STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM F. HUBNER, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED June 16, 2005
v	No. 260783 Oakland Circuit Court
TROWBRIDGE FARMS ASSOCIATION, Defendant-Appellant/Cross-Appellee.	LC No. 03-047063-CH

Before: Talbot, P.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right, and plaintiff cross appeals, from the trial court's order granting plaintiff's motion for summary disposition and denying defendant's cross-motion for summary disposition. We affirm in part, reverse in part, and remand for entry of judgment in favor of defendant.

Plaintiff owns lot 42 in the Trowbridge Farms Subdivision in the city of Bloomfield Hills. The subdivision was originally platted in 1916. Subject to certain exceptions, the deed restrictions permit only one dwelling to be built on each platted lot. Defendant, a nonprofit corporation, was incorporated in 1965 for the purpose of promoting and preserving the best interests of the property owners by enforcing deed restrictions.

In 2003, plaintiff filed the instant action against defendant, seeking a declaration that the one dwelling per lot restriction was unenforceable or inapplicable as applied to lot 42. Plaintiff also sought an injunction enjoining defendant from interfering with plaintiff applying for lot split approval from the city, and damages in excess of $25,000. After the parties filed cross-motions for summary disposition, the trial court determined that the restriction prohibiting more than one dwelling on each lot was clear and unambiguous, but that defendant had waived enforcement of the restriction by acquiescing to the replatting of another lot and several smaller lots, but denied plaintiff's request for damages. The court did not order injunctive relief.

On appeal, defendant challenges the trial court's determination that plaintiff was entitled to summary disposition under MCR 2.116(C)(10) with respect to the question whether it waived enforcement of the one dwelling per lot restriction.

We review a trial court's decision regarding summary disposition de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163-164; 645 NW2d 643 (2002); *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's complaint. *Veenstra*, *supra* at 163. Evidence offered in support of or opposition to the motion is considered only to the extent that it is substantively admissible. *Id.* "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.* at 164.

Defendant does not challenge the trial court's determination that the disputed deed restriction unambiguously provides for only one dwelling per lot, subject to certain exceptions not applicable to lot 42. Indeed, plaintiff is the only party aggrieved by that ruling because the trial court ruled in favor of defendant on this issue. Because plaintiff has inadequately briefed the trial court's interpretation of the one dwelling per lot restriction in his cross appeal, and does not urge consideration of this issue as an alternative basis for affirmance, *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994), we deem this particular issue abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Turning to the question of waiver, we note that a common grantor of land can release certain lots and vary restrictions for a neighborhood. *Carey v Lauhoff*, 301 Mich 168, 173; 3 NW2d 67 (1942). But a covenant running with the land is a contract created with the intention of enhancing the value of property and, therefore, constitutes a valuable property right. *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002). Courts will protect deed restrictions if they are valuable to the property owner asserting the property right and the property owner is not estopped from enforcing the property right. *Rofe v Robinson*, 415 Mich 345, 349; 329 NW2d 704 (1982). Whether a restrictive covenant is waived depends on the facts of each case. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 344; 591 NW2d 216 (1999). A party can be estopped by his conduct from objecting to the violation of a restriction, or can be deemed to have abandoned a restriction by not objecting to frequent violations. *Taylor Avenue Improvement Ass'n v Detroit Trust Co*, 283 Mich 304, 311; 278 NW 75 (1938). A waiver or acquiescence might be found where a person is led to believe that the covenant will not be enforced and incurs damages based on that belief. *Edgewater Park Ass'n v Pernar*, 350 Mich 204, 208; 86 NW2d 269 (1957). But there are generally three equitable exceptions to the general rule that restrictive covenants are enforceable: "(1) technical violations and absence of substantial injury, (2) changed conditions, and (3) limitations and laches." *Webb v Smith (After Second Remand)*, 224 Mich App 203, 211; 568 NW2d 378 (1997).

We find no support for defendant's claim that the trial court applied principles governing the construction of deed restrictions to find a waiver. Rather, it is apparent from the trial court's reliance on *Teagan v Keywell*, 212 Mich 649; 180 NW 454 (1920), and the factual predicate upon which the trial court found a waiver, that its decision falls within the changed conditions exception. Contrary to plaintiff's argument on appeal, our Supreme Court in *Teagan* did not hold that selective enforcement of a restriction constitutes a waiver. Rather, the property owner's own violation of a restriction was but one factor that contributed to the finding of a waiver in that case. A similar approach has been taken when an association of property owners seeks to enforce restrictions. See *Windemere-Grand Improvement & Protective Ass'n v American State Bank*, 205 Mich 539; 172 NW 29 (1919) (our Supreme Court questioned how

long courts would be open to the plaintiff, an improvement association seeking to enjoin a building restriction, where the plaintiff engaged in a program of selective lifting of restrictions on properties, but ultimately denied relief to the plaintiff after determining that the condition and character of the street defeated the object and purpose of the building restriction).

Under the changed conditions exception, a change in neighborhood conditions can make enforcement of a restrictive covenant inequitable if the covenant's purpose can no longer be accomplished. *Webb, supra* at 213. "The true rule seems to be that, even after one or more breaches, equity will grant relief if the restriction can be shown to be of value to complainant and such breaches have not resulted in a subversion of the original scheme of development resulting in a substantial, if not entire, change in the neighborhood." *Carey, supra* at 174, quoting *Misch v Lehman*, 178 Mich 225, 228; 144 NW 556 (1913). Both the character and number of violations must be considered in determining if a complainant waived the benefit of the restriction. *Carey* at 174.

This case does not involve an enforcement action by a lot owner, but rather, is an action by plaintiff, a lot owner, to determine defendant's enforcement rights. Although the purpose of the one dwelling per lot restriction is not explicitly stated in the deed restrictions, this type of restriction serves the purpose of guaranteeing privacy and aesthetic enjoyment to the subdivision landowners. See *Webb, supra* at 212. The factual basis for plaintiff's waiver claim concerns five lots, lots 1, 2, 39, 40, and 41, out of the original fifty-eight lots platted in 1916. The subdivision lots have varying shapes and sizes, but all five of these lots are located along the border of the subdivision.

The evidence established that lots 39, 40, and 41 were the first lots modified from the original plat as a result of replatting undertaken by the Trowbridge Farms Company in 1956. Although defendant claims that Trowbridge Farms Company's action was irrelevant to its conduct, defendant's claim begs the question concerning what authority defendant has to enforce restrictive covenants. The mere fact that defendant is an association of property owners does not create enforcement rights. 20 Am Jur 2d, Covenants, Conditions, and Restrictions, § 253, p 675. Deed restrictions are grounded in contract. *Terrien, supra* at 71. Here, the deed restrictions state that the "Company" and the "owner of any land," including their "respective legal representatives, heirs, successors, and assigns," were granted enforcement rights. There is no indication that defendant owned any land in the subdivision, and defendant's own proofs indicate that it was formed to assume Trowbridge Farms Company's rights and duties. Given this evidence, it appears that defendant derived its authority from Trowbridge Farms Company, and therefore, Trowbridge Farms Company's actions may be imputed to defendant.

It is not apparent from the submitted evidence whether dwellings were actually constructed on the newly platted lots. But even assuming that the replatting resulted in more than one dwelling or otherwise contributed to a change from the original scheme of the development, the change in density along the subdivision's border does not establish that the original purpose of the restriction could no longer be accomplished. *Webb, supra* at 213. Stated otherwise, the evidence did not demonstrate that the character of the subdivision was altered to such an extent that the original purpose of the restriction was defeated. *O'Connor, supra* at 346; *Carey, supra* at 174.

The evidence regarding the later change to lot 1 also fails to establish that the restrictive covenant's purpose was defeated. The evidence indicates that lot 1 is located along the same border as lots 39 to 41, but at the opposite corner from lot 41. Lot 1 was subject to the one dwelling restriction, but was treated differently under the deed restrictions because it was adjacent to a railroad right-of-way. Lot 1 presented additional unique circumstances because the right-of-way was abandoned, causing the size of lot 1 to increase, before defendant entered into a consent judgment allowing lot 1 to be replatted to no more than five lots. Although the evidence does not indicate whether a dwelling was actually built on each lot, even accepting that five dwellings were built and that defendant's conduct contributed to the changed conditions, the evidence did not establish that the purpose of the one dwelling restriction could no longer be accomplished in the subdivision. *Webb, supra* at 213.

Finally, the condition of lot 2 does not support plaintiff's waiver claim because it was undisputed that the one dwelling restriction was not violated with respect to lot 2. Upon de novo review, we conclude that no genuine issue of material fact was shown with respect to plaintiff's claim of waiver. Defendant, rather than plaintiff, should have been granted summary disposition because the evidence did not support plaintiff's claim of waiver with respect to defendant's enforcement rights under the deed restrictions. Hence, we remand for entry of a declaratory judgment in favor of defendant. We express no opinion with regard to the enforcement rights of individual property owners because they are not parties to this case.

Defendant failed to preserve its claim that plaintiff lost his right to bring this cause of action under the authority of *Maatta v Dead River Campers, Inc*, 263 Mich App 604; 689 NW2d 491 (2004), because defendant did not present this argument to the trial court. *FMB-First Michigan Bank v Bailey,* 232 Mich App 711, 718; 591 NW2d 676 (1998). Although there are instances in which this Court may overlook preservation requirements, *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002), defendant has not established that the principles in *Maatta, supra*, concerning amendments of restrictive covenants, are relevant to plaintiff's complaint or otherwise affect the outcome of this case. We, therefore, decline to address this unpreserved issue.

Finally, we decline to address plaintiff's claim that the trial court erred in denying his request for monetary damages because plaintiff does not cite any relevant authority in support of his claim that defendant was liable for such damages. *FMB-First Michigan Bank, supra* at 718. Plaintiff's reliance on *Giannetti Bros Construction Co v Pontiac*, 175 Mich App 442; 438 NW2d 313 (1989), is misplaced because this case does not involve case evaluation sanctions. In any event, our determination that defendant, rather than plaintiff, was entitled to summary disposition under MCR 2.116(C)(10) renders plaintiff's request for damages moot.

We affirm the trial court's denial of damages, reverse the trial court's order of summary disposition, and remand for entry of a declaratory judgment in favor of defendant. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Brian K. Zahra
/s/ Pat M. Donofrio