STATE OF MICHIGAN

COURT OF APPEALS

DONALD L.KOHLER, SHARON L. KOHLER and HOME ACRES SKYRANCH, INC.,

Plaintiffs-Appellees,

v

ARTHUR W. SAPP, JR.,

Defendant-Appellant,

and

RICHARD SHIELS, SANDRA SHIELS, and ROBERT BURCH,

Defendants.[1]

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UNPUBLISHED
June 11, 1999

No. 205029
Missaukee Circuit Court
LC No. 96-003552 CZ

DONALD L. W. KOHLER, SHARON L. KOHLER, and HOME ACRES SKYRANCH, INC.,

Plaintiffs-Appellees,

v

ARTHUR W. SAPP, JR.,

Defendant-Appellant,

and

RICHARD SHIELS, SANDRA SHIELS, and ROBERT BURCH,

No. 207901
Missaukee Circuit Court
LC No. 96-003552 CZ

Defendants.

Before: Griffin, P.J., and Wilder and R. J. Danhof*, JJ.

PER CURIAM.

Defendant Arthur W. Sapp, Jr., appeals as of right following a bench trial verdict in favor of plaintiffs. Defendant also appeals by leave granted from a later order granting plaintiffs' motion for show cause. We affirm both orders.

Following a bench trial, the court determined that defendant breached a restrictive covenant which provided that no resident engage in commercial activity on his or her property. Defendant argues that the judgment was erroneous where the character of the neighborhood had changed and where plaintiffs had waived enforcement of the covenant. We disagree. A trial court's findings will not be set aside unless clearly erroneous. MCR 2.613(C). A trial court's findings are clearly erroneous when the reviewing court is left with a definite and firm belief that it would have reached a different result. *Wiley v Wiley*, 214 Mich App 614, 615; 543 NW2d 64 (1995).

Defendant never denied that the operation of his business was a violation of the restrictive covenant prohibiting commercial activity on residential land. He argues that the doctrines of laches and/or waiver apply. In *Rofe v Robinson (On Second Remand)*, 126 Mich App 151; 336 NW2d 778 (1983), this Court reiterated that, for the doctrine of laches to apply, "it must be shown that there was a passage of time combined with some prejudice to the party asserting the defense of laches." *Id.* at 154, quoting *In re Crawford Estate*, 115 Mich App 19, 25-26; 320 NW2d 276 (1982). Defendant points out that he has been conducting business on his premises since he began living there full-time in 1980. He argues that plaintiffs' failure to bring suit until some sixteen years later bars plaintiffs' action. However, while it is true that plaintiffs acquiesced to defendant's commercial use of the property, evidence showed that defendant's use substantially changed and increased in the 1990s and that, in 1996, defendant had as many as nineteen cars in front of his property. Plaintiffs brought suit shortly thereafter to enjoin defendant from further commercial activity. Thus, given the circumstances, it does not appear that there was an unjustifiable delay in bringing suit. In addition, defendant has not demonstrated how a delay caused him prejudice. Defendant testified that he repaired the automobiles more as a hobby than as a business and that it provided him with "rest and relaxation." Thus, there was no economic reliance on the business. Defendant also pointed out that in the past three years he either made no profit or approximately $3,000 a year. There are no fixtures or buildings that would need to be removed. Therefore, defendant has failed to show that he would be prejudiced.

Defendant maintains that, even if plaintiffs timely brought suit, enforcement of the restriction is barred by the doctrine of waiver. Defendant points to the fact that others in the neighborhood were guilty of violating the restriction and also points to the fact that the character of the neighborhood had changed over time. *Rofe* affirmed that "the right to enforce a restrictive covenant may be lost by waiver if by one's failing to act he leads another to believe that he will not insist upon the covenant and the other is thereby damaged." *Id.* at 155. However, this Court in *Rofe* also stated that "where variations from deed restrictions constitute minor violations, the concept of waiver does not apply" and "[t]here is no

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

waiver where the character of the neighborhood intended and fixed by the restrictions remains unchanged." *Id.* at 155.

The evidence demonstrated that many other individuals had been operating businesses in violation of the covenant against commercial use. However, the evidence also demonstrated that these other businesses were innocuous. The trial court had an opportunity to view the neighborhood and concluded that no other property came close to defendant's in terms of commercial activity. While there was testimony that the character of the neighborhood had changed, the court was in the best position to determine the credibility of the witnesses' testimony. *State Farm Fire & Casualty Co v Couvier,* 227 Mich App 271, 275; 575 NW2d 331 (1998). The court also viewed the neighborhood and stated that "it is clear from my view of the premises that this is a residential plat with homes, people living there" and that "the original intent of the developer here has not changed over a period of time. It's still a residential area." This Court will defer to the trial court's ability to assess the character of the neighborhood given the trial court's unique opportunity to visit the area. *Rofe, supra* at 156. Therefore, defendant failed to show that the character of the neighborhood had changed to such an extent that it would be impossible "to secure in a substantial degree the benefits sought to be realized through the performance of a promise respecting the use of land." *Morgan v Matheson,* 362 Mich 535, 545; 107 NW2d 825 (1961).

Defendant next argues that the trial court abused its discretion when it changed the original judgment and imposed additional burdens on defendant by way of a show cause order. We disagree. Whether the trial court was entitled to "amend" the original judgment is a question of law which is reviewed de novo on appeal. *Brucker v McKinlay Transport, Inc (On Remand),* 225 Mich App 442, 448; 571 NW2d 548 (1997).

Defendant appealed the trial court's judgment in favor of plaintiffs. While the appeal was pending in this Court, plaintiffs brought a motion to show cause why defendant should not be held in contempt for violating the court's order. While the court did not hold defendant in contempt, the court did point out that defendant had violated the spirit of the original order which prohibited commercial activity. The court then entered an order that provided that defendant remove all "wrecked or disabled vehicles from his property." MCR 7.208(A) provides, "[a]fter a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except by order of the Court of Appeals, by stipulation of the parties, or as otherwise provided by law." However, the trial court retains jurisdiction to enforce its orders. *People v Norman,* 183 Mich App 203, 207; 454 NW2d 393 (1989); *Shaw v Pimpleton,* 24 Mich App 265, 269; 180 NW2d 384 (1970). Defendant argues that the trial court violated this provision by imposing additional restrictions on him. Rather than amending the order, however, it appears that the court was merely clarifying the purpose of the order and mandating that defendant comply. On more than one occasion the court advised that the purpose of the order was to eliminate commercial activity. The spirit of the order was clear: defendant was not to engage in commercial activity. The court determined that defendant had not ceased operating the business. Defendant admitted that these vehicles were on his property before the trial began. They were in the name of his business. Defendant claimed that the vehicles were not being offered for sale, but were simply being repaired for other family members. The court was in the best

position to determine defendant's credibility and whether the order was being complied with. *State Farm, supra* at 275.

Finally, defendant claims that the trial court erroneously ordered defendant to remove the wrecked vehicles from his property in contravention of a township ordinance which provides that a resident may have up to three inoperable vehicles on his land. We disagree. Defendant has failed to preserve the issue for appeal because the issue was never raised or addressed by the trial court. *Environair v Steelcase, Inc,* 190 Mich App 289, 295; 475 NW2d 366 (1991). In addition, defendant failed to cite any authority for his position. Insufficiently briefed issues on appeal are deemed waived. *Dresden v Detroit Macomb Hosp,* 218 Mich App 292, 300; 553 NW2d 387 (1996).

Affirmed.

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder
/s/ Robert J. Danhof

[1] A consent judgment as to these parties was entered by the court.