STATE OF MICHIGAN

COURT OF APPEALS

DURVAN W. LECLEAR and CYNTHIA M. LECLEAR,

Plaintiffs/Counter-Defendants-Appellees,

v

DALE R. FULTON,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
May 20, 2008

No. 277225
Ingham Circuit Court
LC No. 05-001184-CH

Before: Donofrio, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right, challenging the trial court's judgment of no cause of action, following a bench trial, on his counterclaim for violation of some deed restrictions. We affirm in part, reverse in part, and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs live in a subdivision that is subject to recorded Declarations of Restrictions. The subdivision property was formerly co-owned by defendant, a proprietor who is entitled to enforce the declarations. Plaintiffs filed an action against defendant, asserting claims for intentional misrepresentation and violation of the Michigan consumer protection act, and defendant filed a counterclaim alleging that plaintiffs violated the recorded deed restrictions by failing to obtain approval for their house plans before construction and by failing to obtain approval for the removal of trees. Plaintiffs' claims were dismissed by the trial court pursuant to defendant's motion for summary disposition. Following a bench trial, the court found that there was no cause of action with respect to defendant's counterclaim.

A covenant constitutes a contract and is a valuable property right. *Village of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 515; 686 NW2d 506 (2004). "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court." *Meagher v Wayne State Univ*, 222 Mich App 700, 721; 565 NW2d 401 (1992). The language used therein should be given its ordinary and plain meaning, and courts should give effect to every word, phrase, and clause. *Id.* "[W]hen the intent of the parties is clearly ascertainable, courts must give effect to the instrument as a whole." *Village of Hickory Pointe Homeowners Ass'n, supra*, pp 515-516. When construing the language of a

restrictive agreement, "[t]he provisions are to be strictly construed against the would-be enforcer, however, and doubts resolved in favor of the free use of property." *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997).

With respect to the removal of the trees, the recorded declarations state:

> Trees existing on the lots will not be moved or destroyed without the approval of Dale R. and/or Mary Jane Fulton, or their successors, or assigns, with the intent being to maintain trees and shrubs as a living screen between the lots and road for the utmost of privacy.

Durvan LeClear admitted that three trees (two spruce and one dead white pine) were removed without defendant's permission in order to put in the driveway to the home. Defendant gave permission for the removal of a fourth tree, a white maple, but permission was not sought before removal of the other three.

In finding no cause of action with respect to the alleged violation of the tree-removal restriction, the trial court stated:

> Now, in regard to the trees, the trees are paragraph 20 of the declaration of restrictions. And it says with the intent being to maintain trees and shrubs as a living screen between the lots and the road for the utmost privacy. The lots are clearly highly treed lots. They look beautiful with a variety of different hardwoods and Evergreen trees, and the driveways look very long, and Mr. LeClear testified that two of the trees had to be removed to – because the person installing the driveway required the two trees be removed. Two spruce trees were necessary for the placement and excavation of the driveway. . . . And he also indicated, removed one dead pine tree and two spruce trees and the four to five inch maple that was obtained with Mr. Fulton's permission. . . . Mr. LeClear specified what trees, where they were, why they were removed. So I don't believe that the removal of those trees violate the spirit and intent of the declarations of restrictions, so the Court does not find that that's been established. And therefore, the Court enters a no cause on the cross-claim.

Regardless of the perceived importance of the trees to the subdivision or their interference with the desires of the homeowner, the prohibition on tree removal without approval is clear in the declarations. The phrase "with the intent being to maintain trees and shrubs as a living screen between the lots and road for the utmost of privacy," is an explanation of the purpose of the restriction, but does not circumscribe its application.

Relying on *Webb v Smith (After Second Remand)*, 224 Mich App 203; 568 NW2d 378 (1997), plaintiffs argue that their failure to obtain defendant's permission to remove the trees falls within the "technical violation" exception to strict enforcement of property restrictions.

It is a "well-understood proposition that a breach of a covenant, no matter how minor and no matter how *de minimis* the damages, can be the subject of enforcement." *Terrien v Zwit*, 467 Mich 56, 65; 648 NW2d 602 (2002) (citation and internal quotation marks omitted). In *Cooper v Kovan*, 349 Mich 520, 530; 84 NW2d 859 (1957), on which this Court relied in *Webb*, *supra*, the

Supreme Court recognized that valid deed restrictions will generally be enforced by injunction, subject to three exceptions: "(a) [t]echnical violations and absence of substantial injury; (b) [c]hanged conditions; and (c) [l]imitations and laches." A technical violation is "a 'slight deviation' or a violation that " 'can in no wise . . . add to or take from the objects and purposes of the general scheme of development." ' " *Webb, supra,* p 212, quoting *Camelot Citizens Ass'n v Stevens*, 329 So 2d 847, 850 (La App, 1976).

The "technical violation" exception to enforcement by injunction concerns the relief that a court may grant upon finding a breach of a covenant. The trial court in this case incorrectly found no breach and did not address the issue of relief. Even if the court were to conclude that injunctive relief was not warranted for the breach, the determination whether a breach had been established was significant to defendant's entitlement to attorney fees. Paragraph 27 of the declarations states:

> 27. . . . In case of a violation or threat to violate the restrictions or conditions herein contained, or breach of any of the covenants or agreements hereof, any of said parties shall forthwith have the right to institute appropriate proceedings at law or in equity to obtain relief against the owner or owners and any occupants of the premises involved, as well as against any other proper party to such proceedings, and, in addition to other remedies given by law, shall be entitled to recover from such owner or owners all costs and expenses, including attorney fees, actually incurred and expended in enforcing the terms and conditions hereof. . . .

Even a breach that amounts to a "technical violation" not warranting injunctive relief is nonetheless a breach. Plaintiffs' argument does not provide a basis for upholding the trial court's entry of no cause of action. The judgment of no cause of action with respect to the breach of covenant concerning the removal of the trees is reversed and we remand for further proceedings. On remand, the trial court may determine the appropriate relief, whether equitable or legal in nature.

Defendant's additional argument, that the declarations require a homeowner to submit plans for his approval before constructing a home, is without merit. The declarations set forth restrictions on the size and construction of a house, but do not expressly require prior approval of the plans. The declarations expressly require approval for certain items, such as use of materials other than stone, brick, wood, aluminum or wood shingle on exterior walls, construction of accessory buildings, placement of a satellite dish, and removal or relocation of trees. The absence of similar language with respect to the submission and approval of house plans belies defendant's contention that submission and approval of house plans is necessary. Moreover, this Court will not infer a restriction that is not expressly stated in the controlling documents. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 341; 591 NW2d 216 (1999). Thus, the trial court did not err in dismissing this claim.

Defendant contends that although the trial court did not address his request for attorney fees and costs, the declarations entitle him to an award under ¶ 27. Plaintiffs assert that defendant's lawsuit was not one to "enforce" the deed restrictions, but was brought in defense of their lawsuit against defendant, and that the Declarations of Restrictions do not provide for reimbursement of attorney fees, costs, and expenses for suits brought in defense. We find no

merit to plaintiffs' argument. The fact that defendant may have been prompted to litigate the issues in his countersuit by the institution of plaintiffs' action against him does not disqualify him from the recovery of costs and expenses that were incurred in enforcing the terms of the declarations. On remand, the trial court shall determine and award "all costs and expenses, including attorney fees, actually incurred and expended in enforcing the terms and conditions hereof."

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ William B. Murphy