Michigan Law Review

Volume 51 | Issue 2

1952

CONSTITUTIONAL LAW-EQUAL PROTECTION-DAMAGE ACTION FOR BREACH OF RACIAL RESTRICTIVE COVENANT

Richard W. Pogue S.Ed.
University of Michigan Law School

CONSTITUTIONAL LAW—EQUAL PROTECTION—DAMAGE ACTION FOR BREACH OF RACIAL RESTRICTIVE COVENANT—Plaintiffs sued at law to recover damages for breach of a racial restrictive covenant,[1] alleging that defendants violated the covenant by conveying restricted property to persons of the Negro race and placing them in possession and occupancy. The circuit court granted defendants' motion to dismiss. On appeal, *held*, affirmed. The Fourteenth Amendment prevents the maintenance of an action for breach of racial restrictive covenants.[2] *Phillips v. Naff*, (Mich. 1952) 52 N.W. (2d) 158.

In a somewhat similar case, plaintiff covenantees brought an action to enforce a racial restrictive covenant and for damages sustained as a result of a conspiracy to injure the value of plaintiff's property. The defendants had conveyed restricted property to a co-defendant, who was "without financial responsibility" and who in turn had conveyed to members of the excluded Negro race.[3] The district court sustained general demurrers to the petition in its entirety and dismissed the action. On appeal, *held*, reversed and remanded insofar as the claim for damages was dismissed. The Fourteenth Amendment does not shield a conspiracy to cause damage by violation of a racial restrictive covenant. *Correll v. Earley*, (Okla. 1951) 237 P. (2d) 1017.

[1] "The use and occupancy of all lands subject hereto is hereby restricted to white persons of pure Caucasian race. . . ." Quoted in the opinion, 52 N.W. (2d) 158 at 159.

[2] The court also put its decision on the ground that the interpretation of the covenant contended for by plaintiff would impose a burden on the power of alienation, invalid in Michigan under the holding in Porter v. Barrett, 233 Mich. 373, 206 N.W. 532 (1925).

[3] The principal defendants in the case were sued on the theory of conspiracy to injure plaintiffs' property, rather than for breach of contract. They did not in fact violate the covenant by selling to the impecunious white middleman.

In 1948 the United States Supreme Court settled a much agitated constitutional issue by holding in the *Restrictive Covenant Cases*[4] that judicial enforcement of racial restrictive covenants by state courts through equitable remedies of specific performance (restraining injunction, divestiture of title, etc.) amounts to "state action" which violates the equal protection clause of the Fourteenth Amendment. The Court's opinion emphasized that the covenants themselves (being created by private persons) are not invalid,[5] and that the amendment is not violated as long as the purposes of the covenants are effectuated by "voluntary adherence"[6] to their terms. Judicial enforcement is the forbidden evil.[7] It was apparent that the next question would be whether the holding in the *Restrictive Covenant Cases* was confined to equitable decrees operating directly upon members of the excluded class or encompassed as well state court judgments for damages for breach of the covenants.[8] In 1949 the Supreme Court of Missouri, in *Weiss v. Leaon*,[9] held that a judgment for damages is not precluded by the Fourteenth Amendment. The theory of the court in that decision, as in *Correll v. Earley*,[10] rests on the narrow interpretation of the *Restrictive Covenant Cases*, i.e., that the holding prohibits only decrees for specific performance of such covenants. The Michigan court in *Phillips v. Naff* (expressly rejecting the principle of *Weiss v. Leaon*) adopts a broad construction in concluding that an action for damages is in reality an indirect method of enforcement of the covenant,[11] and hence falls within the bar. This opinion reasons that if the sale of property subject to a racial covenant cannot be made without making the grantor liable in damages, this "would operate to inhibit freedom of purchase by those against whom the discrimination is

[4] Shelley v. Kraemer, McGhee v. Sipes, 334 U. S. 1, 68 S.Ct. 836 (1948), and the companion cases arising in the District of Columbia, Hurd v. Hodge, Urciolo v. Hodge, 334 U.S. 24, 68 S.Ct. 847 (1948).

[5] Otherwise, among other consequences, Congress could presumably make the formation of such covenants criminal, under the power delegated by the Fourteenth Amendment to enforce its provisions by appropriate legislation.

[6] 334 U.S. 1 at 13.

[7] "The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." 334 U.S. 1 at 19.

[8] Before the Restrictive Covenant Cases it had been assumed by the state courts that a damage action is open to the covenantee, if it is desired. In Wyatt v. Adair, 215 Ala. 363, 110 S. 801 (1926), the court went so far as to sanction a tenant's action for breach of an *implied* covenant of quiet enjoyment when a landlord rented an apartment to Negroes in a building in which the other apartment was occupied by whites. And see Eason v. Buffaloe, 198 N.C. 520, 152 S.E. 496 (1930), and Chandler v. Ziegler. 88 Colo. 1, 291 P. 822 (1930). The reason for the paucity of appellate decisions allowing a damage action is probably that such remedy is vastly inferior to equitable relief in this type of case, and was seldom sought prior to the Restrictive Covenant Cases.

[9] 359 Mo. 1054, 225 S.W. (2d) 127 (1949).

[10] Although the suit in Correll v. Earley was brought in tort for conspiracy to injure the value of plaintiffs' property, the gist of the action was the breach of the covenant.

[11] 52 N.W. (2d) 158 at 162.

directed,"[12] and that the invocation of court aid to permit recovery of such damages is the invocation of state action.[13] The Michigan holding seems to be more consistent with the philosophy of the Court in the *Restrictive Covenant Cases*. Even though the rights of the particular Negro are secure in any given action for damages, the indirect effect of a judgment for plaintiff is to "deny rights of property"[14] by causing members of the excluded race to pay a much higher price for restricted land, a price representing the market value plus the anticipated potential liability to which the seller-covenantor is subjected.[15] Moreover, compliance with the covenant by a willing seller, because of the fear of a court judgment, hardly seems to be "voluntary adherence" to the terms of the covenant. This is true even though the *making* of the contract remains a private affair safe from the prohibition of the Constitution. In view of the direct conflict in the state courts on this issue,[16] it is probable that the question will eventually be raised in the United States Supreme Court; if so, logical extension of the holding in the *Restrictive Covenant Cases* would seem to demand that no distinction be drawn between equitable and legal enforcement of racial restrictive covenants in applying the Fourteenth Amendment.

Richard W. Pogue, S.Ed.

[12] Id. at 164.

[13] "Plaintiffs' action for damages may not be regarded as involving individual conduct solely . . . plaintiffs assert the right to invoke State action within the meaning of the terms as discussed in Shelley v. Kraemer, *supra*." 52 N.W. (2d) 158 at 161, 162.

[14] See note 7 supra and note the language of the court in Barrows v. Jackson, infra note 16, at p. 112: "The coercive device of retribution in the form of damages is as effective as the coercive effect of injunctive relief, although not as immediate."

[15] That such price could well be prohibitive is illustrated by the fact that in Correll v. Early, discussed above, the plaintiffs alleged that their property had suffered a loss in value of $10,000. There is the further point that theoretically every covenantee in the agreement might have an action.

[16] See also Roberts v. Curtis, (D.C. D.C. 1950) 93 F. Supp. 604, and a recent California decision, Barrows v. Jackson, 247 P. (2d) 99 (1952), in which the court aligned itself with the Michigan position and regarded the contrary view of the Missouri and Oklahoma courts as based on a misreading of the Restrictive Covenant Cases.