NEW YORK STATE SUPREME COURT
COUNTY OF FULTON

KATHLEEN M. STONE, ELIZABETH A. DAWSON, JENNIFER M. DAWSON, and JENNIFER M. DAWSON, as Administrator of the Estate of JAMES R. DAWSON

Plaintiffs,

DECISION AND ORDER

-against-

Index No.: EF2021-09524
RJI No: 17-1-2022-0170

GEOFFREY W. PECK, JOHN W. PECK, LAWRENCE D. PECK, JOHN E. DACKOW, PECK'S ASSOCIATES, INC., PECK'S LAKE PROTECTIVE ASSOCIATION, PECK'S LAKE ENTERPRISES, INC., and WENDELL TAYLOR CORP.,

Respondents/Defendants.

P R E S E N T : Hon. Rebecca A. Slezak
Supreme Court Justice

On May 24, 2022, Defendants Geoffrey W. Peck, John W. Peck, Lawrence D. Peck, John E. Dackow, Peck's Associates, Inc., Peck's Lake Protective Association, Peck's Lake Enterprises, Inc., and Wendell Taylor Corp. (collectively, herein "the Defendants"), by and through their attorneys of record, Bond Schoeneck & King, PLLC, by Liza R. Magley, Esq. filed a motion pursuant to Civil Practice Law and Rules (hereinafter "CPLR"), seeking an Order (1) declaring the language in Restrictive Use #9, discussed in more detail herein, forbids offering for rent and renting the subject property as a short-term rental home to any person not listed on the deed; (2) declaring the language in Restricted Use #8, also discussed in more detail herein, forbids offering or providing access to Peck lake to any person using the subject property as a

short term rental home; (3) enjoining Plaintiffs from offering to rent or renting the Dawson Property to the general public as a short-term rental home; (4) enjoining Plaintiffs from offering or providing access to the waters of Peck lake to any person using the subject property as a short term rental home; (5) enjoining Plaintiffs from interfering with Defendants' property rights; and (6) dismissing Plaintiffs' causes of action in their entirety with prejudice (hereinafter "Motion #1"). In support of their motion, Defendants filed a Notice of Motion by Liza R Magley, Esq., dated May 24, 2022; Affidavit of John W. Peck, dated May 23, 2022; Affidavit of John E. Dackow, dated May 20, 2022, with Exhibit A; Affidavit of James McCulley, dated May 23, 2022, with Exhibits A through C; Affirmation of Liza R. Magley, Esq., dated May 24, 2022, with Exhibits A through H; Statement of Material Undisputed Facts, dated May 24, 2022; and Memorandum of Law by Liza R. Magley, Esq., dated May 24, 2022.

Following the death of James R. Dawson, Motion #1 was stayed. On January 13, 2023, a motion was made by Plaintiffs at that time, Kathleen M. Stone, Elizabeth A. Dawson, James R. Dawson, and Jennifer M. Dawson (hereinafter "the Plaintiffs"), by and through their attorneys of record, Tooher & Barone, LLP, by Martin A. Miranda, Esq., filed a motion seeking to substitute Jennifer M. Dawson, as Administrator of the Estate of James R. Dawson, as one of the Plaintiffs, amending the caption to reflect the substitution, and lifting the stay of the proceedings. The motion to substitute and amend caption was granted by Order dated January 31, 2023.

On February 23, 2023, Plaintiffs, by their counsel, filed a motion pursuant to CPLR § 3212, seeking an Order (1) finding that the deed restrictions do not contain any express, direct or definitive prohibition against offering their home as a short-term residential rental; (2) finding that Plaintiff's use of their home as a short-term residential rental is not a business or commercial

enterprise according to the plain language and literal meaning of Restricted Use #9; (3) finding that the plain and literal meaning of the easement allows Plaintiffs to provide right-of-way access to the Sunrise Bay Waterfront Area to their temporary guests, as a means of access to Peck Lake; (4) finding that the plain language of the deed restrictions do not contain any express, direct or definitive prohibition against offering their home as a short term residential rental; (5) finding that Defendants have not established the elements required to obtain a permanent injunction and Defendants' withholding or failure to disclose documents is not exempted from disclosure or attorney-client privilege; (6) denying Defendants'' nuisance claim based on the Courts' interpretation of the deed restrictions or, alternatively, because material issues of fact exist regarding the basis for establishing a nuisance claim; (7) awarding Plaintiffs' costs and attorneys' fees and (8) granting such other and further relief as the Court deems just and equitable (hereinafter "Motion #2"). In support of the cross motion, Plaintiffs filed a Notice of Cross Motion, dated February 23, 2023; Affirmation of Martin A. Miranda, Esq., dated February 23, 2023, with Exhibits 1 through 10; Affidavit of Elizabeth A. Dawson, dated February 20, 2023, with Exhibits 1 through 11; Affidavit of Joshua P. Emhoff, dated February 22, 2023, with Exhibits 1 and 2; Affidavit of Michael M. Blinkoff, dated February 21, 2023, with Exhibit 1; Response to Defendants' Statement of Material Facts, dated February 23, 2023; and Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Cross-Motion for Partial Summary Judgment.

On March 2, 2023, Defendants, by their counsel, filed a Memorandum of Law in Opposition to Plaintiffs' Cross-Motion for Partial Summary Judgment and in Further Support of Defendants' Motion for Summary Judgment, by Attorney Magley, dated March 2, 2023 and

Defendants' Response to Plaintiffs' Additional Material Facts, dated March 2, 2023. Oral argument on both motions was heard April 7, 2023. This decision will address both motions.

FACTUAL BACKGROUND

Plaintiffs are owners, as tenants in common, of real property known as 298 North Shore Road, in the Sunrise Bay Subdivision, Town of Bleeker (hereinafter "the property") (*see* Complaint at pp 4-5). Schedule A of Plaintiffs' deed for the property (hereinafter "Dawson deed"), contains an easement granting a right of way from the property over roads and lands adjacent to Peck Lake, designated as Sunrise Bay Beach Waterfront Area (hereinafter "the Lake easement"). A single-family residence is located on the property (*id.*). On May 9, 2021, Plaintiffs hired a property manager to screen potential guests for the residence (*id.*). On Mary 13, 2021, Plaintiffs advertised the property on the internet as a short-term vacation rental home (*id.*). Defendants believe that the restrictive covenants in the deed prohibit Plaintiffs from renting out the residence pursuant to short-term leases and restrict short-term renters from accessing the waters of Peck Lake. Plaintiffs do not believe the restrictions prohibit renting the property as a short-term vacation rental. The parties seek, among other things, a declaration of their rights as they pertain to the deed restrictions.

In his Affidavit, John Peck averred that he is a fifth generation Peck Family member responsible for stewarding the Peck Lake Community (*see* Peck Affidavit at p 1). In the mid-1800s, Peck Lake was only a pond (*id.*). His great-great uncle purchased land around the pond eventually totaling 5000 acres and went into the resort business. In 1910 Mohawk Hydro-Electric Company (hereinafter "the power company") built a dam at the outlet of Peck pond and raised the water level to create a reservoir, which resulted in the creation of Peck Lake. Pursuant to an

agreement with the power company, the power company had title to the land under Peck Lake, but gave Mr. Peck's great-great uncle and his heirs, the controlling authority for access to the Lake (*id.* at p 2). These facts are not controverted, although no agreement from the power company was produced in the Court's record.

In the 1950's Mr. Peck's father and uncle began selling building lots around Peck Lake. Mr. Peck averred that, although there was some variation, most deeds for the land around Peck Lake contain the restrictions that are reflected in the deeds that are the basis of this dispute. The property that is at the center of this dispute was deeded by Mr. Peck's father, aunt, and two cousins to Maurice and Dolores Cea (hereinafter "the Cea deed") for Lots 24 and 25. The Cea deed contains restrictions 8 and 9, which are the subject of the suit. Restriction number 8 states that,

> No part of the premises hereby conveyed will be used or dedicated for any purpose, nor in such a manner as to permit access to the waters of Peck's Lake by the public generally

(Cea deed annexed). Restriction number 9 states:

> The above described premises and all buildings erected thereon shall be used for residential purposes only and no business, industrial, institutional or commercial enterprise of any kind, name or nature shall be conducted thereon, or therefrom

(*Id.*).

The Cea deed also contains an addendum entitled "Limited Grant of Lake Rights" (hereinafter "the Limited Grant"). The Limited Grant specifies that,

> it is the intention of the parties of the first part (Pecks) to confer the rights of access to and use of the waters of Peck Lake upon the parties of the second part (Cea) and their successors in title, to the extent hereby granted and subject always to the restrictions and limitations set forth herein …

> .... The parties of the first part do hereby grant and release to the parties of the second part, their successors in title, the following: The right to have access, at any and all times, only from the lands or area designated upon the aforesaid map as 'Sunrise Bay Beach Waterfront Area' across lands formerly of one Mortimer Everett, now of Niagara Mohawk Power Corporation, to waters commonly known as Peck Lake, at whatever level the waters may be and to use the same, subject to the limitations, restrictions, and restricted uses hereinafter set forth herein, and only to that extent, and with the limitations as set forth in all those certain Agreements made by the parties of the first part, and their predecessors in title, with Niagara Mohawk Power Corporation, and its predecessors in title

(Limited Grant). Part of the Limited Grant reflects that

> Pursuant to a certain document herein referred to as a Lease between Mortimer Everest and Albert T. Peck dated June 3, 1910, parties of the first part have the exclusive right to use the waters of Peck Lake, located in the Towns of Johnstown and Bleecker, Fulton County, New York, for fishing, boating, and hunting for term of nine hundred and ninety-nine years from said date, together with right of access to said waters at whatever level the waters may be

(*id.*).

The lake access rights are also subject to certain restrictions and restricted uses, including having no more than one boat launched and used upon the waters of Peck Lake for fishing and boating, and that boat must be owned and registered in the name of the lot owner (*id.*). Further, any water skiing or other water sports "shall, at all times, be under the exclusive jurisdiction, management, and control of parties of the first part, their heirs, grantees and assigns" (*id.*).

Elizabeth Dawson owns the property in dispute with her immediate family members, Kathleen Stone and Jennifer Dawson (the Plaintiffs) (*see* Dawson Affidavit at p 1). The property was deeded to them by deed dated April 21, 2021, by the Ceas (hereinafter "the Dawson deed").

Elizabeth Dawson averred that when they submitted an offer for the property, the current joint owners of the property informed the selling agent of their intent to rent the house (*see id.* at pp 1-2). The selling agent is a resident of the Peck Lake community. Elizabeth Dawson further averred that the selling agent indicated "that while not always a welcomed occurrence, there were several rental properties on the lake" (*id.*). Plaintiffs were further advised by the selling agent that there was nothing prohibiting the renting of the property and extending homeowner privileges to their guests (*id.*). In her affidavit, Elizabeth Dawson stated that her family has rented properties in the Adirondacks for four generations, but that Plaintiffs "cannot afford a suitable lake property in the Adirondacks without supplemental rental income" (*id.* at p 2 ¶ 5). She indicates that the rental income "helps cover maintenance and operating costs associated with owning the property" (*id.*). Further, the property is used as a vacation residence but rented when it is unoccupied (*id.*). Plaintiffs have a property manager, Mr. Joshua Emhoff of ADK Lakefront Property Management, who "carefully screens potential renters to confirm that they meet minimum age requirements and occupancy limits" (*id.* at ¶ 7). Renters cook and clean for themselves and no housekeeping services are provided on-site (*id.* at p 3 ¶ 9). The rental agreement and payments are executed online through the ADK Lakefront Property Management's website (*id.* at ¶ 10). The property is listed on the internet for potential renters to preview the home (*id.*).

Elizabeth Dawson confirmed in her Affidavit that the Plaintiffs have executed the Fulton County Room Occupancy Tax Registration form and designated the property as a "Private Home, not a Hotel, Motel or Bed & Breakfast" (*id.* at ¶ 11). They do not take any tax deductions for the rental income (*id.*). Since being notified by the Defendants that their renters should not

use the lake, "Plaintiffs instructed the property manager to remove any mention of access to Peck Lake to avoid further confrontation with the Peck family. The listing now mentions that there is public access to several lakes within a 30-minute drive" (*id.* at p 4 ¶ 13). "Plaintiffs have rented the Dawson Property as a short-term rental seventy-seven nights since May 28, 2021. Plaintiffs have stayed at the residence forty-four nights since purchasing the Dawson Property" (*id.* at ¶ 15). Elizabeth Dawson states in her Affidavit that the Plaintiffs feel privileged to own the amazing property on Pecks Lake and that Plaintiffs' "hope in purchasing the Dawson Property is to continue to appreciate how special the Adirondacks are for our family and to give other families the same enjoyable experiences" (*id.* at p 5 ¶ 19).

Ms. Dawson states that the property manager has informed the Plaintiff that renters are "alarmed, upset and intimidated by the signs posted around Peck Lake and the community" (*see* Id. at p 4). These signs include no trespass signs and signs indicating that water access is solely for property owners. The Complaint asserts that the Defendants also required and issued unauthorized vehicle decals/stickers for property owners (see Complaint at p 7). Plaintiffs' argument is that these actions constitute a nuisance.

Joshua Emhoff averred that his company lists single-family vacation rentals for property owners on the ADK website, as well as VRBO, Airbnb, Find Rentals and New York Rental By Owner (Emhoff Affidavit at pp 1-2). "After each rental, ADK Lakefront Property Management hires an outside vendor to clean the Dawson Property. On occasion, ADK Lakefront Property Management also hires outside vendors for upkeep and maintenance of the Dawson Property" (*id.* at pp 2-3 ¶ 9).

The Affidavit of Michael Blinkoff, an attorney and title examiner in New York State, is produced by Plaintiffs in an attempt to demonstrate what Mr. Blinkoff's understanding is of the two restrictions that are being challenged in this suit. Mr. Blinkoff does not purport to have any personal knowledge of the intent of the parties when the deeds were drafted. His Affidavit represents merely his interpretation of the restrictions. The Court does not consider Mr. Blinkoff's Affidavit probative as it attempts, inappropriately, to substitute Mr. Blinkoff's opinion for the Court's.

Mr. John Dackow is a resident of Pecks Lake and a named Defendant. Mr. Dackow's Affidavit recounts an incident he became aware of where law enforcement was called to the property after a renter attempted to enter the wrong house. The police report is annexed to his Affidavit and recounts the incident. The police report indicates that after interviewing the renter, and being advised that the renter went to a wrong address by mistake, he immediately left. The police report concludes that "[n]o suspicious activity [was] observed" (*see* police report annexed to Dackow Affidavit). Mr. Dackow also states that in 2021 he observed and learned of several Dawson Property renters who behaved "in a manner antithetical to the letter and spirit of the deeds in the Peck Lake community, including," parking a truck preventing a boat launch, engaging in foul language and public urination, using other community members' boats, overusing parking areas, creating noise disruptions, launching boats without regard to invasive species, and using a private dock to unload a passenger from a rented boat (Dackow Affidavit at pp 1-2).

A copy of a rental agreement that is used by the Plaintiffs to rent the property is attached to James McCulley's Affidavit (McCulley Affidavit). Mr. McCulley is a resident of Pecks Lake

and Vice President of the Peck's Lake Protective Association, an association which welcomes all members of the Peck Lake community to join (*id.* at p 1). The rental agreement provides an itemization of the payment expected from the renter, which includes rent, clean fee, and the Fulton County Bed Tax (*see* rental agreement annexed to McCulley Affidavit).

Attached to Mr. Emhoff's Affidavit is an e-mail from a renter which is dated June 12, 2021, in which the renter explains that when he tried to use kayaks, he was approached by "an old man in a golf cart," advising him that the launch area was for homeowners only (*see* email annexed to Emhoff Affidavit as Exhibit). The renter also advises in the e-mail that he will be renting a boat the next day and he needs a dock number to use for the boat launch (*id.*). Mr. Emhoff's Affidavit also states that renters are now told not to use Peck's Lake because there is a "present legal dispute surrounding this lake access entry point" (Emhoff Affidavit at p 4). Further, he states that renters have made numerous complaints to him about being harassed and feeling threatened by the Peck family and their associates. Renters have told him they do not feel comfortable at the property and have asked for refunds for leaving the property before the last day of their reservation. The renters have also expressed to him that they find the signs around the property, advising of limitations to the use of the lake, "alarming, intimidating, hostile and upsetting" (*id.* at p 4 ¶ 14).

PROCEDURAL BACKGROUND

Plaintiffs' causes of action include declaratory judgment regarding the deed restrictions; declaratory judgment regarding the lake easement; private nuisance; and tortious interference with a contract. On their first cause of action, Plaintiffs seek a declaration that Plaintiffs have rights to the property and residence as a short-term rental home for residential use and that such

use does not violate the deed restrictions; and that the purported deed restriction prohibiting Plaintiffs' use of the property and residence as a short-term vacation rental home is unenforceable due to lack of uniform enforcement by Defendants[1] (*see* Complaint Wherefore clause [A]). On their second cause of action, Plaintiffs also seek a declaration that Plaintiffs' rental guests have a right to use the Lake easement and Peck Lake; and that the restriction purportedly prohibiting Plaintiffs' rental guests from using the easement or the lake is unenforceable due to lack of uniform enforcement by Defendants (*id.* at [B]). On their third cause of action, Plaintiffs want the Court to issue a permanent injunction enjoining Defendants' interference with Plaintiffs' use and enjoyment of their property and residence, ceasing verbal and written intimidation against Plaintiffs and their rental guests; ceasing the unwarranted monitoring of Plaintiffs' property and residence; removing any online posts regarding their interpretation of the restrictions; removing road, waterfront, and trail signs alleging the deed restrictions prohibit the use of the easement and lake; and prohibiting unauthorized vehicle decal regulations, which were passed by the Peck's Lake Protective Association (hereinafter "PLPA") (Complaint at p 26). Plaintiffs seek compensatory and punitive damages for Defendants' interference with Plaintiffs' use and enjoyment of their property and residence. On their fourth cause of action, Plaintiffs seek temporary and permanent injunctive relief enjoining Defendants from intentional and tortious misconduct (*see id.* at [D]). They want the Court to direct Defendants to cease verbal and written intimidation, harassment and threats against Plaintiffs and their rental guests; to cease unwarranted monitoring of their property; to remove online posts and road, waterfront, and trail sings, along with a prohibition of unauthorized vehicle decal

[1] Plaintiffs allege that Mr. Dackow registered his own business at his Peck lake residence address.

regulations. Compensatory, consequential and punitive damages are sought for Defendants' alleged tortious conduct. Plaintiffs seek attorney fees and costs.

Defendants' counterclaims include declaratory judgment, seeking to declare that the restrictions forbid offering for rent and renting the property to any person not listed in the deed; injunction seeking to enjoin the Plaintiffs from offering for rent or renting the property to the general public; and nuisance, seeking compensatory and punitive damages. Defendants also seek enjoining Plaintiffs from interfering with Defendants' property rights, attorney fees, and costs and disbursements.

Defendants' motion seeks declaration that Restricted Use #9 forbids offering the property for rent as a short-term rental home; that the language of Restricted Use #8 forbids providing access to Peck Lake to any person using the property as a short term rental home; enjoining Plaintiff from renting the home as a short-term rental home; enjoining Plaintiffs from providing access to the waters of Peck Lake to persons renting the home as a short term rental home; enjoining Plaintiffs from interfering with Defendants' property rights; dismissing Plaintiffs' causes of action in their entirety.

Plaintiffs' cross motion seeks a declaration that the deed restrictions do not forbid Plaintiffs from renting their home as a short-term rental or from providing rental guests access to Peck Lake; denial of Defendants' injunctions; and denial of Defendants' nuisance claim.

LEGAL AUTHORITY

On a motion for summary judgment, the movant bears the initial burden of setting forth evidentiary facts sufficient to entitle that party to judgment as a matter of law (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the moving party meets this burden, the opposing

party must then produce "evidentiary proof in admissible form" to show that a question of fact exists requiring a determination by a trier of fact (*id.*). When determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party (*Vega v. Restani*, 18 NY3d 499, 503 [2012]).

The caselaw interpreting restrictive covenants is certainly wide-ranging. What seems to be the general consensus, however, is that an interpretation of a covenant is absolutely determined by the language used (*see generally* Mark S. Dennison, *Application of Private Covenants Restricting Use of Property to Residential Purposes*, 43 Am Jur Prof 3d 473 [1997]). To that extent, some courts have held that where the phrase "residential purpose" is used, it is meant to limit the use of the property to living purposes as distinguished from business or commercial purposes (*see id.*). If the phrase "residential purpose" is followed by the word "only," it has been interpreted to mean "solely" or "and nothing else," further restricting the use to no nonresidential use whatsoever (*id.*). The reasoning behind these holdings is to maintain the residential character of the neighborhood. Yet, other courts have used a balancing test, interpreting the language to not restrict those activities that have only a negligeable impact on the character of the neighborhood (*id.*). In this collective approach, factors that have been considered are increased noise levels, increased pedestrian or vehicular traffic, outside employees working at the property, increased pollution, hours or operation, and public safety (*id.*).

While some courts have interpreted phrases referring to "single-family dwelling" as referring to the type of structure to be constructed on the property, when combined with the phrase "residential purposes only," nonresidential uses may not be made of the property (*see id.*). Some courts have allowed certain types of business activities that are incidental to the use of a

dwelling when the phrase "residential purposes only" has been used in restrictive covenants without the express prohibition of commercial or business in such covenants. However, generally, courts have noted that a restriction prohibiting commercial or business use will be more narrowly interpreted than one simply restricting the use to residential (*id.*). It is, however, understood that whether a particular business use constitutes a violation, depends on the specific wording of the restriction, as well as the manner in which the use is conducted (*id.*).

Court interpretations are as varied as the wording often used in these restrictions. The majority of courts agree, however, that courts should be guided by the general principles of interpretation. Where a restrictive covenant is ambiguous, it does not fail to be enforced automatically, but it will be interpreted in the least restrictive way against the party seeking its enforcement (*Turner v. Caesar*, 291 AD2d 650, 2002 NY Slip Op 01333 [3d Dept 2002]). If there are only documents to interpret, a court may resolve ambiguities appearing in documents on motion for summary judgment (*Gitlen v. Gallup*, 241 AD2d 856, 1997 NY Slip Op 06960 [3d Dept 1997]). If equivocality can be resolved without reference to extrinsic evidence, the issue is a question of law for the court (*Id.* at 858, *citing Maio v. Gardino*, 184 AD2d 872 [3d Dept 1992] [internal quotations omitted]).

"As home sharing becomes increasingly popular, the line between residential and commercial use is blurring" (Nick Cucrio, *Residential Use Restrictions in the Age of AirBnB*, 99 Feb MIBJ 20 [February 2020]). Further,

> a residential use covenant is a poor method by which to target any specific activity that a common-interest community desires to limit because it is inherently imprecise. Some activities may be consistent with both commercial and residential use, making it difficult to identify violations

(Cai Roman, *Making Business of "Residential Use": The Short-Term-Rental Dilemma in Common-Interest Communities,"* 68 EmoryLJ 801 [2019]). What is apparent from the geographically widespread range of decisions is that, although operating a "de facto hotel" via short-term rentals would not be consistent with the "residential use" of the property, "the precise point at which short-term rental activity ceases to be residential is difficult to determine" (*Roman supra*).

The usual meaning of "residence" as defined in Black's Law Dictionary is bodily presence as an inhabitant in a given place (Black's Law Dictionary 1310 [7th ed 1999). A "business" is defined as commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain (*id.*). Websters Dictionary defines the word "commercial" as pertaining to or characteristic of commerce; engaged in commerce; prepared, done, or acting with sole or chief emphasis on salability, profit, or success (Webster's New Universal Unabridged Dictionary 296 [1994]). One meaning for enterprise as defined in Webster's Dictionary is "a company organized for commercial purpose; business firm (*id.* at 476).

In the context of AirBnB, VRBOs, or other short-term rental arrangements, New York's dearth of caselaw regarding restrictive deed covenants was apparent in the Court's research for this particular case. The Court is not convinced that cases involving municipal code definitions, although offering a glimpse into this area of law, are particularly on point, since those codes usually define the uses they intend to prohibit. The cases that interpret short-term rental use in the context of restrictive covenants, although mostly in sister state jurisdictions and rarely in New York, appear to be more closely on point. However, those also are mixed. Some states have

strictly interpreted deed "residential" restrictions as not prohibiting short-term rentals (*see Shack v. Property Owners*, 555 SW3d 339; *Estate of Desert Ridge*, 30P3d 736; *Tarr v. Timerwood*, 555 SW3d 274; *Houston v. Wilson*, 360 P3d 255; *Vera Lee v. Joim*, 537 SW3d 254; *Santa Monica v. Acord*, 219 So3d 111; *Mason v. DeVaney*, 207 P3d 1176; *Yogman v. Parrott*, 937 P2d 1019). Others, have an opposite interpretation (*Kensley v. Gadd*, 560 SW3d 516; *Eager v. Pwasley*, 322 Mich App 174; *Munson v. Milton*, 948 SW3d 813).

In the context of restrictive covenants, it is understood that the term "residential" generally refers to "activities undertaken … [that] are quintessentially residential – e.g., cooking, bathing, sleeping and recreating" (*West Mountain v. Dobkowski*, 78 Misc3d 963 (Sup Ct Warren CO 2023]). In the realm of residential real estate, use of a premises for short term residential has been classified as transient and profit-oriented in nature (*Aurora v. Hennen*, 157 AD3d 608 [1st Dept 2018]). Commercial activity is defined as profit making and creating jobs and promoting economic prosperity (*Nearpass v Seneca*, 53 Misc3d 737 [2016]). In the context of a rent stabilization statute, a tenant operating an AirBnB has been found to be a "de facto hotel operation [through Airbnb]" and such short-term rentals were "commercial exploitation of her rent-stabilized leasehold…" (*Goldstein v. Lipetz*, 150 AD3d 562 [1st Dept 2017]. In *Brokford v. Penraat*, 47 Misc3d 723 [2014], the court found the defendant's argument that the apartment maintained its residential character because of the "purely residential activities of sleeping, bathing, eating and sitting to have conversation," unconvincing. Further, the court reasoned that defendant's argument that there were no retail goods sold out of, or manufacturing done, at the apartment, and was, therefore not a "business," was "wholly disingenuous," since it completely

ignored the aspect of commercial hotel businesses which mostly provide rooms for rent on a short term, transient basis (*id.*).

In New York, in the context of interpreting "single-family unit," the New York Court of Appeals distinguished "transient" living from the generic character of a family unit (*see City of White Plains v. Ferraioli*, 34 NY2d 300 [1974]). Citing *Ferraioli*, as recent as this year, a lower court in the Third Department has held that transient, short-term rentals violated a restrictive covenant restricting the use to "single-family residential" (*see West Mountain supra*).

Specific to this case, the Fulton County Room Occupancy Tax Registration Form is a required form pursuant to Fulton County Local Law 1 of 2017 and New York State Taxation Law § 1202-dd, entitled "Hotel or Motel Taxes in Fulton County" (*see* NY Tax § 1202-dd). Pursuant to the NY Tax § 1202-dd, which was in effect when Plaintiffs purchased the property, Fulton County is authorized to adopt and amend laws imposing a tax upon persons occupying a hotel or motel room within the county.

> For the purpose of this section, the term "hotel" or "motel" shall mean and include any facility providing lodging on an overnight basis and shall include those facilities designated and commonly known as "bed and breakfast" and "tourist" facilities

(*Id.* at [1]). Fulton County Local Law 1 of 2017, known as Fulton County Occupancy Tax Law, also in effect at the time Plaintiffs purchased the property, provides the definition of "Hotel or Motel" as follows:

> Any facility providing lodging to the public on an overnight basis and shall include, but not limited to, those facilities designated and commonly known as bed and breakfast, inns, cottages, lodges, ***vacation rentals, home rentals, camp rentals***, apartments, resorts, guest houses, town houses, condominiums, RV parks and tourist facilities

(Fulton County Occupancy Tax Law [3] [c]) [emphasis added].

It is important to note that while the Fulton County Occupancy Tax Law provides exemptions for religious and non-for-profit organizations, it specifically excludes from exemption "any organization operated for primary purpose of carrying on a trade or business for profit" (*id.* at [6] [c]). The Fulton County Occupancy Tax Law provides that a tax of 4% shall be paid upon the rent for every occupancy of a room or rooms in a hotel or motel located within the County, but shall not be imposed upon a permanent resident of the hotel or motel (*see id.* at [4] [a]). A permanent resident, is defined as any person occupying the hotel or motel for at least thirty consecutive days (*see id.* at [3] [g]). The owner of the hotel or motel is defined as an "operator" pursuant to the Fulton County Occupancy Tax Law § 3 (f). The instruction for the Fulton County Room Occupancy Tax Registration Form, which seems to have been amended in 2022, sets forth that the person completing the form should check mark the "type of business" where the question on the form asks for "Type of Establishment" and gives the options of hotel, motel private home, etc.

LEGAL ANALYSIS

I. Restriction Number 9 prohibits the short-term rental of the property

Both the Cea and the Dawson deeds contain the same restrictions and restricted uses. Restriction and Restricted Use number 2 provides that the buildings to be erected on the lot, shall "only" "consist of a single one family cottage or dwelling…" (*see* Schedule A to deeds). Additionally, the Restriction number 9 states:

> The above described premises and all buildings erected thereon shall be used for residential purposes only and no business, industrial, institutional or commercial enterprise of any kind, name or nature shall be conducted thereon, or therefrom

(*see id.* at p 4). As seen in the supporting case law as well as the plain meaning of the words as defined in Black's Law and Webster's Dictionaries, residential purpose refers to the use of the property for sleeping, eating, bathing, and socializing. The Court notes that not only is the phrase "residential purpose" used, but also the word "only," as well as an explicit prohibition of business or commercial use "of any kind, name or nature" (*see supra*). While the Court is guided by the principles that the restriction should be narrowly construed, as well as against the party seeking to enforce it, the Court cannot interpret the restriction in such a way as to defeat the plain meaning of the words used. Additionally, if there was any ambiguity that no commercial or business activity shall be conducted on the premises, that ambiguity can be cleared from the four corners of the deed and its restrictions, which also make reference to a "single one family cottage or dwelling" (*see West Mountain supra*).

To be sure, the Court cannot determine if the short-term rental, in general, is a business or commercial activity in all instances, as it is evident in the research that this is dependent on the facts of each case and the wording used in each restrictive covenant. Here, the restriction includes all the language of the most restrictive interpretation of the words "residential purpose," by adding the words "only," while also explicitly restricting commercial or business activity of any kind (*see Dennison supra*). The Court interprets this to mean that incidental commercial activity is also restricted. Even if the Plaintiffs and their renters are using the property for residential purposes, and even if Plaintiffs themselves are physically at the property a portion of the year, the commercialization of the property in any way, by renting it out and advertising it on AirBnB or VRBO websites is prohibited. Moreover, as the court held in *West Mountain*, the

short-term rental would be inconsistent with the intent of the parties, which is clearly to maintain the property as a "single one family cottage or dwelling" (*see West Mountain supra*).

It is worth mentioning that *caveat emptor* is also a principle that governs real property transfers. The Plaintiffs cannot be said to have been unaware of the restrictions in the deed. In fact, part of the Court's record reflects that, despite the language of the deed, the Plaintiffs bought the property with the intent to rent it, as they could not otherwise afford the property (*see* Dawson Affidavit supra). The statements of the selling agent as to the interpretation of the restrictions are of no moment. A selling agent cannot change the plain language of a deed. Additionally, the Plaintiffs were aware that their activity of renting out the property essentially transformed their property in a hotel under the Fulton County Occupancy Tax Law, and made them, as the owners of the property, operators of such a hotel (*see* Fulton County Occupancy Tax Law supra). To be sure, they did in fact register their property as one that would be responsible to pay an occupancy tax pursuant to the Fulton County Occupancy Tax Law. The Plaintiffs have knowingly assumed the risk that a court might interpret their short-term rental of the property as a violation of the restrictive covenant, but none-the-less chose to purchase the property and thereafter rent it.

The short-term rental of the property makes the use "transient," pursuant to *Aurora* and *Goldstein supra*, which also makes such use inconsistent with the deed restricting the use to single one family cottage or dwelling (*see West Mountain supra*). Plaintiffs' arguments – that there is no "commercial" activity that occurs on site because the rental agreements and the rental payments are made online, while the cleaning is done by a third-party company – are as in *Brockford*, disingenuous, as the Plaintiffs clearly are not, and the Court cannot be expected to be

entirely oblivious to the emerging home sharing economy. Neither can the Plaintiffs' arguments that they only rented the home 77 nights since 2021 be seen as evidence of rental as merely incidental to residential use of the property since Plaintiffs bought the property with the intent to rent it. Further, Plaintiffs have not established by clear and convincing evidence that the low number of nights that the property was rented is not simply a result of the property appearing less desirable now that there is no access to the lake, and, by their own admissions, Plaintiffs have been receiving complaints from their renters.

The Court finds Restriction number 9 unambiguous given the intent of the parties as evidenced in the four corners of the deeds by the plain language used, restricting the use of the property to "single one family cottage or dwelling," "residential only," and restrictive of commercial activity "of any kind." Further, it is also clear to the Court that the activity of renting the property in the manner that the Plaintiffs have been, is violative of Restriction number 9.

II. Restriction Number 8 prohibits the Plaintiffs from permitting renters access the waters of Peck Lake

Restriction Number 8 in the Schedule A to Plaintiff's deed states that

> No part of the premises hereby conveyed will be used or dedicated for any public purpose, nor in such a manner as to permit access to the waters of Pecks Lake by the public generally

(*see* Schedule A). Although not listed in the Dawson deed annexed to the Cea deed is a document entitled "Limited Grant of Lake Rights" (*see* Cea deed). In the Limited Grant, Defendants and their ancestors grant to the Ceas,

> their successors in title, the following: The right to have access, at any and all times, only from the lands or area designated upon the aforesaid map as "Sunrise Bay Beach Area" across lands formerly of one Mortimer Everest, now of Niagara Mohawk Power Corporation, to waters commonly known as Peck lake, at whatever

> level the waters may be and to use the same, subject to the limitations, restrictions, and restricted uses hereinafter set forth herein, and only to that extent, and with the limitations as set forth in all those certain Agreements made by the parties of the first part, and their predecessors in title, with Niagara Mohawk Power Corporation, and its predecessors in title

(*see* Limited Grant). The lake access is further restricted, including but not limited to, "no more than one boat" to be launched from Sunrise Bay Beach Waterfront Area, which boat must be registered in the name of the lot owner (*see id.*). Additionally, the Limited Grant also provides that water skiing and other similar water sports will be under the exclusive jurisdiction, management, and control of the Defendants and their successors.

Interestingly, the two identified easements under Schedule A refer to Plaintiff's right of way for purpose of ingress and egress over remaining lands of the Defendants; and right of way for the purpose of ingress and egress over remaining lands to "lands adjacent to Pecks Lake designated upon the aforesaid map as Sunrise Bay Beach Waterfront Area" (*see* Schedule A page 1 of the Dawson deed). Nothing in the Dawson deed mentions access granted by Defendants to Plaintiffs for the waters of the lake itself. As such, the Plaintiffs are subject to the Limited Grant in the Cea deed, which only allowed restricted access to the lake waters to Cea and their successors in title. The Dawsons would be included as successors of the Ceas. As such, the same limitations to that access apply to the Dawsons. Reading the deeds in their entirety, it is clear that Plaintiffs are not the owners of any lake rights except for the limited access granted them in the Cea deed. The language of the restrictions makes it clear that the access is limited to only one boat which would have to be registered in the Dawson's name, with Defendants retaining the control over the activities that occur on the lake. Further, reading the deeds in their entirety and

seeing that the lot was meant for a "single one family residence or dwelling," it is evident that the intent of the parties was to restrict access to the lake to owners of the properties.

Of course, nothing in the deed would prohibit the owners of the land from having their invitees on their property, provided they would abide by the restrictions in the deed, which were placed therein because the power company still owns the land under the lake and the Defendants remain subject to their agreement with the power company. However, giving the words used their plain meaning, the Court finds that the deed restriction prohibits access to the lake by the "public generally," which would include tourists. In this context, tourists would only become aware of the cabin and the lake access through advertising and public internet searches, and would otherwise have no connection to the Plaintiffs. Moreover, Ms. Dawson confirms this in her Affidavit when she states that it is her hope that the rental agreement would give other families the same enjoyable experience (*see* Dawson Affidavit supra).

Webster's New Universal Unabridged Dictionary defines "public" as "relating or belonging to an entire community, state, or nation; open or available for all to use, share, or enjoy (Webster's New Universal Unabridged Dictionary 1162 [1994]). The Defendants could not award to Plaintiffs a right to the lake which they did not have. It is undisputed that the power company still owns the land under the lake and Defendants control access to the lake water. Defendants do not have the rights to permit lake access to the public at large, but only to the owners of land adjoining the lake. As such, they could not grant the owners of land adjoining the land, a category of which Plaintiffs are a part of, a right to permit the public at large access to the lake. It would be inconsistent with the rights of the parties, as established in the deeds, to permit the public at large access to the lake waters. It cannot be said that the individuals renting

Plaintiffs' property are not part of the "public generally," as they do not have any known connection with Plaintiffs, or the land. They are not party to any deed, easement, or license to the land or the lake waters. They are neither family or friends of Plaintiffs, but tenants using the property on a transient basis, as indicated above. As such, permitting Plaintiffs' tenants to access the lake water would be violative of Restriction number 8 in the Cea and Dawson deeds.

The Court finds that the plain language of the deeds restricts access to the lake to the owners of the properties surrounding Peck Lake and their invitees, which would not include individuals who only found the property by a public search on the internet and have, otherwise, no connection to the Plaintiffs. By renting the property out through websites such as AirBnB and VRBO, Plaintiffs have allowed members of the public to have access to the lake, which is prohibited by Restriction number 8. Plaintiffs' argument that the management company carefully screens the tenants does not put the renters in a category other than public generally. Tangentially, the email from one of the renters further outlines the violation of the deed restrictions since his intent was to rent a boat to launch on the lake, an activity which would have also been in contradiction with the deed restricting access to the lake to only one boat which would need to be owned by and registered to the Plaintiffs.

Any arguments made by the Plaintiffs regarding testimony of Mr. Peck's father in 1974 at a meeting of the Adirondack Park Agency; or reference to the Adirondack triathlon, or county snowmobile trails to offer a glimpse into the intent of the restrictions, is impermissible parol evidence, which Plaintiffs agree is unnecessary where the plain and literal meaning of deed restrictions are clear and unequivocal, such as here (*see Gitlen supra*)

III. Defendants are entitled to a permanent injunction

An injunction is appropriate where there is a violation of rights for which there is no adequate remedy at law, which causes serious and irreparable harm, and the equities are balanced in favor of the party seeking it (*see International Shoppers v. At the Airport*, 131 AD3d 926, 2015 NY Slip Op 06710 [2d Dept 2015]). An injunction is appropriate to enforce a restrictive covenant provided the person seeking it is not guilty of laches and the character of the surrounding area has not changed, making its enforcement inequitable (*Meadow Run v. Atlantic Refining*, 155 AD2d 752 [3d Dept 1989]). A person who rents premises with notice of a previous restrictive covenant may be enjoyed from violating it (*see Weinberg v. Edelstein*, 201 Misc 343 [Sup Ct, NY Co 1952]). Given the Court's determination that the Plaintiffs' short-term rental of the property is violative of Restrictions number 8 and 9, of which they were aware of when they bought the property, the Court finds that irreparable harm would occur to the property as well as to the character of the community, which is evidenced by the plain language of the deeds. There is no remedy available at law, as only by stopping the violative conduct, would the restrictive covenants be enforced. It is not inequitable to so restrict Plaintiffs' use of their property as they had actual notice of the restrictions in the deeds when they bought the property and chose to buy and rent it regardless. As, such, Plaintiffs must now be enjoined from offering to rent or renting the property as a short-term rental home in a manner that would be inconsistent with the use of the property as a single one family cottage or dwelling, for residential purposes, and for no other commercial purpose of any kind; and from offering or providing access to the waters of Peck Lake to any member of the public generally by using the property as a short-term rental home.

IV. Plaintiffs' use of the property as a short-term rental is a nuisance

To prevail on a nuisance claim, a plaintiff must demonstrate an interference, substantial in nature, intentional in origin, of an unreasonable character, with a person's right to use and enjoy the land, which was caused by the conduct of another (*see Hitchcock v. Boyack*, 277 AD2d 557, 2000 NY Slip Op 09286 [3d Dept 2000]). Having already ruled that the Plaintiffs' conduct in renting out the property constitutes violation of the deed restrictions number 8 and 9, there is no question that the same conduct constitutes a nuisance since it interferes with the Defendants' rights, as laid out in the deed; and the nuisance was intentionally created by Plaintiffs since they bought the property with the intent to rent it and did, in fact rent it. The Court is in agreement with the court in *Watts v. Oak Shores*, which stated:

> [t]hat short-term renters cost the Association more than long-term renters or permanent residents is not only supported by the evidence but by experience and common sense places the matter beyond debate. Short-term renters use the common facilities more intensely; they take more staff time in giving directions and information and enforcing the rules; and they are less careful in using the common facilities because they are not concerned with the long-term consequences of abuse

(235 Cal App 4h 466 [Ct App, 2d Dist, Div6 2015]).

V. Plaintiffs' remaining causes of action are partially dismissed

Plaintiffs allege that Defendants' actions in trying to enforce the restrictive covenants have risen to the level of a private nuisance. Specifically, Plaintiffs allege that Defendants have unlawfully threatened Plaintiffs' rental guests, causing them to suffer irreparable harm to their reputation and credibly in offering the property as a short-term vacation rental home. Plaintiffs request that Defendants cease verbal and written harassment and intimidation against Plaintiffs

and their rental guests; stop monitoring Plaintiffs' property and their rental guests; remove online posts alleging deed restrictions prohibit lake access; remove road and lake easement signs, alleging the restrictions prohibit access to the lake; and prohibiting unauthorized vehicle decals. Plaintiffs allege that Defendants' interference has "caused damages in ***lost revenue*** and diminished value of the Property and Residence" (Complaint at p 22 [emphasis added]).

A tortious interference with a contract cause of action would require the existence of a valid contract, the defendant's knowledge of the contract, and the defendant's intentional procurement of a breach by the third party without justification, resulting in damages (*see Tri-Start v. Goldstein*, 151 AD3d 1102, 2017 NY Slip Op 05261 [2d Dept 2017]). While the lease of a property in violation of a restrictive covenant makes the lease voidable, and not void *ab initio*, (*see 210 West 70 v. Cosmic Group*, 36 Misc3d 72, 2012 NY Slip Op 22128 [Appellate Term, 1st Dept 2012]); and a voidable contract is not a defense to a claim of tortious interference with a contract, justification is. A claim can be made for tortious interference with a contract only if the interference is without justification (*see Tri-Start supra*). In New York, justification is an absolute defense to a claim for tortious interference (*see Trump v Trump*, 79 Misc3d 866 [Sup Ct New York Co, 2023]). As the Court has held above, the Dawson deed restricted the Plaintiffs from renting the property or providing the public with access to Peck Lake. As such, the Defendants, as successors in interest to the grantor, were justified in enforcing those restrictions by taking appropriate actions. Those actions include monitoring the property to ensure it was not rented to the public and posting signs or information on social media sites representing to the public that those restrictions existed. To that effect, those actions are also not considered a nuisance. Further, to the extent that Plaintiffs claim that Defendants' actions caused damages in

lost revenue, those damages are not a right to which Plaintiffs are entitled to, as explained above – the deed restricts commercial activity which might result in revenue to the Plaintiffs. The conduct of Defendants is not unreasonable in nature with regard to notifying the public of the restrictions imposed on the property by deed.

The sole question that remains is whether the Defendants conduct in requiring vehicle decals can rise to the level of a nuisance. While the Plaintiffs averred that they received a welcoming letter from the Peck Lake Protective Association shortly after purchasing the property, the record does not indicate if the Plaintiffs in fact became members of the PLPA. The ByLaws annexed Plaintiffs' Complaint state that membership qualifications require ownership of property at Peck Lake and payment of the annual dues (*see* ByLaws annexed to Complaint as Exhibit 19, p 1, Article III). The Court's record is unclear as to whether Plaintiffs paid annual dues. The ByLaws state that "[w]henever members are required or permitted to take any action by vote, such action may be taken without a meeting by written consent, setting forth the action so taken, signed by all members entitled to vote thereon" (*id.* at pp 2-3). They also state that "[u]nless otherwise required by law, the vote of majority of the directors present at the time of the vote, if a quorum is present at such time, shall be an act of the board. Each director present shall have one vote" (*id.* at p 4). The e-mail dated July 6 (no year indicated, but alleged to be 2021) states that

> [t]he Peck family, with cooperation of the PLPA has decided to take some steps with the intent to reduce or eliminate these types of incidents [vandalism] going forward. One of the things we are doing is issuing every eligible offshore owner who has legitimate rights to utilize Sunrise Bay, a serialized vehicle decal identifying them as a verified owner

(*see* Exhibit 13 to Complaint). Draft meeting minutes dated Saturday, September 4, 2021 indicate, under PLE/Peck Family Update that "[t]hose with legal access to the lake will be issued car stickers (the property owners with access to Sunrise Bay have already been issued green stickers. John Peck is managing the sicker dissemination" (*see* Exhibit 18 of the Complaint at p 5). The minutes most recent to September in the Court's record are the ones from April 15, 2021 (*see* Exhibit 9 to Dawson Affidavit). Nothing in those minutes indicate that a motion regarding stickers or decals as discussed in the July e-mail or the September minutes was considered or voted upon.

The Court's record does not provide sufficient information to determine as a matter of law if Plaintiffs were due-paying members of the PLPA; if they were not, whether they would be subject to the regulations or motions voted upon by the PLPA; and whether the PLPA discussed or voted upon the issue of decals or stickers. It is undisputed that an owner of a property would have a right to invite friends and/or family to visit their property. If Plaintiffs' vehicles were, indeed, subject to the decal regulation which may or may not have properly been issued, such a requirement may interfere with their enjoyment of the property they own. Because questions of fact remain regarding this issue, the Court cannot dismiss the cause of action for nuisance against Defendants that is based out of the requirement for and issuance of decals as discussed herein.

Any remaining issues raised by any Party not specifically addressed herein have been determined to be without merit.

NOW, upon reading all of the submissions in support, opposition, and reply of Defendants' motion for summary judgment and Plaintiffs' cross motion, it is hereby

ADJUDGED AND DECLARED that deed Restriction number 9 prohibits the short-term rental of the property by the Plaintiffs; and it is further

ADJUDGED AND DECLARED that deed Restriction number 8 prohibits Plaintiffs' from offering lake access to the public generally, which would include persons that have become aware of the property and the lake by means of advertisement through rental websites such as AirBnB and VRBO; and it is further

ADJUDGED that the short-term rental of the property and Defendants' providing access to the lake to the public generally, which includes persons renting the property for short-term, is a violation of Restrictions number 8 and 9 of the deed; and it is further

ADJUDGED that the short-term rental of the property and Defendants' providing access to the lake to the public generally, which includes persons renting the property for short-term is a nuisance and such conduct must be enjoined; and it is further

ADJDUGED that Defendants' interference with Plaintiffs' contract with renters of their property was justified in attempting to enforce the deed restrictions and does not constitute tortious interference with Plaintiffs' contract; and it is further

ADJUDGED that Defendants' conduct in monitoring the cars and the persons renting the property; their comments on social media sites advising the public of the deed restrictions; the posting of no-trespass signs and signs advising everyone of the deed restrictions, does not constitute a nuisance; and it is further

ADJDUGED that issues of fact remain regarding whether the requirement of vehicle decals/stickers constitutes a substantive interference with Plaintiffs' enjoyment of their property; therefore, it is hereby

ORDERED that Plaintiffs' cross motion is denied in its entirety; and it is further

ORDERED that Defendants' motion is granted in part and denied in part; and it is further

ORDERED that Plaintiffs are hereby enjoined from offering for rent and renting the property as a short-term rental home; and it is further

ORDERED that Plaintiffs are hereby enjoined from offering or providing access to Peck Lake to the public generally, which includes persons renting the property as a short-term rental; and it is further

ORDERED that the parties are hereby directed to appear for a conference before the Court via Microsoft Teams on December 11, 2023 at 1:00 p.m.

This Decision shall constitute the Decision and Order of the Court.

PLEASE TAKE NOTICE that the Court is hereby uploading the original Decision and Order to the New York State Courts Electronic Filing system for filing and entry by the County Clerk. Counsel for Defendants is still responsible for serving notice of entry of this Decision and Order in accordance with the requirements of CPLR §2220 and the Local Protocols for Electronic Filing for Fulton County.

DATED: November 13, 2023 **ENTER**

HON. REBECCA A. SLEZAK
Justice of the Supreme Court