

Essay Question No. 8

Answer this question in booklet #8.

Paul and Derek are neighbors in a two-lot subdivision in Anchorage named Shady Acres. Shady Acres has various covenants, enforceable by each owner against the other, one of which is that no exterior lights may be placed around the houses or in their yards, other than a single discrete entryway lantern.

Several years ago, Paul and Derek had a dispute in which Paul claimed Derek was in violation of one of the covenants. To keep the peace, Derek paid Paul \$1000 in exchange for a release.

This fall, the mayor of Anchorage announces a “Thousand Points of Light” program, encouraging each homeowner to put at least 1000 small white lights in trees around the home. On October 1, Derek responds by stringing lights in all the trees on his lot.

On November 1, Paul files a civil action in Superior Court. His complaint alleges the terms of the covenant and attaches a copy, and alleges that Derek is bound by the covenant. It goes on to allege that Derek has strung numerous lights in his trees. The complaint has two counts, one requesting an injunction requiring Derek to remove the lights based on violation of the covenant, and one seeking damages for lost enjoyment of the shady seclusion of Paul’s property based on a trespass theory.

On November 15 Derek files an “Answer and Counterclaim.” His answer admits all allegations except the allegation that he is bound by the covenant. The answer lists no defenses. At the end of the document is “Counterclaim, Count 1,” alleging that by bringing this suit Paul has breached the settlement agreement signed several years ago. On December 15, Derek files a demand for jury trial.

On January 1, Paul files and serves a motion for preliminary injunction, requesting that Derek be ordered to turn off the lights pending resolution of the case. Paul’s motion relies on the complaint and answer, together with an affidavit from Paul describing his distress at the garish lights next door, which illuminate his bedroom window and make it hard for him to sleep.

Derek files and serves a timely opposition to the motion, raising two arguments. First, he raises the settlement agreement, which he claims is broad enough to encompass a suit on the no-more-than-one-lantern covenant. He attaches an authenticated copy of the purported

release. Second, he argues that no relief can be given without a jury trial.

In a timely reply brief, Paul avers that the release argument has been waived.

1. Is Paul correct that the release argument has been waived? Explain.
2. How should the court resolve Derek's argument that he is entitled to a jury trial? Explain.
3. If the court rejects both of Derek's arguments, describe the analysis it should apply in deciding whether to grant or deny the preliminary injunction.