STATE OF MICHIGAN

COURT OF APPEALS

BRIGID FLYNN GODVIN, MAUREEN ANN PORUBSKY and FRANCIS J. FLYNN, Plaintiffs-Appellees,	UNPUBLISHED February 28, 2012
v	No. 300776 Wayne Circuit Court LC No. 09-016372-CK
RDD INVESTMENT CORP., Defendant-Appellant,	
and	
POLICEMAN & FIREMAN RETIREMENT SYSTEM OF CITY OF DETROIT BOARD OF TRUSTEES, ROMULUS DEEP DISPOSAL LIMITED PARTNERSHIP, ROMULUS DEEP DISPOSAL LIMITED PARTNERSHIP 1, REMUS JOINT VENTURE, DOUGLAS F. WICKLUND, TIMMIS & INMAN, P.L.L.C., CORDOBA, L.L.C., ROMULUS LIMITED PARTNERSHIP, FREDERICK K. HOOPS, Trustee, and KELLY CAWTHORN, P.L.L.C., Defendants.	

Before: OWENS, P.J., and JANSEN and MARKEY, JJ.

PER CURIAM.

Defendant, RDD Investment Corp., appeals an order dismissing the case. However, the issue raised on appeal relates to an earlier order granting summary disposition to plaintiffs and denying summary disposition to defendant RDD and to defendant Policeman and Fireman Retirement System of City of Detroit Board of Trustees. We affirm.

Defendant RDD argues that Wendell Flynn and Margaret Flynn (as sellers) and Environmental Disposal System, Inc. (as purchaser), parties to a purchase agreement for the sale of a 38 acre property located in Romulus, Michigan, did not intend for the purchase agreement's incorporated royalty obligation to run with the property and that the royalty obligation does not

affect and concern the property. RDD asserts that the trial court erred in granting plaintiffs' motion for summary disposition, concluding that the royalty obligation is a covenant that runs with the land, and made it enforceable against defendant RDD. We disagree.

The trial court treated plaintiffs' motion for summary disposition as a motion under MCR 2.116(C)(10), and defendant RDD moved for summary disposition pursuant to MCR 2.116(C)(10). This Court reviews de novo a trial court's decision to grant or deny summary disposition in an action for declaratory judgment. *Wayne County v Wayne County Retirement Com'n*, 267 Mich App 230, 243; 704 NW2d 117 (2005). This Court reviews a trial court's order regarding summary disposition based on the record to determine whether the moving party was entitled to judgment as a matter of law. *Davis v City of Detroit*, 269 Mich App 376, 378; 711 NW2d 462 (2006). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The party moving for summary disposition must specifically identify the matters that have no issues of disputed fact. *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). Then the party opposing the motion has the burden of showing, through documentary evidence, that a genuine issue of disputed fact exits. *AFSCME v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). This Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham County Rd Comm'n*, 255 Mich App 299, 310; 660 NW2d 351 (2003). This Court must review a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). A motion for summary disposition should only be granted if the evidence presented to the trial court by the parties does not establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 224-225. "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

"[A] Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605 (A)(1). A covenant that runs with the land requires: the grantor's and grantee's intent that the covenant run with the land, the covenant affect or concern the land with which it runs, and privity of estate between the party claiming the benefit and the party who has the burden. *Greenspan v Rehberg*, 56 Mich App 310, 320-321; 224 NW2d 67 (1974).

> The test as to whether a covenant runs with the land or is merely personal, is whether the covenant concerns the thing granted and the occupation or enjoyment of it, or is a collateral and personal covenant not immediately concerning the thing granted. If a covenant concerns the land and the enjoyment of it, its benefit or obligation passes with the ownership; but to have that effect the covenant must respect the thing granted or demised and the act to be done or permitted must concern the land or the estate conveyed. In order that a covenant may run with the land, its performance or nonperformance must affect the nature, quality, or value of the property demised, independent of collateral circumstances, or must

> affect the mode of enjoyment. [*Id.* (citations and internal quotation marks omitted).]

A covenant to pay a sum of money may run with the land. *See Detroit Trust Co v Mortensen*, 273 Mich 407, 410; 263 NW 409 (1935) (finding "that the assignment of a lease, and its acceptance by the assignee, carries with it the obligation to pay the rent"). In an action to enforce a covenant, the intent of the drafter is controlling. Covenants are grounded in contract and the provisions should be strictly construed against the would-be enforcer and doubts should be resolved in favor of the free use of the property. *See Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997) (finding that a negative covenant in a restriction agreement was grounded in contract, the intent of the drafter controlled, and the provisions were to be strictly construed against the would-be enforcer). Importantly, if the intent of the parties is ascertainable, this Court must give effect to the instrument as a whole. *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 628; 761 NW2d 127 (2008).

> [C]ovenants are to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it, the location and character of the entire tract of land, the purpose of the restriction, whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers, and whether it was in pursuance of . . . improvement of the property. [*Id.* at 628-629 (citations and internal quotation marks omitted).]

Defendant RDD conceded that privity of estate is not at issue here. Therefore, the only two issues are: 1) whether there are genuine issues of material fact regarding whether the Flynns and EDS intended that the royalty obligation run with the property, and 2) whether the royalty obligation affects and concerns the property. Defendant RDD argues that the purchase agreement demonstrates that the parties only intended EDS to be bound by the royalty obligation.

Here, the purchase agreement contains plain language regarding the royalty obligation between the Flynns and EDS. It provides that:

> $8,333.33 on the first day of each month and on a quarterly annual bases [*sic*] the 3.5% royalty on Purchaser's [EDS] gross income shall be computed and paid to Seller [the Flynns] or their assigns, heirs or personal representative by the fifteenth day of the succeeding month, providing said percentage royalty exceeds the amount of the fixed royalty paid as afore provided.

Section 18 of the purchase agreement provides that "the covenants, conditions and obligations set forth herein shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, successors, administrators, representatives and assigns." The warranty deed to the Property was to be subject to the express terms of the Purchase Agreement.

We hold that the intent of the parties is ascertainable from the plain language of the purchase agreement. Thus, this Court must give effect to the purchase agreement as a whole. *City of Huntington Woods*, 279 Mich App at 628. The plain language of the purchase agreement,

as a whole, demonstrates the parties' intent to bind their heirs, successors, administrators, representatives, and assigns to the burden and benefit of the royalty obligation, respectively.

Furthermore, this Court notes that the Flynns conveyed the title to the property to EDS, by warranty deed on December 29, 1995, which incorporated the purchase agreement, including the royalty obligation, and was recorded in Wayne County on June 23, 2000. The Flynns, the sellers of the property in the purchase agreement, are now deceased. However, prior to his death, Wendell Flynn told plaintiff Brigid Flynn Godvin, that their family was entitled to $100,000 per year, once a permit was given for a disposal well facility on a piece of property that was owned by the Flynns. Wendell Flynn also told plaintiff, Francis J. Flynn, that a royalty interest ran with the property and that once the permit was secured, the family would get three and one-half percent of the disposal well facility's gross income or $100,000, whichever were greater. This Court finds that this evidence supports the conclusion that the Flynns and EDS intended the royalty obligation to run with the land.

Defendant RDD next argues that the royalty obligation does not touch and concern the property, and furthermore, the trial court erred in its construction of the purchase agreement and by concluding the contrary. The royalty obligation in the purchase agreement between the Flynns and EDS is:

> 2. Consideration. The purchase price for the Property shall be Seven Hundred Fifty Thousand Dollars ($750,00.00) in cash, plus a royalty equal to 3.5% of the gross revenues from the operation of a class I commercial liquid hazardous disposal well project to be developed on the Property by Purchaser. Said royalty shall commence at the time when waste disposal is permitted on the Property by the federal Environmental Protection Agency (EPA) and the Michigan Department of Natural Resources (DNR) and shall not be less than $100,000 per annum, which ever is greater. Royalty payments shall be payable as follows:
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>> $8,333.33 on the first day of each month and on a quarterly annual bases [*sic*] the 3.5% royalty on Purchaser's [EDS] gross income shall be computed and paid to Seller [the Flynns] or their assigns, heirs or personal representative by the fifteenth day of the succeeding month, providing said percentage royalty exceeds the amount of the fixed royalty paid as afore provided.

The plain language of this provision of the purchase agreement describes the three and one-half percent royalty obligation as being derived from "the gross revenues from the operation of a class I commercial liquid hazardous disposal well project to be developed on the Property by Purchaser" and that it "shall not be less than $100,000 per annum." We hold that the purchase agreement provides that the minimum royalty requirement is to be satisfied out of the revenues generated by the disposal well facility. The performance of the royalty obligation affects the value of the land, because if subsequent owners of the property operate a disposal well facility on the land, the owner must pay royalties to the Flynns or the Flynns' assigns. Therefore, because the royalty obligation is supposed to be derived from the gross revenues of a disposal well facility on the property, and the royalty obligation affects the value of the land because subsequent owners of the property will have to pay these royalties if they choose to operate a

disposal well facility, we hold that the royalty obligation touches and concerns the property. See *Greenspan*, 56 Mich App at 320-321 ("In order that a covenant may run with the land, its performance or nonperformance must affect the nature, quality, or value of the property, independent of collateral circumstances, or must affect the mode of enjoyment."). Therefore, we hold that the royalty obligation is a covenant that runs with the property.

Lastly, plaintiffs argue that the royalty obligation is enforceable as an equitable servitude, while defendant RDD argues the contrary. The trial court did not decide this issue. Because we conclude that the royalty obligation is enforceable as a covenant that runs with the land, we need not address this issue.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Jane E. Markey