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Thisted v. Country Club Tower Corporation, 22 St. Rptr. 694, 405 P.2d 432 (Mont. 1965)

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REAL PROPERTY: "RECIPROCAL NEGATIVE EASMENT" IMPLIED FROM CONTRACT, DEED AND GENERAL BUILDING PLAN.—Defendant Country Club Tower Corporation was formed to build a multi-level, twenty unit apartment building.[1] Prospective purchasers of the apartments were shown descriptive brochures prior to and during construction of the building.[2] Before construction of the building, a contract which described the apartment building as residential property was executed between "Tower" and a Mrs. Roberts. The contract promised conveyance to her of a unit in fee simple and one share in a management corporation to be formed later.[3] After the building was constructed, the building and land were conveyed by Tower to Tower Management Corporation with the exception of twenty apartments, the garage and a "Sundown Room."[4] Subsequently, Tower conveyed individual apartments to Mrs. Roberts and nine other purchasers. With the exception of Mrs. Roberts, none of the purchasers executed contracts with Tower. However, a copy of the blank contract form upon which the Roberts contract was made, had been given to each of the purchasers as part of the sales literature. None of the deeds issued to the plaintiff purchasers contained express restrictions as to the use of the apartments.[5] The defendants attempted to remodel the ten apartments not yet sold to better suit them for transient commercial accommodations.[6] The plaintiff apartment owners obtained an injunction precluding defendant from remodeling for that purpose. Defendant appealed, contending that because the deeds to the purchasers contained no express restrictions as to use, no basis for the

[1]The defendants in the instant case were two corporations: Country Club Tower Corporation (hereinafter called "Tower") and Tower Management Corporation (hereinafter called "Management") and one Peters, who initially held the controlling stock in the corporations. Record, vol. 1, p. 221, *Thisted v. Country Club Tower Corporation.* In order to analyze this opinion, it has been necessary to consider the transcript of the district court and briefs of counsel. (Note: "Appellants" will hereinafter be cited as Defendants, and "Respondents" as Plaintiffs.)

[2]Record, vol. 2, pp. 458-72. The defendants, engaged a real estate firm to inform prospective buyers that the building would eliminate all the cares and worries associated with home ownership. Testimony indicated that no representations were made to the real estate firm that the apartment building would be used exclusively for residential purposes. But the firm acted upon that assumption in advertising the apartments. The blank agreements given to prospective purchasers as brochures, the architect's drawings and floor plans all represented the basic plan and purpose of the building as being residential.

[3]Record, vol. 1, pp. 143-44. Mrs. Roberts executed the contract for purchase prior to the formation of the Tower Management Corporation. The contracts stated in detail the residential character of the units to be sold. Tower Management Corporation was formed for the purpose of managing the "community interest" of the building. One share in Management corporation was issued to each purchaser, and each shareholder had a vote in the management of the common property. Record, vol. 1, pp. 227-29. Note the provisions for regulation of this type of building-unit ownership passed by the 1965 Montana Legislature in REVISED CODES OF MONTANA, 1947, §§ 67-2301 to 67-2342. (REVISED CODES OF MONTANA are hereinafter cited as R.C.M.)

[4]The apartments were later conveyed by Tower to the individual purchasers.

[5]Record, vol. 1, pp. 158-59. An agreement attached to the deed stated, in effect, that if the apartment owner wished to sell or sublease his unit he must get a written consent from the stockholders of Management or allow the corporation a "first refusal" on an offer to sell the apartment.

[6]Record, vol. 1, pp. 253-60. There was conflicting evidence of the defendant's purpose in remodeling its apartments.

issuance of the injunction existed. *Held,* judgment affirmed. The court said an implied equitable servitude attached to the plaintiffs' apartments restricting use to residential purposes. The court further stated that implied reservations or grants of easements of necessity can exist in Montana and expressly overruled *Simonson v. McDonald*[7] insofar as it held to the contrary. *Thisted v. Country Club Tower Corporation,* 22 St. Rptr. 694, 405 P.2d 432 (Mont. 1965).

In determining the plaintiffs' implied rights in the instant case,[8] the court was confronted with a choice between two separate easements: implied easements of necessity, and implied reciprocal negative easements.[9] Implied easements of necessity are easements which involve the use of a servient tenement by one who holds the dominant tenement in fee.[10] They are implied because the use of the servient tenement is necessary for the beneficial utilization of the dominant tenement.[11] Generally, the implied easement of necessity is applied to a right of way.[12]

While the doctrine of implied reciprocal negative easements involves a restriction of the uses to which the servient tenement may be

[7]131 Mont. 494, 311 P.2d 982 (1957). *Simonson* involved a claim of a reserved right of way of necessity, and the court construed R.C.M. 1947, § 67-1616 as providing that even where the lands which are the dominant tenement and the servient tenement are derived from a common grantor, an easement of necessity will not be implied if the right of way can be obtained by eminent domain proceedings.

[8]The first part of the opinion is of interest insofar as it indicates an alternative solution to the case. Instant case at 436-38. The court construed the parol evidence statutes, R.C.M. 1947, §§ 93-401-13, 93-401-17, and held that the Roberts' contract was admissible to show the circumstances at the time the deed was executed. The court cited two Montana cases: Bridges & Co. v. Bank of Fergus County, 77 Mont. 524, 251 Pac. 1057 (1926) and Platt v. Clark, 141 Mont. 376, 378 P.2d 235 (1963). Both of these cases dealt with agreements the validity of which were contested. The statutes cited above state that evidence outside the written agreement is admissible only where (1) mistake or imperfection of the writing is put in issue by the pleadings and (2) where the validity of the agreement is in dispute. The deed to the purchasers in the instant case was not being contested either as to imperfection or as to validity.

The court also decided that the Roberts' contract had not been merged into the subsequent deed. It construed R.C.M. 1947, § 13-708 and cited Story v. Montforton, 112 Mont. 24, 113 P.2d 507 (1941). See Annot., 38 A.L.R.2d 1310, 1312 n. 3, which distinguishes the *Story* case from the general doctrine of merger.

Defendant had argued that if the Roberts' contract were enforceable, the plaintiffs could not claim under it because of their lack of privity with defendant, and because they were not third party beneficiaries. Brief for Appellant, pp. 45-46. Defendant cited McKeever v. Oregon Mortgage Co., 60 Mont. 270, 198 Pac. 752 (1921) as holding that plaintiffs must show that the contract was made expressly for their benefit to claim under it. The plaintiff contended that the apartment building was indivisible insofar as the right to restricted use was concerned and if any apartment in the building were used for any purpose in violation of the contract's provision, it would give Mrs. Roberts a right to restrain defendants. Brief for Respondent, pp. 39-41. Because the court found that defendant had violated the Robert's contract, and because it adopted plaintiffs' argument it would appear the injunction could have been affirmed solely on this basis. Instant case at 438.

[9]See note 25 *infra.* See also text at note 29 *infra.*

[10]Himler Coal Co. v. Kirk, 205 Ky. 666, 266 S.W. 355 (1924).

[11]*Ibid.*, see 3 TIFFANY, LAW OF REAL PROPERTY § 792 (3rd ed. 1939). See also Herrin v. Sieben, 46 Mont. 226, 127 Pac. 323 (1912), Violet v. Martin, 62 Mont. 335, 205 Pac. 221 (1922), which are the cases *Simonson v. McDonald, supra* note 7, overruled, but nevertheless state the general rule on easements of necessity of rights of way.

[12]3 TIFFANY, *op. cit. supra* note 11, § 793.

put, it does not involve physical use of that tenement.[13] Because each estate coming within the scope of the reciprocal negative easement is at the same time a dominant and a servient tenement, the restriction can be enforced by either party against the other. It is thus distinguishable from a purely negative easement which may be enforced only by the party who holds the dominant tenement.[14] Reciprocal negative easements have usually been applied to residential subdivisions,[15] and may be created by either implication or express covenants.[16] Generally, the following elements are necessary before a court will find an implied reciprocal negative easement. Individual lots are conveyed out of a larger tract by a common grantor.[17] Usually, at least one of the deeds contains a statement of the restriction which is then implied in the deeds of the other lots.[18] The party against whom the restriction is sought to be enforced must have had notice, either actual or constructive, of the existence of the restriction.[19] And, finally, the party who seeks to enforce the restriction must show that he is a rightful beneficiary.[20]

The court in the instant case apparently confused these doctrines. The court observed that the deed from "Tower" to "Management" of the land and building, reserving twenty apartments, contained no express reservation by Tower of a right of access to those apartments.[21] Also, there was no provision made for Tower to provide its apartments with heat, electricity, or water since this obviously would require passage through the structural portions of the building already conveyed to Management. The court concluded that "of necessity" these rights of access must be implied from the fact of creation of separate ownership of the building and apartments. The question is then raised by the court: can the right of restricted use be implied from the very nature of the building plan and operation?[22] The court called this right an implied equitable servitude, and concluded that the implied equitable servitude attached to the transfers of the apartments and restricted their

[13]Sanborn v. McLean, 233 Mich. 226, 206 N.W. 496, 60 A.L.R. 1212 (1925), the leading case describing the elements of reciprocal negative easements. See Allen v. City of Detroit, 167 Mich. 464, 133 N.W. 317, 36 L.R.A.(n.s.) 890 (1911); Cook v. Bandeed, 356 Mich. 146, 96 N.W.2d 743 (1959); and Lanski v. Montealegre, 361 Mich. 44, 104 N.W.2d 772 (1960).

[14]*Ibid.*

[15]*Ibid.*

[16]2 THOMPSON, REAL PROPERTY § 382, at 540 (1962 repl.). The author makes the distinction: "True easements are legal interests in land as distinguished from the restriction arising out of a restrictive covenant." See Leasehold Estates, Inc. v. Fulbro Holding Co., 47 N.J. Super. 534, 136 A.2d 423 (1957).

[17]See cases cited in Annot., 45 L.R.A.(n.s.) 966-68.

[18]McQuade v. Wilcox, 215 Mich. 302, 183 N.W. 771 (1921). See also cases cited note 13 *supra*. *McQuade* contained very similar facts to the instant case, with the exception that there was an express statement of the restriction in at least one of the deeds in the *McQuade* case. The court held that the grantor could not change the character of his lot in violation of the restrictions stated in the deeds issued to the grantees.

[19]See cases cited *supra* notes 13 and 18.

[20]See cases cited in Annot., 21 Am. St. Rep. 487.

[21]Instant case at 438.

[22]*Id.* at 439.

use.[23] The court then summarily stated that in Montana there can be implied reservations or implied grants of easements of necessity. These implied easements exist "by reason of our statutes. . . ."[24] The court found that, insofar as the holding of *Simonson v. McDonald* stated to the contrary it was expressly overruled under the facts and circumstances existing in the instant case.

The issue to be decided in the instant case was whether the plaintiffs had an enforceable right to restricted use. The district court found that plaintiffs' rights to restricted use were based on an implied reciprocal negative easement; it did not consider rights implied of necessity.[25] The confusion created by the opinion as to the grounds for the court's decision can be attributed to two omissions: first, a failure to specifically identify the property right the court attributed to plaintiffs whether implied of necessity or by reciprocal negative easement; and second, the failure to give the reasons used in arriving at the conclusion. The opinion relies heavily upon the plaintiffs' brief. An examination of plaintiff's argument will indicate the reasons for the court's discussion of the existence of an implied easement of necessity,[26] as well as showing the logic used in coming to the conclusion upon which the decision is based.

Plaintiffs' basic proposition was that the defendant had sold them a "concept for a way of life,"[27] and not merely a piece of real estate. Plaintiffs used this proposition to show that the actions of defendant were sufficient basis for an implication of a right in the plaintiffs to restrict the use of the apartment building. The proposition was based upon three instruments.[28] The first was the contract executed between Tower and Mrs. Roberts. The second instrument was the deed conveying

[23] *Id.* at 440. The court labels the plaintiffs' rights as "implied conditions," and "implied equitable servitude." The latter phrase could be considered to refer to either the implied easement of necessity, or the implied reciprocal negative easement.

[24] *Ibid.*

[25] The district court in Record, vol. 1, pp. 120-22 found that the Roberts' contract referred to the entire building which had been represented as an apartment building for residential purposes and that the contract and the oral representations of the promoters estopped defendants from changing the use of the building. The court then found that the execution of the contracts, the deeds to the apartments, the deed from "Tower" to "Management" of the building, the formation of Tower Management Corporation:

> [A]nd the representations made by said promoters have created reciprocal negative easements which extend to all of the apartments in the building, whether the deeds contained the separate agreement or not, and such reciprocal negative easements extend also to those apartments still in the ownership of Country Club Tower Corporation and these easements include the right, appurtenant to each apartment, to have all of the other apartments. . .devoted to quiet residential utilization, . . .to have a voice in the selection of persons to whom said apartments may be transferred or leased and the right to quiet and peaceable enjoyment of the premises. . . .

[26] Brief for Respondent, pp. 41-47. The court adopted parts of plaintiffs' brief into its opinion but, by omitting other parts, lost the clarity and continuity of the argument. In an effort to elucidate the apparent purpose of the court, a summary of plaintiffs' argument is set forth.

[27] Brief for Respondent, pp. 26-27. Respondents specifically set out the elements of the concept: that each apartment would be owned in fee simple; each apartment would be a luxury, residential apartment in a high class district, an exclusive, socially acceptable place to live, with quiet, secluded tranquil surroundings; each owner would have the ability to select or pass upon the persons who would be his neighbors.

[28] Brief for Respondent, pp. 44-47.

the building and land from Tower to Management. Plaintiffs argued that this deed illustrated that not all of the property interests in the building were conveyed or reserved by deed.[29] The court adopted this portion of plaintiffs' brief in the opinion,[30] but failed to state the reasons for the discussion of easements of necessity in the opinion. It is submitted that the court had the same purpose as the plaintiffs: to demonstrate that not all of the property rights which were created or passed were in the deeds. The third instrument provided by defendant was the deed delivered by Tower to each of the plaintiff purchasers. Attached to the deed was an agreement which provided for a "first right of refusal" to be given to Management.[31] The agreement was quoted in the opinion, further evidence that the court adopted the argument of plaintiffs and accepted their theory of the sale of a "concept."[32]

Plaintiffs discussed two issues which the arguments of both sides had presented:[33] whether the deeds must contain express rights to restricted use in order for such rights to be enforced; and whether the right to restricted use could be implied from the Roberts' contract and the general building plan and operation. It is submitted that upon these issues the court based its decision, and not upon an implied easement of necessity.[34]

Plaintiffs argued that by characterizing the units as "apartments"[35] in the deeds to the purchasers, the defendant intended the ordinary meaning of the word. Plaintiffs' brief set forth various definitions showing that the word "apartment" meant essentially a separate suite of rooms in a building, which were used permanently for residential purposes.[36] Therefore, the word "apartment" gave the units the character of being apartments and that character passed apurtenant with the units in the conveyance to plaintiffs. In support of this contention plaintiffs cited Montana statutes which provide for the passage of those things incidental and appurtenant to a conveyance or contract.[37] These statutes

[29] *Id.* at p. 45.

[30] Instant case at 438.

[31] Brief for Respondent, p. 47. See note 3 *supra.*

[32] Instant case at 439.

[33] Brief for Appellant, pp. 54-55. Brief for Respondent, pp. 47-59.

[34] Instant case at 439. The court recognizes the issues set forth by plaintiffs, and states that:

> we must decide whether defendants' argument. . .must be adopted by this court. . .and whether there are, in addition to the conditions found in the Roberts' contract and deed, from the very nature of the building plan and operation. . .implied conditions and equitable servitudes that require the use of said building for residential use. . . .

[35] Brief for Respondent, pp. 49-51.

[36] *Id.* at 50. Plaintiff cited: Scanlan v. La Coste, 59 Colo. 449, 149 Pac. 835 (1915), Pierce v. Kelner, 304 Pa. 509, 156 Atl. 61 (1931). Plaintiffs contended that there is a clear distinction between "apartment" and "hotel room" or "motel room."

[37] R.C.M. 1947, § 13-722. "All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded."
R.C.M. 1947, § 67-1607.

> A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real proprty of the person whose estate is transferred in the same manner and to the same extent as such property was

were assimilated into the opinion of the court[38] with the comment that "we think certain Montana statutes, under the facts in this case are controlling." The court did not state the reasons why it used these statutes. The court had previously relied upon "our statutes" for its conclusion that implied easements exist in Montana.[39] But the opinion gives no indication that these were the statutes the court had in mind when it made that statement. Therefore, in light of the close adherence to plaintiffs' argument, it is submitted that the court's purpose in using the cited statutes was the same as plaintiffs'. Namely, that the word "apartment" passed an appurtenant character in the transfers to plaintiffs, and therefore the restriction was not required to be expressed in the deed.

Following the statement of the statutes and without further comment, the court came to this conclusion: "We are further of the opinion that under all the facts shown in evidence here. . .an implied equitable servitude attached to the transfers of the apartments in question, requiring the use of the apartments for residential purposes only."[40] There is no statement of the reasoning upon which the court based this conclusion. It must be concluded, therefore, that the reasoning again followed plaintiffs' argument.

Plaintiffs argued that the rights to restricted use were implied from the actions of defendants in selling the concept. The right was denominated an implied reciprocal negative easement. Specifically, plaintiffs contended that the general building scheme taken in conjunction with the representations made to plaintiffs induced the plaintiffs to buy, and thereby created an implied reciprocal negative easement. This easement gave plaintiffs the right to restrict the building to residential purposes. The right could be enforced against the other apartment owners and against the common grantor, the defendant.[41]

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obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

R.C.M. 1947, § 13-721. "Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention."

R.C.M. 1947, § 49-114. "One who grants a thing is presumed to grant also whatever is essential to its use."

R.C.M. 1947, § 49-121. "That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due."

R.C.M. 1947, § 67-606. The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired."

[38]Instant case at 440.

[39]See above at footnote 24.

[40]Instant case at 440.

[41]Brief for Respondents, pp. 51-56. The defendants had cited California cases, which the court in the instant case mentions, but not by name. The cases were Werner v. Graham, 181 Cal. Rep. 174, 183 Pac. 945 (1919), and McBride v. Freeman, 191 Cal. Rep. 152, 215 Pac. 678 (1923). The California court refused to enforce reciprocal negative easements in favor of common grantees against other grantees because there was no provision expressed in the deed showing which estate was to benefit from the restriction. Because such "equitable servitudes" are in derogation of the common law, they must be construed strictly. The court in the instant case does not explicitly say whether or not it is following or rejecting this line of authority, but it can be assumed it has rejected them because judgment was affirmed for plaintiffs.

The court in the instant case must have concluded that an implied reciprocal negative easement restricting use had resulted from the Roberts' contract and the general building plan.[42] The district court called the right an implied reciprocal negative easement, and did not mention equitable servitudes, as did the supreme court.[43] Since the right of plaintiffs only restricts the use of the other apartments, it can be distinguished from an affirmative right allowing use of the land of another.

Implied negative easements, as distinguished from those created by instrument, have been classified as negative equitable easements.[44] The court in the instant case was exercising its equity jurisdiction.[45] Negative equitable easements which limit the use of land to residential purposes for the benefit of an entire tract of land have been found to be reciprocal negative easements.[46] The existence of purely negative easements had been recognized in Montana prior to the instant case.[47] This case is, however, one of first impression insofar as it recognized an implied reciprocal negative easement.

Two extremes exist in connection with the basic elements required by various states to justify the implication of a reciprocal negative easement. California[48] requires express statement in the deeds, not only of the restriction but also of the estate which it is to benefit. New York,[49] on the other hand, has implied a restrictive easement merely from the existence of a general building scheme. The decision of the court in the instant case at least comes within these two extremes.

In the instant case the defendant was a common grantor. If the situation is analogized to that of a subdivision, the apartments were lots conveyed out of the larger tract. According to the terms of the Roberts' contract and the representations made to the buyers, the apartments would be used only for residential purposes.[50] This necessarily would result in benefit to the apartment owners. Therefore, plaintiffs were the parties to be benefited by the restriction, and had sufficient standing to enforce the restriction against the defendant grantor.[51]

The only question in the instant case was whether the plaintiffs had a right to restricted use based on an implied reciprocal negative easement. The implication of reciprocal negative easements gives effect to the

[42]Instant case at 339. See note 34 *supra.*

[43]See note 25 *supra.*

[44]2 THOMPSON, *op. cit. supra* note 16, at 540.

[45]Instant case at 435.

[46]See note 13 *supra.*

[47]Northwestern Improvement Co. v. Lowery, 104 Mont. 289, 66 P.2d 792, 110 A.L.R. 605 (1937).

[48]See note 41 *supra.*

[49]Tallmadge v. East River Bank, 26 N.Y. Rep. 105 (1862). The New York Court of Appeals implied a restriction where it found that the building scheme was permanent and obviously intended to benefit the lots already conveyed as well as those retained. The lots had been conveyed without express restrictions in the deeds, and sold only with verbal representations. The court held that there was sufficient notice to the grantee from the building scheme to allow enforcement of the restriction against him.

[50]See notes 3 and 25 *supra.*

[51]See text and note 20 *supra.*

probable intent of the parties rather than to the practical necessity of the situation. They are not implied because they are *necessary* for the beneficial use of the property. In the instant case the apartments could be used as apartments regardless of the existence of a reciprocal negative easement.

The supreme court's opinion raised the question of whether implied easements of necessity exist in Montana. This problem was originally raised by counsel for the sole purpose of illustrating that not all the property rights, which were passed to plaintiffs in the purchase of the apartments, were expressly stated in the deeds.[52] The court must have been concerned with implied easements of necessity only as an aside. Any conclusion made on easements of necessity is *obiter dictum*. It follows that, if the court "overruled" *Simonson v. McDonald*[53] upon the facts of the instant case, then *Simonson* has not been overruled because the facts of the instant case did not concern easements of necessity.

The rule of *Simonson* also remains valid if the court overruled it on the facts in the instant case dealing with implied reciprocal negative easements. *Simonson* held only that easements of necessity may not be implied in connection with a right of way, if eminent domain proceedings are available.[54] *Simonson* explicitly limited its holding to the presence of those facts. Application of the rule of *Simonson* to implied easements other than easements of necessity is unjustified.

The decision of the instant case was made in the exercise of the court's equity jurisdiction[55] and it is submitted that while the existence of implied reciprocal negative easements in Montana must have been recognized by the court, it did not overrule *Simonson v. McDonald*.

JOHN R. GORDON

RAMIFICATIONS OF JAIL-BASED PROBATION UPON SUSPENDED IMPOSITION OF SENTENCE.—Petitioner pleaded guilty to grand larceny. At his request the court placed petitioner on the alcoholic rehabilitation program used in the First Judicial District, suspending the imposition of sentence and placing petitioner on probation.[1] The conditions of probation required

[52]See text and note 29 *supra*.
[53]Instant case at 440. "Under the facts and circumstances existing here that holding is expressly overruled."
[54]Simonson v. MacDonald, 131 Mont. 494, 501, 311 P.2d 982, 986 (1957).
[55]Instant case at 435. It is to be noted that cases of this type, decided in equity have generally been based in some measure on the courts finding an estoppel. See Bimson v. Butman, 3 App. Div. 198, 38 N.Y. 209 (1896). Argument on this particular point was raised by counsel from both sides, but apparently the court in the instant case considered it unnecessary for its decision. Brief for Appellant, pp. 52-55. Brief for Respondent, pp. 59-67. Reply Brief for Appellant, pp. 60-68. It is noted that paragraph three of the findings of the district court stated the existence of an estoppel. See note 25 *supra*.

[1]REVISED CODES OF MONTANA, 1947, § 94-7832 provides that whenever any person has been found guilty of a crime or offense upon verdict or plea, the court may adjudge