STATE OF MICHIGAN

COURT OF APPEALS

SAMUEL KATZ AND SHARON KATZ,

Plaintiffs-Appellants,

v

RIVERWOOD SUBDIVISION HOMEOWNERS ASSOCIATION, FREDERICK KALT, DENISE S. KALT, NICHOLAS CALLIS, TERRY SIMMONS, RICHARD L. LEVIN, KAREN L. LEVIN, PATRICIA K. WATT, CAROL W. TRAUGOTT, PEGGY J. OLSEN, JOCELYN A. GLASS, DR. NELSON PONT, NORMA PONT, EDWARD W. POLLAK, FIONA SZENGER-LEE, SUSAN PETROS, JANE SHOEMAKER FRENCH, MARGARET SHOEMAKER TIBBETTS, NORMAN F. MEYERS, SHIRLEY JANE MEYERS, JAN P. RICHTER, KRISTEN RICHTER, JULIAN LEFKOWITZ, RUTH LEFKOWITZ, MICHAEL B. HOYT, STEVEN ROSEN, STEPHANIE ROSEN, STEVEN W. SAMOSIUK, LILA JEANNE SAMOSIUK, MICHAEL L. HEISEL, JULIA A. HEISEL, HOWARD S. BROWN, LISA N. BROWN, SCOTT STERN, LISA STERN, HARRIET SKLAR, DR. MANUEL SKLAR, ARTHUR S. MARDIGAN, ROSALIE MARDIGAN, JOSEPH SHULMAN, BAYLEE SHULMAN, RAINER HOEFS, GABRIELLE TILLIE-HOEFS, ROBERT HUNTER MCDONALD, CHRISTINE H. MCDONALD, WARREN A. SESSING, ROBERT G. LEVY, KERMIT K. LACKEY,

Defendants-Appellees.

UNPUBLISHED
July 6, 2010

No. 288624
Oakland Circuit Court
LC No. 2007-087573-CZ

Before: BORRELLO, P.J., AND MARKEY AND STEPHENS, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition in favor of defendants. Furthermore, plaintiffs also assert on appeal that the trial court had previously erred in granting partial summary disposition in favor of defendants and in denying plaintiffs' motion for reconsideration of that order. We affirm in part and reverse in part.

Plaintiffs first contend that the trial court erred in granting defendants' motion for summary disposition regarding Count I of the complaint pursuant to MCR 2.116(I)(2). We disagree.

Summary disposition pursuant to MCR 2.116(I)(2) "is properly granted to the opposing party if it appears to the court that that party, rather than the moving party, is entitled to judgment." MCR 2.116(I)(2)*; Sharper Image Corp v Dept of Treasury,* 216 Mich App 698, 701; 550 NW2d 596 (1996). It appears that the trial court concluded that defendants were entitled to summary disposition pursuant to MCR 2.116(C)(10). This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper when, upon examining the affidavits, depositions, pleadings, admissions and other documentary evidence, there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1997).

Plaintiffs assert that the deed restrictions in question ceased to exist when they were not timely renewed in 1967. According to plaintiffs, *Sampson v Kaufman*, 345 Mich 48; 75 NW2d 64 (1956), establishes that if deed restrictions explicitly state an expiration date, those restrictions must be extended before that expiration date in order to be effective. In the present case, an extension of the deed restrictions was approved by 2/3 of the homeowners, but not until months after the expiration of the restrictions. In contrast, defendants assert that *Sampson* does not control because of factual distinctions from the present case. The trial court found that although the 1967 agreement was not binding on the entire subdivision, it was binding on the parties to the agreement and their successors in interest.

In *Sampson*, our Supreme Court addressed the validity of an attempted extension of expired restrictions in an Oakland County subdivision. The original restrictions were scheduled to expire on January 1, 1951. The restrictions could be extended beyond that date of expiration if approved by 2/3 of the subdivision's homeowners. The agreement did not state whether the extension had to be approved before the restrictions' expiration date in order to be effective. The restrictions were not renewed before their expiration. Defendants subsequently purchased a home on October 1, 1952. Two year later, in September 1954, 2/3 of the homeowners agreed to extend the previously expired restrictions. When defendants attempted to build a home without conforming to the restrictions, plaintiffs sought an injunction to prevent the construction. *Sampson*, 345 Mich at 49-50. In holding that the restrictions could not be enforced against defendants, our Supreme Court stated:

> The restrictions were operative until January 1, 1951. When defendants acquired title to their lot, plaintiffs, and other lot owners, had not exercised their right to extend the restrictions. Their failure to do so before January 1, 1951, brought the restrictions to an end on that date. This Court has repeatedly held that restrictions are not retroactive. Defendants were not a party to the extension and the trial court

did not err in holding that they were not bound by said extension of restrictions. [*Id*. at 50-51.]

As defendants assert, *Sampson* is distinguishable from the present case because *Sampson* involved an attempted retroactive application of restrictions. However, the language of the opinion does not establish that the Court's holding was dependant on that fact. Rather, the Supreme Court explicitly stated that because the restrictions were not renewed before their extension, the restrictions expired. The Court also indicated that the defendants were not subject to that extension because they were not parties to that agreement. Therefore, *Sampson* establishes that an attempted extension of expired restrictions is not binding on a non-party to that agreement. It does not, however, address whether an attempted extension is binding on a party to that extension or to a party's successor in interest.

Because no case law directly addresses the question posed, this Court will look to general principles of contract law to determine whether the homeowners entered a valid private agreement in 1967. First, in arguing that no enforceable contract exists, plaintiffs correctly cite to the fact that "[r]estrictive covenants in deeds are strictly construed against parties seeking to enforce them. All doubts are resolved in favor of the free use of property." *City of Livonia v Dept of Social Services*, 423 Mich 466, 525; 378 NW2d 402 (1985). However, that proposition is of little help to plaintiffs' position. The above-quoted material merely provides instruction regarding the manner in which a court interprets the meaning or scope of a particular restriction. The restriction in the present case is unambiguous. Rather, more relevant to the present case is the well-established principle that "[r]estrictions for residence purposes are particularly favored by public policy and are valuable property rights." *Id*.

In addition to the fact that public policy favors restricting land to residential use, Michigan courts strongly favor enforcing private contracts. Where a contract unambiguously expresses the intent of the parties, that contract is enforced except where it otherwise violates public policy or law. *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008); *Rory v Continental Ins Co*, 473 Mich 457, 491; 703 NW2d 23 (2005). Plaintiff cites no law or policy that is violated by enforcing the 1967 agreement against the parties to that agreement and their successors in interest.

In arguing that the 1967 agreement is not binding on any of the homeowners, regardless of whether they were parties, plaintiffs argue that such a holding would be illogical because the purpose of the restrictive covenants would be negated if those restrictions did not apply to all the lots in the subdivision. In support of this argument, plaintiffs reply brief cites to *Maatta v Dead River Campers, Inc*, 263 Mich App 604; 689 NW2d 491 (2004). While *Maatta* does contain language that supports plaintiffs' argument regarding the purpose of restrictive covenants, the factual distinctions of *Maatta* limit its applicability to the present case. In *Maatta*, a majority of landowners voted to exempt a limited number of lots from the restriction. The Court analyzed the law of other jurisdictions and explicitly adopted the reasoning of *Walton v Jaskiewicz*, 317 Md 264; 563 A2d 382 (1989). The Court's focus was on the essential mutuality of restrictive covenants. The Court stated that without express language, a majority of owners could not exempt lots from the covenant. The restrictive covenant in *Maatta* did not include such language and the proposed exemption was a result of shareholders resolution that was adopted by a supermajority. In the present case, the property owners voted after the expiration of a specific restrictive covenant to create a new one. While it could be argued that the property owners

understood that they were entering a new agreement but were under the false impression that the agreement would be binding on the entire subdivision, plaintiffs do not take that position. The question in this case is whether a percentage of residents in a subdivision can enter into a private agreement that creates restrictions for each of the parties to that agreement. Therefore, while *Maatta's* rationale may be somewhat persuasive, it does not control the outcome of this case.

Plaintiffs imply that to enforce the agreement against the parties that signed it, along with any successors in interest, would be improper because an agreement that is not binding on all homeowners is not supported by adequate consideration. However, "[c]ourts do not generally inquire into the sufficiency of consideration." *Amerisure Insurance Co v Graff Chevrolet, Inc*, 257 Mich App 585, 596; 669 NW2d 304 (2003). As has been famously stated, "[a] cent or a pepper corn, in legal estimation, would constitute a valuable consideration." *Whitney v Stearns*, 16 Me 394 (1839). Although it may seem undesirable to agree to restrict the use of your land if your neighbor is not similarly restricted, it is not as if plaintiffs' lot is the only lot that is restricted. The parties to the 1967 agreement could very well have concluded that they were willing to restrict the use of their land in exchange for a similar agreement from a significant portion of their neighbors.

Because Michigan law values residential deed restrictions and the ability to enter into private agreements, and because plaintiffs cite no law or public policy that is violated by the enforcement of the deed restrictions, we find that the parties to the 1967 agreement created a valid private agreement that was binding on themselves, as well as their successors in interest.[1] Therefore, it follows that the trial court properly granted defendants summary disposition regarding Count I of the complaint.

Plaintiffs next argue that the trial court erred in granting defendants' motion for summary disposition regarding Count II pursuant to MCR 2.116(C)(10). The trial court determined that there was no genuine issue of material fact relating to whether a change in circumstances rendered the deed restrictions invalid. We agree that the trial court's holding constitutes error.

Plaintiffs assert that the residential nature of the subdivision has been changed and that the deed restrictions are no longer practical. In so arguing, plaintiffs primarily cite to the fact that Telegraph Road has widened and has become increasingly busy in the years since the creation of the restrictions. Furthermore, a portion of one of plaintiffs' lots has previously been condemned and has subsequently been transformed into a turn and deceleration lane. Plaintiffs also allege that the subdivision has ceased to be residential due to the close proximity to an electrical substation. According to an affidavit submitted by Sharon Katz, the combination of these factors has rendered plaintiffs' lots unsuitable for residential use. Mrs. Katz stated in her affidavit that she and her husband have not been able to sell the lots for residential use despite 25 years of effort. In contrast, defendants submitted multiple affidavits that stated that the nature of

[1] We note that the record is not sufficiently developed for this Court to address whether the fact that the residential restrictions are not binding on each of the lots in the subdivision constitutes a change in circumstances that renders the restrictions entirely invalid.

the subdivision had not changed and that the evolution of Telegraph Road has not rendered the subdivision unsuitable for residential development.

While we agree with plaintiffs' contention that *Rofe v Robinson*, 415 Mich 345; 329 NW2d 704 (1982), does not prevent this Court from considering the effect that Telegraph Road has had on the residential nature of the subdivision, we further conclude that the record does not establish that the evolution of Telegraph Road has definitively changed the nature of the subdivision. However, in granting defendants' motion for summary disposition regarding Count II, the trial court disregarded Mrs. Katz's affidavit. In doing so, the trial court essentially made a credibility determination. "Summary disposition is suspect where motive and intent are at issue or where the credibility of a witness is crucial." *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). In Mrs. Katz's affidavit, she stated that she has been unable to sell her property despite 25 years of effort because her land was not suitable for residential use. Although a jury may not ultimately be persuaded by that position, it was improper for the trial court to determine that the affidavit did not create a genuine issue of material fact.

Affirmed in part, reversed in part, remanded for further proceedings. We do not retain jurisdiction. Neither party having prevailed in full, we award no costs.

/s/ Stephen L. Borrello
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens