

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF OTSEGO,

Plaintiff-Appellee,

v

JOAN WALTERS, JOHN J BOLGER III, and
J & J WINDIGO LLC,

Defendants-Appellants.

UNPUBLISHED

November 20, 2007

No. 275667

Allegan Circuit Court

LC No. 06-039401-CH

Before: Murphy, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

In this suit to enforce a restrictive covenant, defendants appeal as of right the trial court's grant of summary disposition in favor of plaintiff. Specifically, defendants contend that plaintiff lacks standing to enforce the covenant and that, based on changes to the restrictions in later phases of the development, it would be inequitable to enforce the restriction applicable to the plat where defendants' property is located. Because we conclude that plaintiff has standing to enforce the covenant and that the covenant may properly be enforced, we affirm.

I. Facts and Procedural History

Sometime prior to 1978, plaintiff purchased a tract of farmland from the Eley family in order to develop a single-family residential community. Plaintiff developed the farmland in six phases. Plaintiff platted the first phase as Eley Acres in 1978. Plaintiff platted Eley Acres VI, which was the last phase, in 2002. Each of the six phases contained a series of restrictive covenants that were intended to ensure that the lots within the plats were used only for single-family residential purposes. For Eley Acres and Eley Acres II, the covenants included a restriction stating that "[a]ll dwellings shall be owner occupied." However, plaintiff altered the owner occupancy requirement for subsequent phases of the development. Starting with Eley Acres III, the declarations provide that,

[a] dwelling may be occupied by persons other than the owner for not more than twenty-four (24) consecutive months in any five (5) year period, beginning on the date that persons other than the owner first occupy the dwelling, so long as no provision of these restrictions is violated as a result of such occupation. In all other cases, dwellings shall be owner occupied.

In 1981 plaintiff conveyed lot #5 of Eley Acres by warranty deed to Otsego Public Schools, subject to the conditions, restrictions, limitations and easements of record. On the same day, Otsego Public Schools conveyed lot #5 by warranty deed to defendant Joan Walters' (Walters) mother, subject to the conditions, restrictions, limitations and easements of record. In 1983, Walters' mother quitclaimed her interest to herself and Walters as joint tenants with rights of survivorship. Walters' mother left the home in November 2002.

In December 2002, Walters leased the home to a tenant. In December 2003, plaintiff sent a letter informing Walters that leasing the property violated the owner occupancy requirement. Walters' attorney responded to plaintiff by letter in January 2004. In the letter, Walters' attorney indicated that the leasing arrangement was temporary and stated that Walters intended to sell the property. In closing, Walters' attorney asked plaintiff to provide Walters with sufficient time to sell the home. Walters listed the property for sale while it was vacant from July 2004 through December 2005, but was unable to find a buyer.

Walters' mother died in 2005. In December 2005, Walters again leased the property to a tenant for one year. In that same month, plaintiff again notified Walters by letter that leasing the property was a violation of the requirement that the property be owner occupied. Plaintiff gave Walters 30 days to sell the property.

In January 2006, Walters conveyed her interest by quitclaim deed to herself and her business partner, defendant John Bolger III. In February 2006, Walters and Bolger conveyed the property to defendant J & J Windigo LLC. At the time of the conveyance, Walters and Bolger were the sole members of J & J Windigo LLC. Walters testified at her deposition that she and her partner formed the J & J Windigo to "handle repairs" and centralize management of "income property."

In April 2006, plaintiff sued defendants. Plaintiff asked the trial court to declare that, by renting the property, defendants were in violation of the requirement that the property be owner occupied. Plaintiff further asked the trial court to permanently enjoin defendants from violating the restrictions applicable to the property.

In October 2006, plaintiff moved for summary disposition. The trial court held a hearing on the motion in December 2006. At the hearing, the trial court noted that there was no dispute that defendants had notice of the restrictions and that defendants were currently in violation of the owner occupancy requirement. Further, the trial court rejected defendants' contention that the owner occupancy requirements applicable to Eley Acres should be modified to conform to the requirements stated in phases three through six. The trial court explained that plats that are side by side can have different deed restrictions. For these reasons, the trial court determined that plaintiff was entitled to the requested relief.

On December 28, 2006, the trial court issued an order permanently enjoining defendants from renting the property. However, the trial court stayed the injunction until February 2007, in order to give defendants time to bring the dwelling into compliance with the deed restrictions. This appeal followed.

II. Moot Appeal

As a preliminary matter, plaintiff contends that, because defendants have complied with the terms of the injunction,¹ this Court should decline to consider defendants' appeal as moot. We do not agree that defendants' appeal is moot. Absent a stay, defendants have a duty to comply with the injunction entered by the trial court pending appeal. *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003). But compliance with the injunction does not render a challenge to the propriety of the injunction moot. A challenge to an injunction is moot once the injunction "ceases to be of any force or effect." *Affeldt v Dudley Paper Co*, 306 Mich 39, 49; 10 NW2d 299 (1943). Because the injunction is still in force and clearly restricts defendants' ability to rent the property to a new tenant, defendants may properly appeal the propriety of the trial court's decision to grant plaintiff relief in the form of an injunction.

III. Standing

Defendants first argue that the trial court should not have granted summary disposition in favor of plaintiff because plaintiff lacked standing to enforce the owner-occupancy requirement. We disagree.

This Court reviews de novo whether the trial court properly granted summary disposition to the moving party. *Estate of Wolfe-Haddad v Oakland County*, 272 Mich App 323, 324; 725 NW2d 80 (2006). Likewise, whether a party has standing is a question of law that this Court reviews de novo. *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 479 Mich 280, 291; 737 NW2d 447 (2007).

Covenants are contractual agreements entered into with the intention of enhancing the value of property. *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002). When clearly established by proper instruments, covenants become valuable property rights, which courts sitting in equity will protect. *Id.* at 72; see also *Hill v Rabinowitch*, 210 Mich 220, 224; 177 NW 719 (1920). Although the rights are created by contract, it is not clear whether Michigan law permits a developer to contractually retain the right to enforce restrictive covenants even after selling all the properties benefited by the restrictions. See *Kotesky v Davis*, 355 Mich 536, 538-539; 94 NW2d 796 (1959) (holding that the defendant had no right to enforce a restrictive covenant entered into as part of a land contract where the plaintiff completed performance of the land contract and the defendant no longer owned any property in the vicinity) and *Oakman v Marino*, 241 Mich 591, 596; 217 NW 794 (1928) (holding that a developer had standing to enforce restrictions where the developer had an interest as a vendor of lots in the affected subdivision and owned extensive properties in adjoining additions with identical restrictions). However, it is well established that persons with an ownership interest in property benefited by a restrictive covenant have standing to enforce the restriction. *Indian Village Ass'n v Barton*, 312 Mich 541, 549; 20 NW2d 304 (1945). For this reason, if plaintiff has an ownership interest in

¹ The trial court apparently determined that defendants came into compliance with the occupancy requirement when they transferred a nominal interest in J & J Windigo LLC to their current tenant. Because plaintiff has not challenged this determination on appeal, we express no opinion concerning whether occupancy by a part owner of an entity constitutes occupancy by that entity for purposes of the owner-occupancy requirement.

property benefited by the restrictive covenants, it will not be necessary to determine whether Michigan is among the states that permit a developer to contractually retain the right to enforce covenants even after the developer no longer has a property interest in land benefited by the covenants.² Therefore, we shall first determine which properties were intended to benefit from the restrictions.

In construing restrictive covenants, the overriding goal is to ascertain the intention of the restrictor. *Tabern v Gates*, 231 Mich 581, 583; 204 NW 698 (1925). Where the restrictions are unambiguous, they should be enforced as written. *Hill, supra* at 224.

In the present case, it is not disputed that plaintiff no longer owns any of the lots within the plat of Eley Acres,³ but that plaintiff does still own lots in later phases of the development. In the preamble to the declaration of restrictions for Eley Acres, plaintiff provided that the restrictions were binding on plaintiff and any person “holding an interest in and to the above described premises or any parcel thereof.” Further, the covenants were to run with the land and could be enforced by any “person or persons owning any real property situated in said development or subdivision or the City of Otsego.” Hence, by the terms of the declaration, the restrictions were intended to benefit the owners of real property situated in the “development.” Throughout the declaration of restrictions, the covenants refer to the plat, lots or building plots when referring to land within the plat of Eley Acres. In addition, the declaration refers to the plat of Eley Acres collectively as the subdivision at some points. However, the term development is not defined or used at any other point. Construing the declaration in its entirety and giving the term “development” its ordinary meaning, we conclude that the reference to development refers to the entire planned residential community. *Tabern, supra* at 583. Therefore, we conclude that plaintiff intended the restrictions to benefit all the properties in the residential development, including the properties platted in later phases of Eley Acres. Consequently, as the owner of properties in the later phases of the development, plaintiff has standing to enforce the restrictions applicable to the plat of Eley Acres. *Indian Village Ass’n, supra* at 549.

² See, e.g., *Tri-State Sand & Gravel, LLC v Cox*, 871 So 2d 1253, 1257 (La App, 2004) (noting that the original subdivider could enforce the covenants at issue even though it no longer held an interest in the benefited land because the agreement reserved the right and the subdivider had a “real and actual” interest in the enforcement of the covenants); *B.C.E. Development, Inc v Smith*, 215 Cal App 3d 1142, 1147; 264 Cal Rptr 55 (1989) (stating that “the talisman for enforcement is not the rigid requirement of retention of an interest in land, but rests instead upon a determination of the *intention* of those creating the covenant.”); *Christiansen v Casey*, 613 SW2d 906, 909-910 (Mo App, 1981) (holding that an original grantor could enforce a covenant even after divesting himself of the benefited land as a personal covenant); See also Restatement 3d, Property (Servitudes) § 8.1 (noting that ownership of land intended to benefit from the servitude is not a prerequisite to enforcement if the person holding the benefit in gross can “establish a legitimate interest in enforcing the covenant.”).

³ However, plaintiff notes that it still has ownership interests in certain public areas within the plat of Eley Acres. Because of our resolution of this issue, we need not consider whether the City’s ownership interest in public lands gives the City adequate standing to enforce the covenants.

IV. Equitable Modification of the Restrictions

Defendants next argue that the trial court erred when it refused to equitably apply the less restrictive owner-occupancy requirement applicable to later phases of Eley Acres. We find no merit to this argument.

The owner occupancy requirement for Eley Acres is not ambiguous. Therefore, it must be enforced as written. *Hill, supra* at 224. Further, a developer might reasonably determine that it is in its economic best interest to establish varying requirements for different phases of a development. The fact that plaintiff altered the owner occupancy requirement applicable to later phases of the development is not the type of changed circumstance that would justify equitable modification of the requirement. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 213; 568 NW2d 378 (1997). If defendants do not like the restrictions as written, they may follow the procedures outlined in the declaration and modify or eliminate the requirement for owner occupancy.⁴ However, until such a change, defendants must abide by the requirement.

V. Attorney Fees

Finally, plaintiff argues that this Court should award it attorney fees on the grounds that the appeal was vexatious or, in the alternative, as authorized by the declaration of restrictions applicable to Eley Acres. We do not agree that an award of attorney fees is warranted under the facts of this case.

Plaintiff argues that this Court should award plaintiff its actual damages because defendants knew that their issues were moot and, therefore, defendants did not have “any reasonable basis for belief that there was a meritorious issue to be determined on appeal.” MCR 7.216(C)(1)(a). However, as we have already noted, defendants’ purported compliance with the injunction did not moot defendants’ issues on appeal. Consequently, there is no basis for an award of damages under MCR 7.216(C).

Plaintiff also argues that the declaration of restrictions permits plaintiff to recover its attorney fees. We disagree. “The parties to a contract may include a provision that the breaching party will be required to pay the other side’s attorney fees, and such provisions are judicially enforceable.” *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich app 190, 195; 555 NW2d 733 (1996). The declaration provides that certain persons may sue persons who are violating or attempting to violate any of the covenants and may “*either* prevent him or them from so doing *or* recover damages or other dues for such violation” (emphasis added). Although this clause is not artfully worded, it is clear that the party seeking to enforce the covenant is entitled to have the covenant enforced against the transgressing party *or* may recover “damages

⁴ The declaration provides that, after the year 2000, the restrictions are automatically renewed for successive ten-year periods until modified by a majority of the lot owners in the plat.

or other dues for such violation.” In the present case, plaintiff has obtained injunctive relief. Therefore, plaintiff is not entitled to “damages or other dues” as a result of the violation.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter