

STATE OF MICHIGAN
COURT OF APPEALS

CLEAR SPRING LAKE HOMEOWNERS
ASSOCIATION,

UNPUBLISHED
May 29, 1998

Plaintiff-Appellee,

v

No. 199701
Macomb Circuit Court
LC No. 95-004081 CZ

JAMES R. GALL,

Defendant-Appellant.

Before: Whitbeck, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting summary disposition in favor of plaintiff, and the trial court's order granting a permanent injunction requiring defendant to remove his deck from the lakefront on his subdivision lot pursuant to a use restriction. We reverse in part and affirm in part.

Defendant argues that the trial court erred in granting the motion for summary disposition where genuine issues of material fact existed regarding whether his deck violated the use restriction. We agree. The trial court construed plaintiff's motion for summary disposition brought pursuant to MCR 2.116(C)(9) as if originally brought pursuant to MCR 2.116(C)(10) because the parties relied extensively upon matters outside the pleadings. A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Marx v Dep't of Commerce*, 220 Mich App 66, 70; 558 NW2d 460 (1996). The court must consider the pleadings, affidavits, depositions, and other documentary evidence available to it and grant summary disposition if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.* This Court reviews summary disposition decisions de novo. *Id.*

The use restriction at issue provides that "[t]here shall be no docks, boathouses or swimming rafts of any type anchored on the lake property or constructed on any lot in the Subdivision or on the abutting acreage property." Negative covenants are grounded in contract. *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997). In an action to enforce such a covenant, the intent of the

drafter controls. *Id.* The provisions are to be strictly construed against the would-be enforcer, however, and doubts resolved in favor of the free use of property. *Id.* Courts will not grant equitable relief unless there is an obvious violation. *Id.* On the other hand, this Court has held that a negative easement is a valuable property right. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997). Public policy favors use restrictions in residential deeds. *Id.* The judiciary's objective is to protect property owners who have complied with the deed restrictions. *Id.* at 210-211. Restrictive covenants protect property values and aesthetic characteristics considered to be essential constituents of a family environment. *Id.* at 211.

We believe that defendant has established a question of fact regarding the intended purpose of the use restriction. In support of its argument that the restriction was intended to prohibit structures such as defendant's deck, plaintiff refers to the affidavit of Joel Garrett, the subdivision developer, in which Garrett stated that the restriction was intended to prevent the installation of any dock structures either floating or fixed, because such structures reduce the unobstructed open water area, create a cluttered look around the shoreline, and make the lake appear smaller, thereby reducing the desirability of the lake and adversely affecting property values. However, defendant has asserted that another homeowner has constructed an island fifteen feet from the shore and that other owners have built docks extending over the water. Plaintiff took no action against the owners of the structures, although it seems that they are also in violation of the restriction's purpose of preventing open water obstructions and shoreline clutter. In addition, Garrett is a member of the homeowners association, which is the plaintiff in this case. His affidavit indicating the purpose of the restriction was made in the process of this litigation. Therefore, while the intent of the drafter of the restriction generally controls, summary disposition was not proper where Garrett's credibility and the intent of the use restriction is at issue. Accordingly, we find that the trial court erred in granting summary disposition in favor of plaintiff and ordering the permanent injunction.

Moreover, we also believe that there is a question of fact as to whether defendant's "deck" is prohibited by the use restriction. The use restriction prohibits "docks" of any type on the lake property or any lot in the subdivision. Plaintiff contended in its motion for summary disposition that because defendant's structure protrudes over the water from the shore, similar to a wharf or platform used to load and unload passengers, it is a "dock" subject to the use restriction. Defendant, however, maintains that his deck is not a "dock" prohibited by the use restriction because it is not used for tying up watercraft or loading or unloading passengers. Plaintiff counters with reference to a letter that defendant delivered to other homeowners in which defendant stated that his boardwalk served as access for his elderly grandmother to enjoy paddle boat rides with her great grandchildren. Given these countervailing averments, we find that whether defendant's use of the deck actually violates the use restriction presents a genuine issue of material fact; therefore, summary disposition was inappropriate.

Defendant further contends that he had no notice of the restriction until after he built his deck. We first note that the trial court failed to address this issue. However, the record indicates that plaintiff obtained the subdivision property from the Lakeshore Development Company by quitclaim deed in 1983. This deed contained a use restriction that prohibited docks on Clear Spring Lake. Through the affidavit of Garrett, plaintiff maintains that this deed was recorded with Macomb County when

defendant acquired his lot on the lake in 1985. However, our review of the record reveals that the copy of the 1983 deed provided by plaintiff does not indicate that it was recorded with Macomb County. Instead, the record indicates that defendant acquired his lot by quitclaim deed in 1985 from First Federal Bank of Michigan, and in 1986, only *after* defendant acquired his lot, did plaintiff record the use restriction with Macomb County. Therefore, we find that there is a question of fact regarding whether defendant had constructive notice of the use restriction by way of the 1983 deed when he acquired his property in 1985, and summary disposition was therefore inappropriate.

Defendant also raised the defenses of waiver, estoppel, and laches below, and argued that the trial court erred in granting summary disposition in favor of plaintiff. Again, we agree with defendant. Waiver has been defined by this Court as follows:

“To constitute a waiver, there must be an existing right, benefit, or advantage, knowledge, actual or constructive, of the existence of such right, benefit, or advantage, and an actual intention to relinquish it, or such conduct as warrants an inference of relinquishment. There must be an existing right and an intention to relinquish it, and there must be both knowledge of the existence of a right and an intention to relinquish it.

“A waiver exists only where one, with full knowledge of material facts, does or forbears to do something inconsistent with the existence of the right in question or his intention to rely on that right.” [*Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716, 718; 179 NW2d 252 (1970), citing 31 CJS, Estoppel, § 67, p 408.]

And, the elements of equitable estoppel are as follows: (1) a party, by representations, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on that belief; and (3) the other party will be prejudiced if the first party is allowed to deny the existence of those facts. *Mich Nat’l Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 23; 566 NW2d 7 (1997).

In the case at bar, defendant presented evidence that other homeowners had violated the use restriction without penalty from plaintiff. Defendant also maintains that he relied on plaintiff’s lack of enforcement, or acquiescence, when he built his deck, and was prejudiced by that reliance. Therefore, we find that defendant has demonstrated sufficient questions of fact on the defenses of waiver and estoppel to avoid summary disposition.

The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendants. *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 96-97; 572 NW2d 246 (1997). If a party acts with reasonable promptness after they know or should know of violations of building restrictions, they will not be turned away from a court of equity on the ground of laches. *Tuttle v Ohio Boulevard Land Co*, 245 Mich 188, 192; 222 NW 121 (1928). Defendant, however, has demonstrated a genuine issue of material fact regarding whether plaintiff informed him with reasonable promptness that his deck was allegedly in violation of the use restriction, and whether defendant was prejudiced by the delay. Therefore, summary disposition on the defense of laches was also not proper.

Finally, defendant argues that the trial court erred in granting summary disposition where genuine issues of material fact existed regarding the balancing of the equities, in that it would cost him approximately \$7,000 to remove the deck, outweighing the lack of harm to plaintiff. Courts typically do not consider the parties' respective damages in deciding whether to enforce a valid restriction by injunction. *Webb, supra* at 211. Owners may enforce negative easements regardless of the extent of the other owners' damages. *Id.* The economic damages suffered by the landowner seeking to avoid the restriction do not, by themselves, justify a lifting of the restrictions. *Id.* Thus, we find that the trial court did not err in failing to balance the equities, because defendant's damages are immaterial. In addition, defendant has failed to provide any evidence to support his estimates of the cost to construct and remove his deck.

In sum, we affirm the trial court with respect to defendant's balancing of the equities defense, but reverse and remand for further proceedings on all other issues. We vacate the order granting the permanent injunction.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Barbara B. MacKenzie
/s/ William B. Murphy