STATE OF MICHIGAN

COURT OF APPEALS

RON NEAL, MARY NEAL, WILLIAM S. BRITZ, KATHLEEN BRITZ, ERIC D. WILLIAMS, LEONARD KOGUT, and LAKE MIRAMICHI PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiffs-Appellees,

v

DISTRICT HEALTH DEPARTMENT #10,

Defendant-Appellee,

and

MIRAMICHI UTILITIES, INC.,

Defendant-Appellant.

UNPUBLISHED
October 22, 2002

No. 239746
Osceola Circuit Court
LC No. 01-008979-CH

Before: Fitzgerald, P.J., and Holbrook, Jr., and Cavanagh, JJ.

PER CURIAM.

Defendant Miramichi Utilities, Inc. appeals by right from an order granting summary disposition to plaintiffs Ron Neal, Mary Neal, William S. Britz, Kathleen Britz, Eric D. Williams, Leonard Kogut, and Lake Miramichi Property Owners Association, Inc. Plaintiffs, who are lot owners in the plat of Lake Miramichi Subdivision, commenced this action against defendant Miramichi Utilities, Inc. and various governmental defendants seeking revocation of restrictive covenants prohibiting private water wells and requiring payment to defendant Miramichi Utilities, Inc. for water service. The governmental defendants were voluntarily dismissed from this action. We affirm.

This Court reviews a motion for summary disposition de novo to determine whether the moving party is entitled to judgment as a matter of law. *Groncki v Detroit Edison Co*, 453 Mich 644, 649; 557 NW2d 289 (1996). A motion pursuant to MCR 2.116(C)(9) requires a determination whether the opposing party has failed to state a valid defense to an asserted claim. *Gotterson v Estate of Smith*, 226 Mich App 285, 288; 574 NW2d 388 (1997). Under an MCR 2.116(C)(9) motion, only pleadings may be considered, and the court must accept all well-

pleaded allegations as true. MCR 2.116(G)(5). We must determine whether the defenses are so clearly untenable as matter of law that no factual development could possibly deny the opposing party's right to recovery. *Nicita v City of Detroit*, 216 Mich App 746, 750; 550 NW2d 269 (1996).

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for the claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In deciding a motion based on MCR 2.116(C)(10), we must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

Defendant first contends that it categorically denied plaintiffs' material allegations by denying the applicability of a restriction alleged in plaintiffs' complaint, thus precluding summary disposition pursuant to MCR 2.116(C)(9). *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 47; 457 NW2d 637 (1990). We agree that while defendant categorically denied plaintiffs' allegation, defendant lacked standing to challenge the applicability of the restriction.

The restriction stated that the subject restrictive covenants "may be thereafter, and from time to time, changed, altered, amended or revoked in whole or in part by the owners of the lots in the subdivision whenever the owners of at least two thirds of said lots so agree in writing." Here, defendant's categorical denial of the restriction's applicability lacked standing because defendant was unable to show an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent." *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 740; 629 NW2d 900 (2000), quoting *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992).

Next, defendant argues that the court erred by failing to accept its affirmative defense as true and contends that factual development could deny plaintiffs' recovery. Plaintiffs' complaint partially stated one of the subject restrictive covenants governing revocation:

> All of the restrictions, conditions, covenants, or agreements contained herein shall continue until January 1, 1977. The same may be thereafter, and from time to time, changed, altered, amended or revoked in whole or in part by the owners of the lots in the subdivision whenever the owners of at least two thirds of the said lots so agree in writing. Provided, however, that no changes shall be made which might violate the purpose set forth in restriction No. 1. . . .

Defendant stated, as its affirmative defense that

> [f]or residential proprieties to be sustained in the Miramichi subdivision, a central water system is an absolute necessity. Decertifying the utility will create an immediate danger to the public because it will result in a termination of a source of potable water and force the drilling of wells in an unsafe density and proximity to septic disposal systems.

Generally, only parties with standing are allowed to assert a claim; "[t]he purpose of standing requirements is to ensure that only those who have a substantial interest will be allowed to come into court and complain." *Rogan v Morton*, 167 Mich App 483, 486; 423 NW2d 237 (1988). "Standing has been described as a requirement that a party ordinarily must have a substantial personal interest at stake in a case or controversy, as opposed merely to having a generalized interest in the same manner as any citizen. *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 217-218; 634 NW2d 692 (2001). Defendant was neither named in the contract plaintiffs sought to revoke, nor was it named in the contract as the party that would ultimately supply water to the subdivision. Also, defendant itself would not be directly harmed by the lack of a water supply in the subdivision, if that ultimately occurred. To be an intended third-party beneficiary, a promisor must have undertaken to do something to or for the benefit of the party asserting such status. *Paul v Bogle*, 193 Mich App 479, 491; 484 NW2d 728 (1992). The fact that a third party is incidentally benefited does not entitle that party to the rights of a third-party beneficiary. *Id*. at 492. Thus, we hold that defendant did not have standing to challenge the revocations because it was not a lot owner, and its public health and safety concerns were only "a generalized interest."[1] *Id*.

We agree with the circuit court's reasoning that public health and safety is not "a valid defense to the owners' rights to exercise their ability to agree under the terms of the restrictive covenants," because the revocations themselves do not create a threat to public health and safety. Thus, defendant's affirmative defenses do not "avoid the legal effect of or defeat the claim of the opposing party, in whole or in part." MCL 2.111(F)(3)(b). As a matter of law, defendant's public-health-and-safety defense is not a valid defense to the lot owners' right to seek the instant revocations.

On de novo review, we hold the trial did not err in granting plaintiffs' motion under MCR 2.116(C)(9) because, on the contract, defendant's defenses were so untenable as a matter of law that no factual development could possibly deny plaintiffs' right to recovery.

Finally, defendant argues that the issue of whether revocation was permitted by the restrictive covenants is a question of fact, thus precluding summary disposition pursuant to MCR 2.116(C)(10). We disagree.

Defendant contends that if the revocations are granted, and a majority of lot owners sink wells, defendant will be forced out of business, leaving those lot owners unable to obtain well permits without access to potable water. The trial court noted that "[t]he deletion of those provisions from the covenants does not, by itself, aside from economic realities, terminate the parties' – the lot owners' ability to buy water from the Utility, the Utility's ability to provide service to the lot owners."

Generally, we construe restrictive covenants strictly against those claiming the right to enforce them. *Beverly Island Ass'n v Zinger*, 113 Mich App 322, 325; 317 NW2d 611 (1982). Restrictive covenant cases depend on the unique facts of the particular case. *Id*. at 326. Here, lot owners were specifically granted standing to challenge any proposed revocations. Defendant

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[1] The parties failed to address standing, in relation to the circuit court's ruling under MCR 2.116(C)(9).

was without any right to enforce the restrictive covenants because it was not a third-party beneficiary, and it only had "a generalized interest" in the subdivision's public health and safety. *Michigan Coalition of State Employee Unions*, *supra* at 217-218.

Finally, plaintiffs' motion under 2.116(C)(10) required defendant to "set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). Defendant failed to produce any evidence other than contingent speculation that some lot owners might be without potable water, thereby violating the subdivision's residential purpose restriction. Therefore, the trial court correctly granted plaintiffs' motion for summary disposition, pursuant to MCR 2.116(C)(10), because there was no genuine issue of fact.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh