

A franchisor who owned two adjoining parcels conveyed the eastern parcel to an entrepreneur. The franchisor covenanted in the deed to the entrepreneur that when she, the franchisor, sold the western parcel, she would impose restrictive covenants to prohibit uses that would compete with the filling station that the entrepreneur intended to construct and operate on the eastern parcel. The deed was not recorded.

The entrepreneur constructed and operated a filling station on the eastern parcel and then conveyed the eastern parcel to his station manager, who continued the filling station use. The deed did not refer to the restrictive covenant and was promptly and properly recorded.

The franchisor then conveyed the western parcel to her friend, who knew about the franchisor's covenant with the entrepreneur to impose a covenant prohibiting the filling station use but nonetheless completed the transaction when he noted that no such covenant was contained in the franchisor's deed to him. The friend began to construct a filling station on the western parcel.

The station manager brought an appropriate action to enjoin the friend from using the western parcel for filling station purposes.

If the station manager prevails, what will be the most likely reason?

- A. Business-related restrictive covenants are favored in the law.
- B. The friend had actual knowledge of the covenant to impose restrictions.
- C. The friend has constructive notice of the possibility of the covenant.
- D. The friend is bound by the covenant because of the doctrine of negative reciprocal covenants.

Explanation:

Elements of real covenants & equitable servitudes

Real covenants

(enforceable by money damages)

For *burden* to run

Writing

Intent to run

Touch & concern

Horizontal & vertical

privity

Notice

For *benefit* to run

Writing

Intent to run

Touch & concern

Limited vertical

privity

No notice required

Equitable servitudes

(enforceable by equitable relief)

Express

Writing

Intent to run

Touch &

concern

Notice

Implied

Intent to create common scheme

Restrictive servitude

Notice

Real covenants and equitable servitudes are promises to do or not do something on the land and can be enforced against the parties who made the promise and their successors in interest. The distinction turns on the type of remedy sought. **Money damages** are available for breach of a **real covenant**, while **equitable relief** (eg, injunction—as seen here) is available for **equitable servitudes**. Therefore, the station manager will prevail if he can satisfy the following requirements for an express equitable servitude:

Writing – covenant is expressed in a writing that satisfies the statute of frauds (eg, deed from franchisor to entrepreneur)

Intent to run – promising parties intended that the covenant run to (ie, bind) their successors in interest (eg, agreeing to impose restrictive covenants on future buyers)

Touch and concern – covenant relates to the use, enjoyment, or occupation of the land (eg, prohibits uses that would compete with the filling station)

Notice – servient (ie, burdened) estate owner has actual, record, or inquiry **notice** of the covenant (eg, friend had actual knowledge of the covenant between franchisor and entrepreneur)

Therefore, if the station manager prevails, it will likely be because the friend had *actual* knowledge of this covenant.

(Choice A) Restrictive covenants—including those that are business-related—are generally *disfavored* in the law because they interfere with the free use and alienability of land.

(Choice C) The friend did not have constructive (ie, inquiry or record) notice of the covenant because (1) there were no facts suggesting that there would be a restriction

prohibiting use of the land for a filling station and (2) the deed containing the covenant was not recorded.

(Choice D) Negative reciprocal covenants* can be implied from a common scheme (eg, residential subdivision) when there is no express covenant between the parties—not seen here.

*Also called implied equitable servitudes or implied reciprocal negative easements.

Educational objective:

To enforce an express equitable servitude, (1) the covenant must be in writing, (2) the promising parties must intend for it to run to their successors in interest, (3) it must touch and concern the land, and (4) the servient-estate owner must have notice.

References

Restatement (Third) of Property: Servitudes § 5.2 (Am. Law Inst. 2000) (persons to whom an appurtenant benefit or burden runs).

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