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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002444-MR

RESERVE ESTATES, LLC — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 06-CI-00554

DAVE BERKEMEIER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND DIXON, JUDGES; HENRY,[1] SENIOR JUDGE.

DIXON, JUDGE: In this appeal, Reserve Estates, LLC, contends the Oldham Circuit Court erred by rendering a declaratory judgment in favor of Dave Berkemeier, which granted him the right to construct a detached garage on his property. Finding no error, we affirm.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

Reserve Estates, LLC, is a real-estate development company, and Tom Borntraeger is its president.[2] Borntraeger developed a subdivision in Oldham County, Kentucky, known as the Reserve Estates of Sleepy Hollow. In July 2003, Borntraeger filed a deed of restrictions for the subdivision with the Oldham County Clerk. Section 3.5 provides:

> Garages; Carports. All Lots shall have at least a two-car garage. The openings or doors for vehicular entrances to any garage located on a Lot shall include doors. **No detached garages are allowed.** Garages, as structures, are subject to prior plan approval under Section 3.1. No carport shall be constructed on any Lot. There shall be no front-entry garages. (emphasis added).

In August 2003, Berkemeier purchased a lot in the subdivision. In addition to building his own home in the subdivision, Berkemeier worked as a construction project manager on several other houses in the neighborhood. As a result, Berkemeier and Borntraeger became well acquainted.

In late 2004, Berkemeier had plans drawn for a two-story detached garage. According to Berkemeier, in early 2005, Borntraeger visited his home, reviewed and approved the plans, and helped him place stakes on the lot pursuant to the blueprint.[3] Berkemeier then sought estimates for the construction of the garage, but ultimately decided to put the project on hold for a short time. In the following months, the relationship between Berkemeier and Borntraeger

[2] Throughout this opinion, we refer to the actions of "Borntraeger," rather than the corporate entity, Reserve Estates, LLC.

[3] Borntraeger denied the meeting occurred.

deteriorated rapidly, and they became involved in litigation unrelated to the case at bar.

In early 2006, Berkemeier submitted the garage plans to Borntraeger, with the intent of moving forward with construction. Borntraeger, however, denied Berkemeier's request, stating the deed of restrictions prohibited detached garages. Berkemeier submitted his garage plans a second time, in June 2006, which Borntraeger again denied.

On August 9, 2006, Berkemeier filed a complaint in Oldham Circuit Court seeking a declaratory judgment that he was entitled to construct his garage pursuant to Borntraeger's prior approval. The court held a bench trial on October 12, 2007, and heard testimony from Berkemeier; his wife, Christine Berkemeier; the Berkemeiers' neighbor, Stephen Camiolio; and Borntraeger. The court rendered its findings and judgment in favor of Berkemeier on October 31, 2007. This appeal followed.

Since this case was tried before the court without a jury, we will not disturb the court's factual findings unless they are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. A finding of fact is not clearly erroneous if it is supported by substantial evidence, which is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). In our review, we are mindful that the trial court is in the best position "to determine the credibility of witnesses and the weight to be given the evidence."

Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 118 (Ky. 1991) (citation omitted). The trial court's conclusions of law, including the "[i]nterpretation or construction of restrictive covenants," are reviewed *de novo*. *Colliver v. Stonewall Equestrian Estates Ass'n, Inc.*, 139 S.W.3d 521, 523 (Ky. App. 2003).

The first argument raised by Borntraeger is that Section 3.5 unambiguously prohibits detached garages, and the trial court erred by concluding otherwise. After thorough review, and despite the language of the restrictions, we conclude Borntraeger waived his right to enforce Section 3.5 against Berkemeier.

> As this Court noted in *Colliver*, *supra*,
>
> > The rule of law in regard to waiver of restrictions was succinctly stated in *Bagby v. Stewart's Ex'r*, 265 S.W.2d 75, 77 (Ky. 1954):
> >
> > > A change in the character of the neighborhood which was intended to be created by restrictions has generally been held to prevent their enforcement in equity, where it is no longer possible to accomplish the purpose intended by such covenant. . . .
> >
> > Arbitrary enforcement of covenants does not necessarily render covenants unenforceable. Instead, when arbitrary enforcement has resulted in a fundamental change in the character of a neighborhood, the purpose of the covenants may be defeated and accordingly become unenforceable.

Colliver, 139 S.W.3d at 525 (citation and internal quotation marks omitted).

Colliver, like the case at bar, addressed a subdivision's deed of restrictions regarding detached garages. *Id*. at 523. The *Colliver* restrictions, however, provided that detached garages were allowed with the approval of the

homeowner's association. *Id*. at 523-24. The Collivers argued that lax enforcement of "other" restrictions regarding swimming pools and fences constituted waiver of the detached garage restriction. *Id*. at 525. The Court disagreed, concluding, "although the covenants have not been strictly enforced in reference to pools and fences, we cannot say that a fundamental change in the neighborhood defeating the purpose of the covenants has occurred." *Id*.

Here however, the deed of restrictions clearly prohibits detached garages, unlike *Colliver*, where the restrictive covenants provided for the integration of detached garages in the neighborhood. In contrast, the covenants at issue here do not contemplate the existence of detached garages in the neighborhood, and any deviation from that clear directive fundamentally changes the character of the neighborhood and defeats the purpose of the covenant. At trial, Borntraeger testified that, despite the language of the restrictions, detached garages are allowed with his approval, and owners must submit architectural plans, landscape design plans, and the name of the proposed contractor. Borntraeger admitted that he had specifically approved a detached garage for another home in the subdivision, and he acknowledged that there were times when he had not strictly enforced the restrictions. Furthermore, the trial court was in the best position to weigh the evidence, and the court concluded Borntraeger approved Berkemeier's garage plans. In light of the facts and circumstances of this case, we believe that Borntraeger's actions constituted a waiver of Section 3.5, and public policy dictates that the non-waiver clause cannot preclude waiver based on

Borntraeger's words and conduct. Accordingly, we believe Borntraeger is precluded from enforcing Section 3.5 against Berkemeier.

Borntraeger next points out that the deed of restrictions includes a non-waiver clause, and he contends it applies here to preclude a finding of waiver. Specifically, Section 7.1(d) states:

> **Waivers.** Declarant reserves the right to waive any obligation or violation of any Lot owner under the terms of this Declaration upon Declarant's determination, in its sole and absolute discretion provided that such waiver shall be express and in writing. Failure of any party to demand or insist upon observance of any of these restrictions or covenants, or to proceed for a restraint of violations, shall not be deemed a waiver of the violation, or the right to seek enforcement of these restrictions.

Under the circumstances presented here, we are not persuaded that Borntraeger's conduct falls under the protection of the non-wavier clause. "[I]t is contrary to equity and good conscience to enforce rights under restrictive building covenants where the [property owner] has been led to suppose by word, conduct, or silence . . . that there are no objections to his or her operations." 20 Am. Jur. 2d Covenants, Conditions, and Restrictions § 229.

Finally, we note that Borntraeger raised an alternative argument regarding the sufficiency of the evidence at trial. As previously noted, appellate review of factual findings is limited and we will not disturb a trial court's judgment as to the credibility of witnesses unless it is clearly erroneous. Our review of the record establishes that the trial court's ruling was not clearly erroneous, as it was amply supported by substantial evidence.

For the reasons stated herein, the judgment of the Oldham Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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