

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL H. RICE, SUSANNA I. RICE,
MICHAEL J. BECK, MARY A. BECK, and
JAMES SENSTOCK,

UNPUBLISHED
January 15, 2008

Plaintiffs-Appellants,

v

KIT C. BOWMAN,

No. 274968
Macomb Circuit Court
LC No. 05-003138-CZ

Defendant-Appellee.

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

In this action to enforce restrictive covenants, the trial court denied plaintiffs' motion for summary disposition under MCR 2.116(C)(10), and granted summary disposition in favor of defendant under MCR 2.116(I)(2). Plaintiffs appeal by right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs reside and own lots in Venice Shores Subdivision No. 3, which borders Lake St. Clair and contains man-made canals. One canal was dug into a 50-foot easement along the eastern border of the subdivision. On the west side of the canal, completely within the Venice Shores, there are homes and lots. On the east side of the canal there is a 3½-foot strip of land, which was platted as also being within Venice Shores. To the east of this strip are lots and homes entirely within the Belvidere Subdivision. Most of the Venice Shores homeowners on the west side of the canal own the contiguous 50 feet of the canal and the 3½-foot strip on the east side. In some cases, however, the Venice Shores lot was split, and the eastern 25 feet of the canal and the 3½-foot strip were conveyed to the owner of the adjoining Belvidere lot.

Defendant owns Belvidere Lot 146 and portions of the abutting Venice Shores Lots 245 and 246 extending 25 feet into the canal. Plaintiffs alleged that defendant violated Venice Shores deed restrictions by mooring a boat that extended beyond his property line into the canal.

Two documents containing subdivision covenants and restrictions relevant to this controversy were recorded with the Macomb County Register of Deeds. The first, dated November 30, 1961, is entitled "Subdivision Restrictions Covering Subdivisions 2 and 3 Venice Shores Subdivisions" and states that its "covenants and restrictions are to run with the land" and were binding on all of the parties to the document and their successors in interest for 25 years. After that, the covenants would be automatically extended for successive periods of ten years

unless they were amended by a majority of the then owners. Twenty-five years later, on November 25, 1986, the second document, an amendment to the first, was recorded. This document contains, among others, the following restriction regarding canal usage: “Nothing shall extend into the canals as platted from any property at any time, e.g., watercraft, seawalls, piers, pilings, catwalks, etc.”

Plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(10), seeking to enforce the deed restrictions against defendant. The trial court denied plaintiffs’ motion and granted defendant summary disposition pursuant to MCR 2.116(I)(2). The court determined that although defendant’s predecessors in interest were partial owners of Venice Shores Lots 245 and 246 and although the amendment stated that the undersigned included all of the title holders of Venice Shores Subdivision No. 3, defendant’s predecessors in interest were not included as potential signatories to the amendment. Further, the Belvidere homeowners had never been members of the Venice Shores Property Owners Association. Construing any ambiguity against plaintiffs as the would-be enforcers of the restrictions, the court found no question of fact that the restrictions were not intended to bind defendant’s property.

This Court reviews a motion for summary disposition de novo. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing an order granting or denying summary disposition under MCR 2.116(C)(10), this Court “must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law.” *Unisys Corp v Comm’r of Ins.*, 236 Mich App 686, 689; 601 NW2d 155 (1999). If it appears that the opposing party, rather than the moving party, is entitled to judgment, summary disposition in favor of the opposing party is appropriate. MCR 2.116(I)(2).

Negative restrictive covenants are contracts running with the land, which courts will generally enforce when fairly and voluntarily entered into. *Terrien v Zwit*, 467 Mich 56, 70-71; 648 NW2d 602 (2002). But the “provisions are to be strictly construed against the would-be enforcer” and “any doubts resolved in favor of the free use of property.” *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997).

The trial court did not err in denying plaintiffs’ motion for summary disposition and in granting summary disposition in favor of defendant. It is apparent from the face of the amendment that defendant’s predecessors in interest, and therefore defendant, were not among the parties to the document. As the court noted, the amendment states that it includes all of the title holders in the Venice Shores Subdivisions 2 and 3, yet defendant’s predecessors in interest, the Wilsons, were not included or mentioned as possible signatories and the listed property owners include only Venice Shores homeowners. Plaintiffs properly note that where a deed restriction allows a majority of owners within a particular subdivision to change, modify, or alter given restrictions, “others owners are bound by properly passed and recorded changes in the same manner as those contained in any original grant and restriction.” *Ardmore Park Subidivision Ass’n, Inc v Simon*, 117 Mich App 57, 62; 323 NW2d 591 (1982). The question here, however, is whether defendant’s predecessors in interest, the Wilsons, were “owners” within the meaning of the amendment and whether his property was properly restricted. Plaintiffs argue that the owners of the Venice Shores homes on Lots 245 and 246 signed the amendment “on behalf of all owners of said lots.” There is, however, no indication that the Wilsons ever ceded to the homeowners on Lots 245 and 246, the right to sign for them or that the

Wilsons were even aware that their property rights, and the rights of their successors in interest, were being restricted. While the amendment provides that a majority of property owners could bind all owners, this presumably refers to a majority of the owners listed. Plaintiffs' attempt to construe the trial court's order as improperly stating that the deed restrictions apply only to those lot owners who signed is misplaced. While some of the listed Venice Shores homeowners declined to sign the amendment, we can see no reason why those titleholders who were association members, whose names appear on the amendment and were allowed to vote on the amendment, would not be bound by its covenants. The amendment clearly evinces an intent to bind such lot owners. No such intent exists on the face of the amendment regarding the Wilsons.

Plaintiffs also argue that the trial court erred in partially relying on the fact that defendant was not a member of the property owners' association. Plaintiffs maintain that this is "irrelevant" and has "no bearing whatsoever on the enforcement of the restrictions nor on the applicability of the restrictions." Plaintiffs assert that, in any event, defendant is a member of the association because although irrelevant, "membership is mandatory." The trial court referred to defendant's affidavit and those of other Belvidere homeowners, but it did not appear to rely on defendant's nonmembership as material to its decision. Instead, it gave more weight to the fact that defendant's predecessors in interest were not listed among the property owners. Nonetheless, nonmembership in the association is further evidence that the Belvidere homeowners were not parties to the amendment and, therefore, are not bound by its restrictions. Although plaintiffs assert that defendant is a member, the submitted evidence showed that defendant does not pay dues, has never been asked to pay dues, has never attended or been invited to attend meetings, and has never had the opportunity to vote on any subdivision matter.

Finally, plaintiffs argue that defendant's deed contained two descriptions, one within Belvidere and another within Venice Shores. Plaintiffs maintain that defendant had constructive notice of the deed restrictions because his deed states that the property is "subject to easements and restrictions of record" and the 1986 amendment was recorded. However, while defendant had constructive notice that the amendment existed, the document on its face does not bind him to its contents. Although plaintiffs argue that it is "incongruous" that canal owners whose homes are within Venice Shores are bound by canal usage restrictions while those whose homes are within Belvidere are not, that is the plain meaning of the amendment as written. The amendment cannot be said to have been "voluntarily and fairly made," *Terrien, supra* at 71, to the extent that it purports to bind the Belvidere homeowners use of their property without allowing them any consideration or input in the development of the restrictions. Thus, the trial court did not err in denying plaintiffs' motion and in granting summary disposition in favor of defendant because it strictly construed the amendment against plaintiffs as the would-be enforcers and resolved any doubts in favor of defendant and "the free use of property," *Stuart, supra* at 210.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael R. Smolenski