the conservation restriction, and that their conduct in removing mature trees and vegetation from and excavating the locus, along with constructing an unauthorized sports court, fencing, and lighting, violated the conservation restriction. In addition, they conceded that the Council was entitled to payment of its attorney's fees and costs incurred to enforce the conservation restriction, pursuant to G. L. c. 184, § 32.[6] The Pereiras filed a cross motion for summary judgment requesting that judgment be entered against them on all counts except count II, trespass to trees pursuant to G. L. c. 242, § 7, and to the extent that any other count included a basis for imposition of monetary damages other than attorney's fees. In opposition, the Council argued that judgment should enter in its favor on all counts, and that the judgment should include attorney's fees and costs, and monetary damages in addition to a restoration order because the restoration plan will take years to restore the locus to its prior condition.

In support of their cross motion for summary judgment, the Pereiras submitted a copy of the restoration plan prepared for the Council and to which, at least as to the remediation portion, the Pereiras ultimately agreed to comply. The restoration plan required the planting of new saplings to replace the mature trees. The saplings were to be smaller both in height and trunk width than the mature trees that had been destroyed.[7] The plan proposed a compensatory payment of $72,750, consistent with a methodology used to calculate recommended contributions to the Wellesley Tree Bank based on the size differential of the replacement trees and the mature trees that had been destroyed.

The Pereiras and, ultimately, the judge rejected the proposed compensatory payment. The judge entered summary judgment in favor of the Pereiras, concluding that the Council is not an "owner" as that term is used in G. L. c. 242, § 7, and the Council's right to enforce the conservation restriction does not include a claim for money damages.

2. Agreement for judgment. After the summary judgment decision, the scope of the restoration plan and declaratory and injunctive relief, along with the amount of the Council's attorney's fees and costs remained outstanding and final judgment did not enter on any count. At another hearing, with the encouragement of the judge, the parties settled the outstanding issues and filed a proposed judgment that was changed to an agreement for judgment. In addition to resolving the

attorney's fees and costs issue and the scope of the restoration order, consistent with the summary judgment decision, the agreement for judgment provided that judgment would enter against the Council on their request for monetary damages. Judgment entered on all counts on August 16, 2018.

Thereafter, the Council filed a notice of appeal from the judgment. The Pereiras responded by filing in the Superior Court an emergency motion to strike the notice of appeal because, they argued, by executing the agreement for judgment, the Council waived its right of appeal. The judge denied the motion, noting that nothing in the agreement for judgment indicated that the Council waived its right to appeal the hotly contested summary judgment decision and in the absence of an express waiver, he would not infer an intention to waive appeal from the summary judgment decision.[8] The Pereiras thereafter filed a notice of appeal from the judgment and from "those judgments, rulings, and orders of the Superior Court adverse to them in this action."

Discussion.[9] "'[S]tatutory interpretation is a question of law for the court to decide,' Annese Elec. Servs., Inc. v. Newton, 431 Mass. 763, 764 n.2 (2000), and can be appropriately resolved by summary judgment if there is no real dispute as to the salient facts, Community Natl. Bank v. Dawes, 369 Mass. 550, 553 (1976)." Molly A. v. Commissioner of the Dep't of Mental Retardation, 69 Mass. App. Ct. 267, 277 (2007). "We review a grant of summary judgment de novo to determine whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." Boss v. Leverett, 484 Mass. 553, 556 (2020), quoting Galenski v. Erving, 471 Mass. 305, 307 (2015).

1. Enforcement of conservation restriction. The Council argues that it is entitled to monetary damages alternatively under G. L. c. 184, §§ 31-32, because the restoration plan did not immediately restore the locus to its prior condition or, under G. L. c. 242, § 7, for the willful trespass to trees. We first address G. L. c. 184, §§ 31-32. Conservation restrictions are defined by G. L. c. 184, § 31:

"A conservation restriction means a right, either in perpetuity or for a specified number of years, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land . . . appropriate to retaining land or water areas

predominantly in their natural, scenic or open condition or . . . to forbid or limit any or all (a) construction or placing of buildings, roads, signs, billboards or other advertising, utilities or other structures on or above the ground, (b) dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste or unsightly or offensive materials, (c) removal or destruction of trees, shrubs or other vegetation, (d) excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such manner as to affect the surface, (e) surface use except for agricultural, farming, forest or outdoor recreational purposes or purposes permitting the land or water area to remain predominantly in its natural condition, . . . or (g) other acts or uses detrimental to such retention of land or water areas."

"In passing the Conservation Restriction Act, G. L. c. 184, §§ 31–33, the Legislature recognized, and sought to protect, the public benefits of conserving land and water in their 'natural, scenic or open condition' by government bodies and qualified charitable corporations or trusts." Weston Forest and Trail Ass'n v. Fishman, 66 Mass. App. Ct. 654, 658 (2006), quoting G. L. c. 184, § 31. See Chatham Conservation Found., Inc. v. Farber, 56 Mass. App. Ct. 584, 590 (2002), quoting G. L. c. 184, § 31 ("Inherent in the 'natural state' of the land are environmental concerns").

It is undisputed that the terms of the conservation restriction at issue here and the provisions of G. L. c. 184, § 32, provide the Council with standing to enforce the conservation restriction. Section 32 states in pertinent part, that conservation restrictions may be enforced by a charitable corporation that holds the restriction, even if there is a lack of privity or a "lack of benefit to particular land." The sole question before us is whether the Council may recover monetary damages in enforcing the conservation restriction. "The single issue raised is one of statutory interpretation, and we review the motion judge's decision de novo" (quotation and citation omitted). Arias-Villano v. Chang & Sons Enters., Inc., 481 Mass. 625, 627 (2019). "A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." Sullivan v. Brookline, 435 Mass. 353, 360 (2001).

The judge concluded that § 32 does not authorize enforcement by way of the payment of damages. The plain language of § 32 provides that "[t]he restriction may be enforced by injunction or other proceeding, and shall entitle

representatives of the holder to enter the land in a reasonable manner and at reasonable times to assure compliance. If the court in any judicial enforcement proceeding . . . finds there has been a violation of the restriction . . . then, in addition to any other relief ordered, the petitioner bringing the action or proceeding may be awarded reasonable attorneys' fees and costs incurred in the action." (Emphasis added.)

Thus, § 32 by its own terms does not limit enforcement measures to injunctive relief alone.[10] Although specifically allowing injunctive relief, § 32 also provides for "other proceeding(s)." Similarly, § 32 does not limit a monetary award to attorney's fees and costs.[11] It expressly contemplates that an award of attorney's fees and costs could be in addition to "any other relief ordered." We disagree that the right to "enforce" the conservation restriction does not include a right, in appropriate circumstances, to recover a monetary damage award.

Our conclusion is supported by the language of § 30 of the same statute, G. L. c. 184. That section addresses general restrictions on property, and provides that it may be inequitable to "enforce" restrictions in certain circumstances "except by award of money damages." In other words, not only is enforcement by monetary damages a recognized option -- in some circumstances it is the only equitable method of enforcing a restriction. See Blakeley v. Gorin, 365 Mass. 590, 607 (1974). The same may be true for some conservation restrictions. The concept that enforcing a conservation restriction may not include, where appropriate, an award of damages is belied by § 32. While we recognize that § 30 and § 32 address different types of restrictions, "when similar words are used in different parts of a statute, the meaning is presumed to be the same throughout." Arias-Villano, 481 Mass. at 628 n.5, quoting Booma v. Bigelow-Sanford Carpet Co., 330 Mass. 79, 82 (1953). Thus, where one section of the same statute permits enforcement in some instances only by an award of money damages, it is unlikely the use of the term "enforced" in another section reasonably may be interpreted to exclude the award of money damages without expressly so providing.

We discern nothing in § 32 that prevents a holder of a conservation restriction from enforcing it by seeking an award of monetary damages where appropriate. See Restatement (Third) of Property: Servitudes § 8.5 (2000), which states that "[a] conservation servitude held by . . . a conservation organization is enforceable by coercive remedies and other relief designed to give full effect to the

purpose of the servitude." Although comment a of § 8.5 indicates that equitable remedies designed to preserve the important public benefits of conservation restrictions are often warranted, it states that "[i]n appropriate cases, additional remedies may be needed to compensate the public for irreplaceable losses in the value of the property protected by the servitude and other damages flowing from violation of the servitude." Particularly where full restoration would be unreasonably expensive or "technically feasible but practically unlikely given the size of the trees and survivability concerns," including an award of monetary damages may achieve a fairer and more adequate remedy. Glavin v. Eckman, 71 Mass. App. Ct. 313, 321 (2008).

Here, the Council does not seek to enforce the restriction by an award of money damages, alone, but rather seeks an award of damages to reflect the fact that the restoration plan will not actually restore the locus to its former condition -- at least not until after many years of growth. In Glavin, 71 Mass. App. Ct. at 321-322, in determining the value of the trees unlawfully removed from a party's property in a dispute between neighbors, an expert arborist testified as to how long it would take replacement trees to grow to the size of the trees that were cut; he then calculated the average years to parity for the destroyed trees and factored a corresponding amount into the total replacement cost of the destroyed trees. We held there was no error in allowing the expert to "testify regarding the formula used to arrive at a replacement cost for the wrongfully cut trees," where there was "unrebutted testimony that the replacement cost method was accepted within the community of professional arborists." Id. at 321. In Glavin, we observed that "[t]he trees represented decades of natural growth that could not easily be replicated" and "making an actual restoration would be uneconomical." Id. at 319, 320.

Here, where the Pereiras admit that they must restore the locus but the restoration plan will not actually restore the locus for decades to come, we discern no reason why a component of the restoration plan cannot include a monetary award to compensate for the amount of time it will take to actually restore the restricted locus.[12] Such an award would, obviously, correspond to the length of the delay in returning the locus to its prior condition and is not inconsistent with a remediation order. See note 10, supra. Of course, "[w]hen applying a restoration cost measure of damages, a test of reasonableness is imposed." Ritter v. Bergmann, 72 Mass. App. Ct. 296, 307 (2008), quoting Glavin, 71 Mass. App. Ct. at

319. Here, because the judge concluded that in no instance may an entity enforcing a conservation restriction recover monetary damages, the judge did not consider whether in these circumstances, an award of money damages is warranted or whether the restoration order if including an award of money damages, would be reasonable. The case must be remanded for consideration of those issues.

2. Trespass to trees, G. L. c. 242, § 7. The Council seeks treble damages pursuant to G. L. c. 242, § 7, which provides:

"A person who without license willfully cuts down, carries away, girdles or otherwise destroys trees, timber, wood or underwood on the land of another shall be liable to the owner in tort for three times the amount of the damages assessed therefor; but if it is found that the defendant had good reason to believe that the land on which the trespass was committed was his own or that he was otherwise lawfully authorized to do the acts complained of, he shall be liable for single damages only."

Here, the Pereiras removed trees from their own property -- property to which the Council has no right of possession or physical use. While G. L. c. 184, § 32, characterizes a conservation easement as an interest in land, its unique bundle of rights does not equate to that of "owner" as that term is used in G. L. c. 242, § 7. See Labounty v. Vickers, 352 Mass. 337, 347 (1967) ("A 'restriction on the use of land' is a right to compel the person entitled to possession of the land not to use it in specified ways"). We agree with the judge that the Council has no standing to bring a claim as an "owner" against the Pereiras under G. L. c. 242, § 7.

Conclusion. The portion of the judgment that holds that the Council, in enforcing the conservation restriction, may not recover monetary damages is vacated and the issue is remanded for further proceedings consistent with this opinion. In all other regards, the judgment is affirmed.[13]

So ordered.

footnotes

[1]Of the 19 Pembroke Road Realty Trust.

[2]Cheri L. Pereira, as trustee of the 19 Pembroke Road Realty Trust, and John Does nos. 1 through 5.

[3]We acknowledge the brief submitted by the amici curiae, the Trustees of Reservations and the Massachusetts Land Trust Coalition.

[4]The conservation restriction was approved by the board of selectmen of Wellesley and the Secretary of Environmental Affairs, and was accepted by the Council. It was recorded in the Norfolk County registry of deeds on December 26, 1975.

[5]The restriction "run[s] with the property" and is "binding upon all future owners"; it "is intended to retain the property in its natural, scenic and open condition," by among other things, prohibiting the construction of any structures, the removal or destruction of trees, shrubs, or other vegetation, and excavation, or other acts detrimental to retention of the locus predominately in its natural condition.

[6]Conservation restrictions are enforceable by the express terms of G. L. c. 184, § 32. Parkinson v. Assessors of Medfield, 398 Mass. 112, 115 (1986).

[7]In addition, "[d]ue to the high cost," replacement of understory shrubs and herbaceous vegetation was not recommended as they were expected to naturally reestablish themselves over time.

[8]The judge's order denying the motion to strike stated, "The 'Proposed Judgment' which was changed to 'Agreed' at the hearing on 8/14/18, resolved the issues remaining in the case in light of my summary judgment ruling and as I urged the parties in paragraph 2 of the Order issued in connection with that decision. . . . Nothing in the Judgment waived plaintiff's right to seek an appeal of my summary judgment ruling, which issues were hotly contested by plaintiff. That the Judgment 'resolves all counts in the Complaint[,]' is, of course, true, but is not sufficient given the procedural history of this case to waive plaintiff's right to appeal from the Court's summary judgment ruling."

[9]The Pereiras contend the Council waived its right to appeal from the summary judgment decision by entering into the "agreement for judgment" and agreeing that judgment should enter against it on count II of the complaint. As the

judge noted, however, the agreement for judgment does not expressly waive appellate rights and the issues resolved on summary judgment had been hotly contested. It is evident that in approving the agreement for judgment, the judge did not understand the Council to be waiving its appellate rights on the issues decided on summary judgment. Indeed, the judge indicated that the attorneys had not even intended on signing the proposed judgment and it was the judge that imposed that requirement. Here, the judge, who was in the best position to make the determination, essentially concluded that the parties had agreed on the form of the judgment while reserving rights of appeal as to the issues decided on summary judgment. As a procedural matter, judgment had to enter on those counts. We are satisfied, as the judge was, that in the circumstances presented, the Council did not waive its appellate rights as to the summary judgment decision. See L.B. Holding, Inc. v. University Bank & Trust Co., 406 Mass. 1002, 1002 (1989) (hearing appeal of summary judgment on liability even though agreement for judgment on damages entered after summary judgment on liability and was treated as final judgment in case). Cf. Levy v. Crawford, 33 Mass. App. Ct. 932, 933 (1992) (although agreement for judgment generally serves as waiver of all matters within scope of that judgment, where liability had been established by earlier summary judgment decision and agreement for judgment determined damages, appeal of prejudgment attachment not barred by agreement for judgment).

[10]The Pereiras contend that when § 32 was first enacted, it provided that a conservation restriction could be enforced only by an injunction or proceeding in equity. See St. 1969, c. 666, § 5. They argue money damages, therefore, were not available. In some circumstances, however, "[o]ur courts have also awarded damages where equitable relief was sought on a complaint brought in equity." Ritter v. Bergmann, 72 Mass. App. Ct. 296, 301 (2008). See George v. Coolidge Bank & Trust Co., 360 Mass. 635, 641 (1971) ("The bill of complaint prays for general relief, and a court of equity, once it has taken jurisdiction over a cause, may award damages which arise out of the wrongful conduct").

[11]"As a general rule in Massachusetts, a litigant must bear his own expenses including attorney's fees, except where a statute permits the award of costs, a valid contract [or] stipulation provides for costs, or rules concerning damages permit[] recovery." Larrabee v. Massachusetts Comm'n Against Discrimination, 96 Mass. App. Ct. 516, 526 (2019), quoting Ventresca v. Town Manager of Billerica, 68 Mass.

App. Ct. 62, 66 n.12 (2007). Here, § 32 expressly expands a plaintiff's recovery by allowing an award of attorney's fees.

[12]To the extent the Pereiras argue that the Council is not entitled to both an order to return the locus to its former condition and money damages, we disagree. See Perroncello v. Donahue, 448 Mass. 199, 205 (2007). Cf. Chesarone v. Pinewood Bldrs., Inc., 345 Mass. 236, 242 (1962) (where trespass is enjoined, plaintiff entitled to compensation for harm suffered while trespass continued); Tehan v. Security Nat'l Bank of Springfield, 340 Mass. 176, 188 (1959) (plaintiff may recover damages in addition to injunctive and declaratory relief for interference with easement unless damages are so trivial that framing jury issue not warranted); Sturtevant v. Ford, 280 Mass. 303, 317 (1932) (plaintiff entitled to recover compensatory damages for wrongful interference with easement); Boynton v. Buchanan, 12 Mass. App. Ct. 822, 824-825 (1981) (awarding $15,000 for disruption of easement and ordering restoration or substitution of easement). Compare Motsis v. Ming's Supermarket, Inc., 96 Mass. App. Ct. 371, 378 (2019) (on proper proof court may order specific performance of contract for sale of land and damages for compensation for delay in performance).

[13]We deny the Council's requests for appellate attorney's fees under G. L. c. 184, § 32, and for costs under Mass. R. A. P. 26, as appearing in 481 Mass. 1655 (2019).