

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JOHN SCHOENHERR, SHELLEY  
SCHOENHERR, TIMOTHY SPINA, and  
ELIZABETH SPINA,

UNPUBLISHED  
November 22, 2002

Plaintiffs-Appellees,

v

No. 235601  
Wayne Circuit Court  
LC No. 00-001835-CH

VERNIER WOODS DEVELOPMENT, LLC,

Defendant-Appellant,

and

CITY OF GROSSE POINTE FARMS,

Defendant.

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Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant Vernier Woods Development, Inc. (“defendant”) appeals as of right the trial court’s order granting summary disposition in favor of plaintiffs in this declaratory judgment action to preclude defendant’s planned development of a parcel of land in Grosse Pointe Farms. We reverse in part, affirm in part, and remand.

I

Plaintiffs are residents of the Lothrop subdivision of Grosse Pointe Farms and live adjacent to a subdivision parcel purchased by defendant. The parcels are all part of the Pine Woods, a group of four parcels bordered on the east end by Lothrop Road and on the west end by Charlevoix Road. Lothrop Estate Company platted the Pine Woods parcels in 1949 and conveyed the parcels with common deed restrictions. Each parcel was subsequently developed so that the homes, all of a contemporary design, were built on the east side of the parcels with the west side left in a natural wooded state. After purchasing the Pine Woods parcel, defendant razed the existing home on the land and obtained preliminary approval from the City of Grosse Pointe Farms to divide the parcel into two home sites. Plaintiffs filed an action in circuit court seeking injunctive relief and a declaratory judgment to preclude defendant’s planned

development, claiming that it violated deed restrictions and the general plan of development for the Pine Woods.

The trial court granted plaintiffs' request for a temporary restraining order (TRO), but later granted defendant's motion to dissolve the TRO. Defendant thereafter moved for summary disposition. Following a hearing, the trial court denied defendant's motion and instead granted summary disposition in favor of plaintiffs pursuant to MCR 2.116(I)(2), adopting plaintiffs' brief and oral argument as the basis of the court's decision.

## II

Defendant claims that the trial court erred in ruling as a matter of law that 1) the applicable deed restrictions prohibit defendant from dividing the Pine Woods parcel into two home sites, 2) a reciprocal negative easement exists that precludes defendant from constructing two single family dwellings on the Pine Woods parcel, and 3) the deed restrictions entitle other property owners in the subdivision to review and approve proposed construction plans for residences to be built on the Pine Woods parcel. The nature of the court's decision in this case leaves to question its particular rulings. Nonetheless, we agree that the grant of summary disposition in favor of plaintiffs, purportedly on all three bases, was improper.

## A

This Court reviews de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). As defendant notes, however, appellate review of the trial court's summary disposition order in this case is complicated by the fact that the court provided no specific legal rationale to support its decision. In granting summary disposition, the court merely noted: "adopt plaintiffs['] brief and oral argument as the basis for my decision."

Plaintiffs argued alternative theories for their request for equitable relief to preclude defendant's proposed development. Plaintiffs argued that defendant's plan was contrary to the general plan of development for the Pine Woods and therefore the proposed construction was precluded by a reciprocal negative easement. Alternatively, plaintiffs argued that the deed restrictions provided plaintiffs the right to enforce the restrictions, including requiring prior approval of defendant's construction plans, by an architect designated by plaintiffs, on the basis of "aesthetic consideration[s] and the effect upon the outlook of neighboring property." It was plaintiff's contention that dividing the Pine Woods parcel into two home sites would destroy the character and integrity of a "one-of-a-kind area," particularly because constructing a home on the west end of the parcel would destroy its woods, which is considered to be one of the first reforestation efforts in the United States. We find neither theory, as presented, a proper basis for summary disposition, but agree that the deed restrictions expressly entitle plaintiffs to enforce the restrictive covenants put into place by the original grantor with regard to development of the Pine Woods parcels.

Because the trial court's decision involved considerations outside the pleadings, this Court applies the principles for summary disposition under MCR 2.116(C)(10). *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich.App 629, 633, n 4; 601 NW2d 160 (1999). Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of

material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Id.*

## B

We find no basis for a conclusion as a matter of law that the deed restrictions bar defendant's proposed development in total. Words used in restrictive covenants must be given their ordinary meaning, and, where clear and unambiguous, they are controlling. *Sylvan Glens Homeowners Ass'n v McFadden*, 103 Mich App 118, 121-122; 302 NW2d 615 (1981). However, where the language of such covenants is ambiguous, courts must observe established rules of interpretation with regard to such covenants. *Borowski v Welch*, 117 Mich App 712, 716; 324 NW2d 144 (1982). In *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997), our Supreme Court noted that, with respect to the interpretation of covenants: "[n]egative covenants ... are grounded in contract ... [and] the intent of the drafter controls." Restrictive covenants are to be strictly construed against those seeking to enforce them and any doubts must be resolved in favor of the free use of the property. *Id.* "Courts will not grant equitable relief unless there is an obvious violation." *Id.*

It is undisputed that defendant's parcel is subject to deed restrictions, which provide in relevant part:

1. APPROVAL OF PLANS. No buildings shall be erected on any building site as hereinafter defined and no improvements or alterations of any building on any building site shall be undertaken except in accordance with complete plans and specifications, which plans and specifications shall show the grade of the proposed buildings in relation to the grade level of the street and shall show the proposed location of the buildings on the building site, furnished to and approved in writing, prior to the commencement of construction, by the architect designated for that purpose by the Lothrop Estate Company and any expense connected with such designation, submission or approval shall be borne by the parties submitting said plans and specifications, and such plans and specifications shall be disapproved if there is any noncompliance with any of the restrictions herein contained and may be disapproved if in the opinion of the architect the proposed structure would otherwise be unsuitable or undesirable, and in this connection aesthetic consideration and the effect upon the outlook from neighboring property may be considered. The restrictions set forth in paragraphs 1 to 12 hereof shall not be waived by the Company or the architect except where provision for such waiver is expressly made and failure of the architect to act upon the plans and specification shall in no manner affect the right of any owner of any building site in the building sites to enforce such restrictions.

2. BUILDING SITES. No building shall be erected, placed or maintained on any parcel of land in the tract which has less area than the minimum area of the building site herein described. The minimum area of a building site shall be 75 feet in width measured at right angles to the line dividing Private Claims 122 and 231 and at least 260 feet in depth measured parallel to said line.

4. SINGLE DWELLING HOUSE ONLY. No building shall be erected on any building site other than one single residence dwelling and a private garage for use in connection with the residence building. The residence dwelling shall be designed for the use of and shall be used and occupied by only one single family and the domestic servants in the employ of the family.

The deed restrictions do not expressly prohibit dividing defendant's parcel into two building sites or limit construction of a home to the east end of the parcel and to a contemporary design as sought by plaintiffs.

However, the deed restrictions expressly preserve plaintiffs' right to enforce the restrictions set forth, including those with regard to the approval of construction plans:

The restrictions set forth in paragraphs 1 to 12 hereof shall not be waived by the Company or the architect except where provision for such waiver is expressly made and failure of the architect to act upon the plans and specification shall in no manner affect the right of any owner of any building site in the building sites to enforce such restrictions.

Under ¶ 1, Approval of Plans, defendant's proposed construction must be approved by an architect designated for that purpose. In the absence of enforcement by Lothrop Estate Company, plaintiffs, i.e., the other site owners, are entitled to enforce this restrictive covenant.

"[T]he language employed in stating the restriction is to be taken in its ordinary and generally understood or popular sense ...." *Borowski, supra* at 716. The deed restrictions require that building plans be "furnished to and approved in writing, prior to the commencement of construction, by the architect designated for that purpose by the Lothrop Estate Company ...." It is undisputed that the Lothrop Estate Company no longer exists. Therefore, we agree that, pursuant to plaintiffs' express right to enforce the deed restrictions, plaintiffs may reasonably designate an architect to approve defendant's construction plans to ensure compliance with the deed restrictions, and that the architect may consider whether "the proposed structure would otherwise be unsuitable or undesirable." The parties to a written conveyance are presumed to have intended a reasonable construction, and the courts will resolve all doubts by adopting a construction that does not produce unusual or unjust results. *Wisniewski v Kelly*, 175 Mich App 175, 178-179; 437 NW2d 25 (1989).

The court's determination that plaintiffs could designate an architect who would review defendant's construction plans to achieve the stated purposes of the deed restrictions was a reasonable interpretation of the grantor's intent. *Id.* at 179. We affirm the grant of summary disposition to the extent it permits plaintiffs to enforce the deed restrictions in a reasonable manner.

C

We find no basis for a conclusion as a matter of law that a reciprocal negative easement bars defendant's development plan. If the owner of two or more lots sells one lot with restrictions that benefit the land retained, the restriction becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot

sold. *Sanborn v McLean*, 233 Mich 227, 229-230; 206 NW 496 (1925). This is known as a reciprocal negative easement. *Id.* at 230.

A reciprocal negative easement requires that:

[t]here must have been a common owner of the related parcels of land, and in his various grants of the lots he must have included some restriction, either affirmative or negative, for the benefit of the land retained, evidencing a scheme or intent that the entire tract should be similarly treated. Once the plan is effectively put into operation, the burden he has placed upon the land conveyed is by operation of law reciprocally placed upon the land retained. In this way those who have purchased in reliance upon this particular restriction will be assured that the plan will be *completely* achieved. [*Lanski v Montealegre*, 361 Mich 44, 47; 104 NW2d 772 (1960).]

We find no clear evidence of a reciprocal negative easement in this case to support summary disposition. Plaintiffs do not argue that Lothrop Estate Company, the common grantor, sold their parcels with express restrictions that by operation of law should apply to defendant's parcel because such express restrictions were not placed on defendant's parcel. See *Sanborn, supra* at 230-231 (common grantor sold numerous lots, including plaintiffs', with restrictions to effect a common residential plan, but defendants' lot in the same subdivision was later conveyed without the restrictions). In fact, the restrictions at issue, placed upon plaintiffs' parcels, are the same as those placed on defendant's parcel.

Plaintiffs' contend that there is overwhelming evidence establishing the Lothrop Estate Company's general plan for the Pine Woods to effect the alleged restrictions. We disagree. Plaintiffs presented their own affidavits, as well as those of an architect and one of the original Pine Woods homeowners,<sup>1</sup> as evidence that the Pine Woods homes are all of contemporary design, flow with the contours of the land, and are built on the east sides of the property with access only from Lothrop Road, leaving the wooded western half of the property undisturbed. The affidavit of the former owner of defendant's parcel specifically averred that he purchased his vacant lot from Lothrop Estate Company and engaged the services of an architect, who was considered the architect of Lothrop Estate Company, to design his home in conformity with the deed restrictions. He stated that the architect designed the home with contemporary styling, similar to the other homes in the immediate area, and to preserve the neighborhood aesthetics by maintaining the woods.

Plaintiffs also point out that Lothrop Estate Company provided each Pine Woods parcel with an easement to Lothrop Road, but not Charlevoix Road, and there is a stone wall along the western edge of the parcels, evincing the grantor's intent that homes be built only on the east half of the parcels. Finally, plaintiffs point to a 1935 news article on the career of George Lothrop, reporting that he planted evergreens in the back of his farm (apparently, the wooded area of the Pine Woods), considered to be the first example of reforestation in the United States, which plaintiffs contend further supports their assertion of the intended deed restrictions.

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<sup>1</sup> the original owner of the home purchased by defendant.

Plaintiffs evidence does not rise to the level of proof required to conclusively establish a “scheme of restrictions” on defendant’s parcel. *Doxtator-Nash Civic Ass’n v Cherry Hill Professional Bldg, Inc*, 12 Mich App 468, 473; 163 NW2d 262 (1968). Plaintiffs evidence does not establish that the alleged common scheme was imposed by the grantor, Lothrop Estate Company, on certain parcels sold for the benefit of parcels retained, rather than that the commonalities merely reflect the choice of the original purchasers. A reciprocal negative easement cannot be created retroactively by mutual agreement among common land owners to act in a certain way. *Sanborn, supra* at 230. Reciprocal negative easements “arise, if at all, out of a benefit accorded land retained, by restrictions upon neighboring land sold by a common owner.” *Id.* at 230.

Further, the fact that Lothrop Estate Company required architectural approval of the home plans does not establish that it, as grantor, specifically required that the homes be built of a contemporary design and constructed only on the eastern half of the parcels. While such an inference may be drawn from the evidence, plaintiffs are not entitled to have such inferences drawn in their favor under either the summary disposition standard or under the rules for judicial interpretation of restrictive covenants. In deciding a motion for summary disposition, the court must consider the evidence in the light most favorable to the party opposing the motion. *Smith, supra* at 454. In an action to enforce a covenant, the provisions are to be strictly construed against the enforcer and doubts are to be resolved in favor of the free use of the property. *Stuart, supra*. The trial court erred in granting summary disposition on the basis of the evidence presented.

Reversed in part, affirmed in part, and remanded. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald