STATE OF MICHIGAN

COURT OF APPEALS

FRANKLIN COMMONS, L.L.C.,

Plaintiff-Appellant,

v

HELMAN WOODS SUBDIVISION HOMEOWNERS ASSOCIATION,

Defendant-Appellee,

and

LASALLE BANK and RBK INVESTMENTS, L.L.C.,

Defendants.

UNPUBLISHED
November 4, 2010

No. 292952
Oakland Circuit Court
LC No. 2008-089966-CZ

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Plaintiff, Franklin Commons, L.L.C., appeals as of right an order granting summary disposition in favor of defendant, Helman Woods Subdivision Homeowners Association ("HWSHA")[1]. We affirm.

A. FACTS

In 1951, Hannan Real Estate Exchange and Grandville Construction Company ("Grandville") entered into a land contract. The property, called Helman Woods Subdivision, was comprised of Lots 1-78 and "Outlot A", and a plat for the same was thereafter recorded. In 1952, Grandville recorded building and use restrictions concerning the property. Among them was a restriction limiting construction to a single-family dwelling and associated structures on

[1] The other defendants, RBK Investments and LaSalle Bank, have no role in this appeal. There are references to dealings with Michigan National Bank, *infra*, but LaSalle Bank subsequently acquired Michigan National Bank.

each lot. The restrictions did, however, permit changes upon the approval of both the "seller or his duly authorized representative" and the abutting lot owners.

In 1953, after receiving permission from the appropriate authority, Grandville subdivided Outlot A into lots 79-84, calling the same "Helman Woods No. 1." In 1974, two of the lots in the subdivision (fronting Telegraph Road) were rezoned from residential to commercial use, despite objections from homeowners within the subdivision. Twelve years later, a project began to construct a bank on the rezoned lots. The project was, however, abandoned prior to its completion. When Michigan National Bank expressed an interest in purchasing the lots and completing the project, HWSHA worked with Michigan National Bank to come to an agreement as to how the bank could conduct business on the rezoned lots while still protecting the residential neighborhood comprised of the remaining lots in the subdivision. The matter was resolved through entry of a consent judgment in 1993.

In 2002, plaintiff obtained title to Lots 73 and 79-84. Seeking to commercially develop the property, plaintiff filed this lawsuit seeking "declaratory, injunctive, and other equitable relief" to establish that HWSHA could not enforce any deed restrictions or covenants limiting the use of its property to residential purposes. Plaintiff moved for summary disposition, and defendant thereafter moved for summary disposition in its own favor, asserting that the restrictions recorded in 1952 were, in fact, enforceable as to plaintiff's property. The trial court agreed with defendant, denying plaintiff's summary disposition motion and entering summary disposition in defendant's favor. This appeal followed.

B. HWSHA'S STANDING TO ENFORCE COVENANTS

Plaintiff first argues that HWSHA lacks standing to be able to enforce any restrictive covenants. We disagree. Whether a party has standing to assert a claim constitutes a question of law that is reviewed de novo. *Miller v Citizens Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 290522, issued May 13, 2010), slip op, p 9.

First, it is well established that those who have ownership interests in property that benefit from restrictive covenants have standing to enforce such restrictions. *Terrien v Zwit*, 467 Mich 56, 71-72; 648 NW2d 602 (2002); *Indian Village Ass'n v Barton*, 312 Mich 541, 549; 20 NW2d 304 (1945). Here, defendant homeowner association is a landowner in the subdivision. As a result of the 1994 Michigan National Bank ("MNB") transaction, HWSHA became the owner of the vast majority of lots 45 and 48, so long as the properties are used for green space or a park. Thus, HWSHA, as a landowner, has the ability to enforce any restrictive covenants within the subdivision.

Second, even if HWSHA was not a landowner, HWSHA would still be able to enforce the restrictions. Homeowner associations that actively represent the interests of landowners are allowed to enforce deed restrictions. *Civic Ass'n of Hammond Lake v Hammond Lake Estates No. 3 Lots 126-135*, 271 Mich App 130, 135-136; 721 NW2d 801 (2006). This Court has stated that a "voluntary association whose 'sole purpose is to represent the interest of its members,' . . . may bring suit to effectuate that purpose, regardless of whether the association itself owns any land." *Id.* at 135, quoting *White Lake Improvement Ass'n v Whitehall*, 22 Mich App 262, 272-274; 177 NW2d 473 (1970). Here, HWSHA was active in representing the interests of the subdivision landowners. In fact, the purpose listed in HWSHA's articles of incorporation is "[t]o

protect and exercise the rights provided in the building and use restrictions of Helman Woods Subdivision." And since 1992, HWSHA has been active, as evidenced by their various meeting minutes. Plaintiff's characterization of HWSHA as never attempting to enforce any restrictions in the last 50 years is patently false. For example, in 1975, when the association was initially formed, it opposed the rezoning of certain lots within the subdivision from residential to commercial. Though HWSHA was unsuccessful in preventing the zoning change, its efforts are not to be ignored. Plaintiff also argues that HWSHA never objected to or defended against the 1987 lawsuit. While true, it has little bearing since HWSHA was not in existence at that time as it was automatically dissolved in 1979, only to be revived later in 1992.

Plaintiff also argues that HWSHA lacks standing because HWSHA's articles of incorporation only refer to "Helman Woods Subdivision" with no reference to "Helman Woods Subdivision No. 1." This distinction, however, has no bearing on the "Helman Woods Subdivision" lots from *enforcing existing deed restrictions* that were created for their benefit, even if the deed restriction violations take place outside the "Helman Woods Subdivision." See *Terrien*, 467 Mich at 71 (stating that property owners have a right to enforce covenants "affecting their own property"). Here, the restrictions at issue in this case were meant to benefit the Helman Woods lots; thus, those lot owners, acting through the HWSHA, would be able to enforce any restrictions that were binding on Helman Woods Subdivision No. 1.

Because HWSHA is a landowner within the subdivision and is a voluntary association that actively represents the interests of its landowners, it has standing to enforce any restrictive covenants that were created for the benefit of those landowners. Thus, the trial court did not err when it decided that HWSHA had standing to enforce the covenants.

C. EXPRESS RESTRICTIVE COVENANTS

Plaintiff argues that the restrictive covenants do not apply to its lots 79 through 84, which were formerly known as Outlot A. We disagree.

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001). Additionally, the scope of a deed restriction is a question of law that is reviewed de novo. *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007).

There is no dispute that on April 1, 1952, Grandville recorded the following use restrictions:

> No building shall be erected, altered, or used on any lot whatsoever in said subdivision (except as may be herein stated) for any purpose whatsoever, other

> than (1) one single detached dwelling occupied by the purchaser . . . for residence purposes only.

At the time, the Helman Woods Subdivision consisted of lots 1 through 78 and Outlot A. Plaintiff maintains that, because the restriction uses the word "lot" and does not refer to any "outlot," Outlot A is not covered by this restriction. This argument is unavailing. This Court summarized the general rules for construing restrictive covenants:

> When interpreting a restrictive covenant, courts must give effect to the instrument as a whole where the intent of the parties is clearly ascertainable. . . . Where the intent is clear from the whole document, there is no ambiguous restriction to interpret and the rules pertaining to the resolution of doubts in favor of the free use of property are therefore not applicable. . . . In placing the proper construction on restrictions, if there can be said to be any doubt about their exact meaning, the courts must have in mind the subdivider's intention and purpose. . . . The restrictions must be construed in light of the general plan under which the restrictive district was platted and developed. . . . In attempting to give effect to restrictive covenants, courts are not so much concerned with the grammatical rules or the strict letter of the words used as with arriving at the intention of the restrictor, if that can be gathered from the entire language of the instrument. . . . Moreover, the language employed in stating the restriction is to be taken in its ordinary and generally understood or popular sense, and is not to be subjected to technical refinement, nor the words torn from their association and their separate meanings sought in a lexicon. . . . Covenants are to be construed with reference to the present and prospective use of property as well as to the specific language employed and upon the reading as a whole rather than from isolated words. . . . [*Brown v Martin*, ___ Mich App ___; ___ NW2d ___ (Docket No. 289030, issued June 15, 2010), slip op, p 3., quoting *Borowski v Welch*, 117 Mich App 712, 716-717; 324 NW2d 144 (1982)]

Plaintiff's argument, that an outlot is not a lot, is precisely the type of linguistic gymnastics that this Court warned against performing when construing restrictive covenants. The subdivider's intent is readily apparent from reviewing the words that the subdivider used: "any lot whatsoever in said subdivision." In ordinary and generally understood language, an out*lot* is a type of *lot*. Moreover, the phrase "any lot whatsoever" leaves no doubt with regard to the drafter's intent – the building restriction is to apply to the entire subdivision, which includes Outlot A.

Plaintiff also argues that the restrictions did apply to Outlot A, because Outlot A was subdivided into the six lots, which compose "Helman Woods No. 1" and no restrictions were recorded with respect to "Helman Woods No. 1." We again disagree.

In April 1954, Helman Woods No. 1 was created by resubdividing Outlot A into six roughly equal lots, numbered lots 79 through 84. No restrictions were recorded for Helman Woods No. 1. However, this is not relevant since the text of the original restrictive covenants established that they were to "run with the land." Because the restrictive covenants were in effect for Outlot A prior to the Helman Woods No. 1 resubdivision, they continued to remain in effect after the resubdivision. See, e.g., *Goodlove v Hamburger*, 218 Mich 156, 161; 187 NW 398 (1922) (restrictions did not become inoperative because of a subdivision of property).

Accordingly, the trial court did not err by granting summary disposition in favor of HWSHA, and plaintiff's claim fails.

D. IMPLIED NEGATIVE RECIPROCAL EASEMENTS

Plaintiff argues that the trial court erred when it stated that plaintiff's lots were subject to an implied negative reciprocal easement, which prohibited any nonresidential use. This issue is moot because of our finding that plaintiff's lots were restricted by express covenants in Part C, *supra*.

The doctrine of negative reciprocal easements "is based upon the fairness inherent in placing uniform restrictions upon the use of all lots similarly situated, notwithstanding that *less than all of the deeds contain an express restriction*. Thus, the implied restriction arises from the express restriction." *Hammond Lake*, 271 Mich App at 137 (emphasis added), citing *Dwyer v City of Ann Arbor*, 79 Mich App 113, 118-119; 261 NW2d 231 (1977), rev'd on other grounds 402 Mich 915 (1978). Accordingly, since the burdened land at issue here has an express deed restriction, this doctrine is not applicable.

E. PLAINTIFF'S LEGAL AND EQUITABLE DEFENSES AGAINST ENFORCING THE VALID RESTRICTIONS

Plaintiff argues that, even if the restrictions are valid and otherwise enforceable, the restrictions should not be enforced for a variety of equitable and legal defenses. We disagree.

Plaintiff first argues that the HWSHA lot owners effectively waived the restrictions through their consent to the initial commercial construction on lots 46 and 47 in 1987, and their later consent to the 1993 bank construction covering those same lots. Determining whether a restrictive covenant has been waived is based on the particular facts of each individual case. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 344; 591 NW2d 216 (1999). Waiver can occur when a party does not promptly file suit when it becomes clear that the owner of a restricted lot is about to change the use of the lot to one that is contrary to the deed restrictions. *Bloomfield Estates*, 479 Mich at 218.

However, even if a party does not challenge a particular deed restriction violation, "the restriction does not thereby become void and unenforceable when a violation of a *more serious and damaging degree occurs*." *Id.* at 219 (internal quotations omitted, emphasis in original). To determine if a prior acquiescence to a violation of a deed restriction prevents contesting a later violation, a reviewing court compares the character of the prior violation with the character of the present violation. *Id.*

> Only if the present violation constitutes a "more serious" violation of the deed restriction may [a party] contest the violation despite [acquiescing] to prior violations of a less serious character. In general, a "more serious" violation occurs when a particular use of property constitutes a more substantial departure from what is contemplated or allowable under a deed when compared to a previous violation. [*Id.*]

Here, enlarging the commercial activity to encompass lots 79 through 84 constitutes a "more serious" violation of the deed restrictions. Currently, the only commercial activity is confined to the corner of Telegraph Road and Thirteen Mile Road, consisting of a bank located on lots 46 and 47 and a driveway on lot 45. However, the bank was effectively segregated from the rest of the neighborhood by the implementation of a treed berm on the two adjacent lots, lots 45 and 48. This activity was coupled with the remaining majority of lots 45 and 48 being conveyed to HWSHA to keep as a park or green space, thereby creating even more of a "buffer" between the commercial activity and the rest of the residential neighborhood. Additionally, the bank is only accessible from the major roads, Telegraph and Thirteen Mile. Thus, the current commercial-use violation has a very subdued impact on the rest of the subdivision.

On the other hand, plaintiff's proposal to expand commercial activity to an additional six or seven lots would substantially increase the commercial-use impact on the neighborhood. Aside from the obvious mathematical calculations (from essentially two lots of commercial activity to eight or nine), the negative impact of introducing commercial usage on plaintiff's lots is significant. First, if plaintiff were allowed to proceed with its commercial activity, approximately ten residential lots would then become adjacent to commercial activity. Second, unlike the bank, and counter to plaintiff's claims, the lots comprising Outlot A (lots 79 through 84) are accessible from the subdivision on Birchway Drive, which means that there could be increased traffic within the subdivision. Accordingly, because the proposed commercial use would constitute a "more serious" violation of the existing deed restrictions, the homeowners' acquiescence to the bank does not provide a means for plaintiff to bypass the deed restrictions.

Plaintiff next argues that technical violations of the restrictive covenant are permitted as long as there is no substantial injury. While this is an exception to the general rule of strictly enforcing restrictive covenants, *Webb v Smith (After Second Remand)*, 224 Mich App 203, 211-212; 568 NW2d 378 (1997), constructing commercial buildings where only residential ones are permitted cannot be considered a mere "technical violation." This Court has defined a "technical violation" to be 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." *Id.* at 212. The undisputed purpose of the restrictions was to maintain a residential character to the neighborhood. Clearly, plaintiff introducing commercial activity completely runs afoul of this purpose. Furthermore, plaintiff's suggestion, that the commercial activity should be allowed simply because HWSHA cannot prove that there would be any substantial injury, is not consistent with the law. A party's "right to maintain [deed] restrictions is not affected by the extent of the damages he might suffer for their violation." *Terrien*, 467 Mich at 65. Accordingly, plaintiff's proposed commercial activity would not be a technical violation, and the deed restrictions can be enforced.

Plaintiff next argues that the circumstances surrounding the subdivision have changed such that they defeat the covenants' purpose. We disagree. A change in neighborhood conditions can make enforcement of a restrictive covenant inequitable if the covenant's purpose can no longer be accomplished. *Webb*, 224 Mich App at 213. However, the evidence in this case does not establish that the covenant's purpose, of having a residential neighborhood, can no longer be accomplished. If we assume arguendo that the build up along Telegraph Road may have adversely affected plaintiff's lots, it is clear that the character of the subdivision as a whole has not changed. And it is this overall character that is evaluated to see whether it would be

inequitable to enforce a restrictive covenant. *Rofe v Robinson*, 415 Mich 345, 352; 329 NW2d 704 (1982). Thus, plaintiff's defense fails.

Plaintiff next argues that, because of laches, the restrictions are not enforceable. "The doctrine of laches is concerned with unreasonable delay that results in 'circumstances that would render inequitable any grant of relief to the dilatory plaintiff.'" *Yankee Springs Twp v Fox*, 264 Mich App 604, 611-612; 692 NW2d 728 (2004), quoting *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 503-504; 608 NW2d 105 (2000). However, plaintiff's brief does not address how HWSHA caused any unreasonable delay. Instead, plaintiff argues, "It would be inequitable to enforce the Restriction against Plaintiff[']s Property because it is unsuitable for residential development. [Also, enforcement] of the Restrictions against Plaintiff's Property would essentially render Plaintiff's Property worthless." However, plaintiff offers no evidence to show how the lot owners of the subdivision unreasonably delayed in enforcing the restrictions against plaintiff. Accordingly, plaintiff's laches argument fails.

Next, plaintiff raises for the first time separate statute of frauds, ambiguity, and lapse arguments as defenses concerning the enforcement of the deed restrictions. This Court is not obligated to address issues raised for the first time on appeal. *Porter v Porter*, 285 Mich App 450, 464; 776 NW2d 377 (2009). In the instant matter, we decline to address them.

In sum, all of the legal and equitable defenses against enforcing the restrictive covenant are without merit. Accordingly, the trial court did not err when it granted summary disposition in favor of HWSHA.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro